

Union Calendar No. 47

112TH CONGRESS
1ST SESSION

H. R. 5

[Report No. 112-39, Parts I and II]

To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 24, 2011

Mr. GINGREY of Georgia (for himself, Mr. DAVID SCOTT of Georgia, and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

MARCH 17, 2011

Reported from the Committee on the Judiciary with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

MARCH 17, 2011

Referral to the Committee on Energy and Commerce, extended for a period ending not later than May 13, 2011

MAY 13, 2011

Referral to the Committee on Energy and Commerce, extended for a period ending not later than May 23, 2011

MAY 23, 2011

Additional sponsors: Mr. SESSIONS, Mr. ROGERS of Michigan, Mrs. BLACKBURN, Mr. PLATTS, Mr. DENT, Mr. ROE of Tennessee, Mr. FLEMING, Mrs. MYRICK, Mr. BRADY of Texas, Mr. FRANKS of Arizona, Mr. PRICE of Georgia, Mr. BISHOP of Utah, Mr. CRAWFORD, Mr. BURTON of Indiana, Mr. BUCSHON, Mr. LAMBORN, Mr. WILSON of South Carolina, Mr. HERGER, Mr. FLORES, Mr. MARCHANT, Mr. PEARCE, Mr. McCLINTOCK, Mr. HARRIS, Mr. HUELSKAMP, Mr. HARPER, Mr.

BILBRAY, Mr. ROYCE, Mr. GRIMM, Mr. SHIMKUS, Mr. GRAVES of Missouri, Mrs. BIGGERT, Mr. STEARNS, Mr. HELLER, Mr. GARRETT, Mr. WESTMORELAND, Mr. JOHNSON of Ohio, Mr. SIMPSON, Mr. AKIN, Mr. ROGERS of Kentucky, Mr. WALDEN, Mr. ROSS of Florida, Mr. WOLF, Mr. QUAYLE, Mr. CONAWAY, Mr. GIBBS, Mr. MILLER of Florida, Mr. GERLACH, Mr. YOUNG of Florida, Mrs. BLACK, Mr. GALLEGLY, Mr. GUTHRIE, Mr. TIBERI, Mr. MATHESON, Mr. WITTMAN, Mr. SCALISE, Mr. BOUSTANY, Mr. BUCHANAN, Mrs. BONO MACK, Mr. ISSA, Mrs. MCMORRIS RODGERS, Mr. GOSAR, Mr. MARINO, Mr. LATTA, Mr. HUIZENGA of Michigan, Mr. WOODALL, Mr. COLE, Mr. COFFMAN of Colorado, Mr. BENISHEK, Mr. FITZPATRICK, Mrs. ELLMERS, Mr. FORBES, Mr. LATHAM, Mr. KLINE, Mr. SCHOCK, Mr. TIPTON, Mr. CRENSHAW, Mr. CALVERT, Mr. SHUSTER, Mr. GUINTA, Mr. LUETKEMEYER, Mr. JONES, Mr. MCKINLEY, Mr. CANSECO, Mr. MANZULLO, Mr. WALBERG, Mr. ROHRABACHER, Mr. AUSTRIA, Mr. ALEXANDER, Mr. BASS of New Hampshire, Mr. OLSON, Mr. KINZINGER of Illinois, Mrs. CAPITO, Mr. GARY G. MILLER of California, Mr. REED, Mr. DOLD, Mr. TURNER, Mr. NEUGEBAUER, Mr. WALSH of Illinois, Ms. BUERKLE, Mr. ROSKAM, Mr. MCCOTTER, Mr. THOMPSON of Pennsylvania, Mr. MCCAUL, Mr. KELLY, Mr. CHAFFETZ, Mr. BARTLETT, Mrs. BACHMANN, Ms. GRANGER, Mr. LONG, Mr. MACK, Mr. HANNA, Mr. PETRI, Ms. JENKINS, Mr. HENSARLING, Mrs. HARTZLER, Mr. SAM JOHNSON of Texas, Mr. AUSTIN SCOTT of Georgia, Mr. LABRADOR, Mr. HALL, Mr. FLEISCHMANN, Mr. MURPHY of Pennsylvania, Mr. WEST, Mr. RIBBLE, Mr. FARENTHOLD, Mr. HULTGREN, Mr. NUNNELEE, Mr. GARDNER, Mr. WOMACK, Mr. LANDRY, Ms. HAYWORTH, Mr. HUNTER, and Mr. RUNYAN

MAY 23, 2011

Reported from the Committee on Energy and Commerce with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in boldface roman]

A BILL

To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.

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

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) *SHORT TITLE.*—*This Act may be cited as the*
 5 *“Help Efficient, Accessible, Low-cost, Timely Healthcare*
 6 *(HEALTH) Act of 2011”.*

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

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purpose.

Sec. 3. Encouraging speedy resolution of claims.

Sec. 4. Compensating patient injury.

Sec. 5. Maximizing patient recovery.

Sec. 6. Punitive damages.

Sec. 7. Authorization of payment of future damages to claimants in HEALTH
care lawsuits.

Sec. 8. Definitions.

Sec. 9. Effect on other laws.

Sec. 10. State flexibility and protection of States’ rights.

Sec. 11. Applicability; effective date.

9 **SEC. 2. FINDINGS AND PURPOSE.**

10 (a) *FINDINGS.*—

11 (1) *EFFECT ON HEALTH CARE ACCESS AND*
 12 *COSTS.*—*Congress finds that our current civil justice*
 13 *system is adversely affecting patient access to health*
 14 *care services, better patient care, and cost-efficient*
 15 *health care, in that the health care liability system is*
 16 *a costly and ineffective mechanism for resolving*
 17 *claims of health care liability and compensating in-*
 18 *jured patients, and is a deterrent to the sharing of in-*
 19 *formation among health care professionals which im-*

1 *pedes efforts to improve patient safety and quality of*
2 *care.*

3 (2) *EFFECT ON INTERSTATE COMMERCE.*—*Con-*
4 *gress finds that the health care and insurance indus-*
5 *tries are industries affecting interstate commerce and*
6 *the health care liability litigation systems existing*
7 *throughout the United States are activities that affect*
8 *interstate commerce by contributing to the high costs*
9 *of health care and premiums for health care liability*
10 *insurance purchased by health care system providers.*

11 (3) *EFFECT ON FEDERAL SPENDING.*—*Congress*
12 *finds that the health care liability litigation systems*
13 *existing throughout the United States have a signifi-*
14 *cant effect on the amount, distribution, and use of*
15 *Federal funds because of—*

16 (A) *the large number of individuals who re-*
17 *ceive health care benefits under programs oper-*
18 *ated or financed by the Federal Government;*

19 (B) *the large number of individuals who*
20 *benefit because of the exclusion from Federal*
21 *taxes of the amounts spent to provide them with*
22 *health insurance benefits; and*

23 (C) *the large number of health care pro-*
24 *viders who provide items or services for which*
25 *the Federal Government makes payments.*

1 (b) *PURPOSE.*—*It is the purpose of this Act to imple-*
2 *ment reasonable, comprehensive, and effective health care*
3 *liability reforms designed to—*

4 (1) *improve the availability of health care serv-*
5 *ices in cases in which health care liability actions*
6 *have been shown to be a factor in the decreased avail-*
7 *ability of services;*

8 (2) *reduce the incidence of “defensive medicine”*
9 *and lower the cost of health care liability insurance,*
10 *all of which contribute to the escalation of health care*
11 *costs;*

12 (3) *ensure that persons with meritorious health*
13 *care injury claims receive fair and adequate com-*
14 *penensation, including reasonable noneconomic dam-*
15 *ages;*

16 (4) *improve the fairness and cost-effectiveness of*
17 *our current health care liability system to resolve dis-*
18 *putes over, and provide compensation for, health care*
19 *liability by reducing uncertainty in the amount of*
20 *compensation provided to injured individuals; and*

21 (5) *provide an increased sharing of information*
22 *in the health care system which will reduce unin-*
23 *tended injury and improve patient care.*

1 **SEC. 3. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

2 *The time for the commencement of a health care law-*
3 *suit shall be 3 years after the date of manifestation of injury*
4 *or 1 year after the claimant discovers, or through the use*
5 *of reasonable diligence should have discovered, the injury,*
6 *whichever occurs first. In no event shall the time for com-*
7 *mencement of a health care lawsuit exceed 3 years after the*
8 *date of manifestation of injury unless tolled for any of the*
9 *following—*

10 (1) *upon proof of fraud;*

11 (2) *intentional concealment; or*

12 (3) *the presence of a foreign body, which has no*
13 *therapeutic or diagnostic purpose or effect, in the per-*
14 *son of the injured person.*

15 *Actions by a minor shall be commenced within 3 years from*
16 *the date of the alleged manifestation of injury except that*
17 *actions by a minor under the full age of 6 years shall be*
18 *commenced within 3 years of manifestation of injury or*
19 *prior to the minor's 8th birthday, whichever provides a*
20 *longer period. Such time limitation shall be tolled for mi-*
21 *nors for any period during which a parent or guardian*
22 *and a health care provider or health care organization have*
23 *committed fraud or collusion in the failure to bring an ac-*
24 *tion on behalf of the injured minor.*

1 **SEC. 4. COMPENSATING PATIENT INJURY.**

2 (a) *UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL*
3 *ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.*—*In any*
4 *health care lawsuit, nothing in this Act shall limit a claim-*
5 *ant’s recovery of the full amount of the available economic*
6 *damages, notwithstanding the limitation in subsection (b).*

7 (b) *ADDITIONAL NONECONOMIC DAMAGES.*—*In any*
8 *health care lawsuit, the amount of noneconomic damages,*
9 *if available, may be as much as \$250,000, regardless of the*
10 *number of parties against whom the action is brought or*
11 *the number of separate claims or actions brought with re-*
12 *spect to the same injury.*

13 (c) *NO DISCOUNT OF AWARD FOR NONECONOMIC DAM-*
14 *AGES.*—*For purposes of applying the limitation in sub-*
15 *section (b), future noneconomic damages shall not be dis-*
16 *counted to present value. The jury shall not be informed*
17 *about the maximum award for noneconomic damages. An*
18 *award for noneconomic damages in excess of \$250,000 shall*
19 *be reduced either before the entry of judgment, or by amend-*
20 *ment of the judgment after entry of judgment, and such re-*
21 *duction shall be made before accounting for any other re-*
22 *duction in damages required by law. If separate awards*
23 *are rendered for past and future noneconomic damages and*
24 *the combined awards exceed \$250,000, the future non-*
25 *economic damages shall be reduced first.*

1 (d) *FAIR SHARE RULE.*—*In any health care lawsuit,*
2 *each party shall be liable for that party’s several share of*
3 *any damages only and not for the share of any other person.*
4 *Each party shall be liable only for the amount of damages*
5 *allocated to such party in direct proportion to such party’s*
6 *percentage of responsibility. Whenever a judgment of liabil-*
7 *ity is rendered as to any party, a separate judgment shall*
8 *be rendered against each such party for the amount allo-*
9 *cated to such party. For purposes of this section, the trier*
10 *of fact shall determine the proportion of responsibility of*
11 *each party for the claimant’s harm.*

12 **SEC. 5. MAXIMIZING PATIENT RECOVERY.**

13 (a) *COURT SUPERVISION OF SHARE OF DAMAGES AC-*
14 *TUALLY PAID TO CLAIMANTS.*—*In any health care lawsuit,*
15 *the court shall supervise the arrangements for payment of*
16 *damages to protect against conflicts of interest that may*
17 *have the effect of reducing the amount of damages awarded*
18 *that are actually paid to claimants. In particular, in any*
19 *health care lawsuit in which the attorney for a party claims*
20 *a financial stake in the outcome by virtue of a contingent*
21 *fee, the court shall have the power to restrict the payment*
22 *of a claimant’s damage recovery to such attorney, and to*
23 *redirect such damages to the claimant based upon the inter-*
24 *ests of justice and principles of equity. In no event shall*

1 *the total of all contingent fees for representing all claimants*
2 *in a health care lawsuit exceed the following limits:*

3 (1) *Forty percent of the first \$50,000 recovered*
4 *by the claimant(s).*

5 (2) *Thirty-three and one-third percent of the next*
6 *\$50,000 recovered by the claimant(s).*

7 (3) *Twenty-five percent of the next \$500,000 re-*
8 *covered by the claimant(s).*

9 (4) *Fifteen percent of any amount by which the*
10 *recovery by the claimant(s) is in excess of \$600,000.*

11 (b) *APPLICABILITY.—The limitations in this section*
12 *shall apply whether the recovery is by judgment, settlement,*
13 *mediation, arbitration, or any other form of alternative dis-*
14 *pute resolution. In a health care lawsuit involving a minor*
15 *or incompetent person, a court retains the authority to au-*
16 *thorize or approve a fee that is less than the maximum per-*
17 *mitted under this section. The requirement for court super-*
18 *vision in the first two sentences of subsection (a) applies*
19 *only in civil actions.*

20 **SEC. 6. PUNITIVE DAMAGES.**

21 (a) *IN GENERAL.—Punitive damages may, if other-*
22 *wise permitted by applicable State or Federal law, be*
23 *awarded against any person in a health care lawsuit only*
24 *if it is proven by clear and convincing evidence that such*
25 *person acted with malicious intent to injure the claimant,*

1 *or that such person deliberately failed to avoid unnecessary*
2 *injury that such person knew the claimant was substan-*
3 *tially certain to suffer. In any health care lawsuit where*
4 *no judgment for compensatory damages is rendered against*
5 *such person, no punitive damages may be awarded with*
6 *respect to the claim in such lawsuit. No demand for puni-*
7 *tive damages shall be included in a health care lawsuit as*
8 *initially filed. A court may allow a claimant to file an*
9 *amended pleading for punitive damages only upon a mo-*
10 *tion by the claimant and after a finding by the court, upon*
11 *review of supporting and opposing affidavits or after a*
12 *hearing, after weighing the evidence, that the claimant has*
13 *established by a substantial probability that the claimant*
14 *will prevail on the claim for punitive damages. At the re-*
15 *quest of any party in a health care lawsuit, the trier of*
16 *fact shall consider in a separate proceeding—*

17 (1) *whether punitive damages are to be awarded*
18 *and the amount of such award; and*

19 (2) *the amount of punitive damages following a*
20 *determination of punitive liability.*

21 *If a separate proceeding is requested, evidence relevant only*
22 *to the claim for punitive damages, as determined by appli-*
23 *cable State law, shall be inadmissible in any proceeding*
24 *to determine whether compensatory damages are to be*
25 *awarded.*

1 **(b) DETERMINING AMOUNT OF PUNITIVE DAMAGES.**—

2 **(1) FACTORS CONSIDERED.**—*In determining the*
3 *amount of punitive damages, if awarded, in a health*
4 *care lawsuit, the trier of fact shall consider only the*
5 *following—*

6 **(A)** *the severity of the harm caused by the*
7 *conduct of such party;*

8 **(B)** *the duration of the conduct or any con-*
9 *cealment of it by such party;*

10 **(C)** *the profitability of the conduct to such*
11 *party;*

12 **(D)** *the number of products sold or medical*
13 *procedures rendered for compensation, as the*
14 *case may be, by such party, of the kind causing*
15 *the harm complained of by the claimant;*

16 **(E)** *any criminal penalties imposed on such*
17 *party, as a result of the conduct complained of*
18 *by the claimant; and*

19 **(F)** *the amount of any civil fines assessed*
20 *against such party as a result of the conduct*
21 *complained of by the claimant.*

22 **(2) MAXIMUM AWARD.**—*The amount of punitive*
23 *damages, if awarded, in a health care lawsuit may be*
24 *as much as \$250,000 or as much as two times the*
25 *amount of economic damages awarded, whichever is*

1 *greater. The jury shall not be informed of this limita-*
2 *tion.*

3 (c) *NO PUNITIVE DAMAGES FOR PRODUCTS THAT*
4 *COMPLY WITH FDA STANDARDS.—*

5 (1) *IN GENERAL.—*

6 (A) *No punitive damages may be awarded*
7 *against the manufacturer or distributor of a*
8 *medical product, or a supplier of any component*
9 *or raw material of such medical product, based*
10 *on a claim that such product caused the claim-*
11 *ant's harm where—*

12 (i)(I) *such medical product was subject*
13 *to premarket approval, clearance, or licen-*
14 *sure by the Food and Drug Administration*
15 *with respect to the safety of the formulation*
16 *or performance of the aspect of such medical*
17 *product which caused the claimant's harm*
18 *or the adequacy of the packaging or labeling*
19 *of such medical product; and*

20 (ii) *such medical product was so ap-*
21 *proved, cleared, or licensed; or*

22 (iii) *such medical product is generally*
23 *recognized among qualified experts as safe*
24 *and effective pursuant to conditions estab-*
25 *lished by the Food and Drug Administra-*

1 *tion and applicable Food and Drug Admin-*
2 *istration regulations, including without*
3 *limitation those related to packaging and*
4 *labeling, unless the Food and Drug Admin-*
5 *istration has determined that such medical*
6 *product was not manufactured or distrib-*
7 *uted in substantial compliance with appli-*
8 *cable Food and Drug Administration stat-*
9 *utes and regulations.*

10 *(B) RULE OF CONSTRUCTION.—Subpara-*
11 *graph (A) may not be construed as establishing*
12 *the obligation of the Food and Drug Administra-*
13 *tion to demonstrate affirmatively that a manu-*
14 *facturer, distributor, or supplier referred to in*
15 *such subparagraph meets any of the conditions*
16 *described in such subparagraph.*

17 *(2) LIABILITY OF HEALTH CARE PROVIDERS.—A*
18 *health care provider who prescribes, or who dispenses*
19 *pursuant to a prescription, a medical product ap-*
20 *proved, licensed, or cleared by the Food and Drug Ad-*
21 *ministration shall not be named as a party to a prod-*
22 *uct liability lawsuit involving such product and shall*
23 *not be liable to a claimant in a class action lawsuit*
24 *against the manufacturer, distributor, or seller of such*
25 *product. Nothing in this paragraph prevents a court*

1 *from consolidating cases involving health care pro-*
2 *viders and cases involving products liability claims*
3 *against the manufacturer, distributor, or product sell-*
4 *er of such medical product.*

5 (3) *PACKAGING.*—*In a health care lawsuit for*
6 *harm which is alleged to relate to the adequacy of the*
7 *packaging or labeling of a drug which is required to*
8 *have tamper-resistant packaging under regulations of*
9 *the Secretary of Health and Human Services (includ-*
10 *ing labeling regulations related to such packaging),*
11 *the manufacturer or product seller of the drug shall*
12 *not be held liable for punitive damages unless such*
13 *packaging or labeling is found by the trier of fact by*
14 *clear and convincing evidence to be substantially out*
15 *of compliance with such regulations.*

16 (4) *EXCEPTION.*—*Paragraph (1) shall not apply*
17 *in any health care lawsuit in which—*

18 (A) *a person, before or after premarket ap-*
19 *proval, clearance, or licensure of such medical*
20 *product, knowingly misrepresented to or with-*
21 *held from the Food and Drug Administration in-*
22 *formation that is required to be submitted under*
23 *the Federal Food, Drug, and Cosmetic Act (21*
24 *U.S.C. 301 et seq.) or section 351 of the Public*
25 *Health Service Act (42 U.S.C. 262) that is mate-*

1 rial and is causally related to the harm which
2 the claimant allegedly suffered; or

3 (B) a person made an illegal payment to an
4 official of the Food and Drug Administration for
5 the purpose of either securing or maintaining
6 approval, clearance, or licensure of such medical
7 product.

8 **SEC. 7. AUTHORIZATION OF PAYMENT OF FUTURE DAM-**
9 **AGES TO CLAIMANTS IN HEALTH CARE LAW-**
10 **SUITS.**

11 (a) *IN GENERAL.*—In any health care lawsuit, if an
12 award of future damages, without reduction to present
13 value, equaling or exceeding \$50,000 is made against a
14 party with sufficient insurance or other assets to fund a
15 periodic payment of such a judgment, the court shall, at
16 the request of any party, enter a judgment ordering that
17 the future damages be paid by periodic payments, in ac-
18 cordance with the Uniform Periodic Payment of Judgments
19 Act promulgated by the National Conference of Commis-
20 sioners on Uniform State Laws.

21 (b) *APPLICABILITY.*—This section applies to all ac-
22 tions which have not been first set for trial or retrial before
23 the effective date of this Act.

24 **SEC. 8. DEFINITIONS.**

25 *In this Act:*

1 (1) *ALTERNATIVE DISPUTE RESOLUTION SYSTEM;*
2 *ADR.—The term “alternative dispute resolution sys-*
3 *tem” or “ADR” means a system that provides for the*
4 *resolution of health care lawsuits in a manner other*
5 *than through a civil action brought in a State or Fed-*
6 *eral court.*

7 (2) *CLAIMANT.—The term “claimant” means*
8 *any person who brings a health care lawsuit, includ-*
9 *ing a person who asserts or claims a right to legal or*
10 *equitable contribution, indemnity, or subrogation,*
11 *arising out of a health care liability claim or action,*
12 *and any person on whose behalf such a claim is as-*
13 *serted or such an action is brought, whether deceased,*
14 *incompetent, or a minor.*

15 (3) *COMPENSATORY DAMAGES.—The term “com-*
16 *pensatory damages” means objectively verifiable mon-*
17 *etary losses incurred as a result of the provision of,*
18 *use of, or payment for (or failure to provide, use, or*
19 *pay for) health care services or medical products, such*
20 *as past and future medical expenses, loss of past and*
21 *future earnings, cost of obtaining domestic services,*
22 *loss of employment, and loss of business or employ-*
23 *ment opportunities, damages for physical and emo-*
24 *tional pain, suffering, inconvenience, physical im-*
25 *pairment, mental anguish, disfigurement, loss of en-*

1 *joyment of life, loss of society and companionship,*
2 *loss of consortium (other than loss of domestic serv-*
3 *ice), hedonic damages, injury to reputation, and all*
4 *other nonpecuniary losses of any kind or nature. The*
5 *term “compensatory damages” includes economic*
6 *damages and noneconomic damages, as such terms*
7 *are defined in this section.*

8 (4) *CONTINGENT FEE.*—*The term “contingent*
9 *fee” includes all compensation to any person or per-*
10 *sons which is payable only if a recovery is effected on*
11 *behalf of one or more claimants.*

12 (5) *ECONOMIC DAMAGES.*—*The term “economic*
13 *damages” means objectively verifiable monetary losses*
14 *incurred as a result of the provision of, use of, or*
15 *payment for (or failure to provide, use, or pay for)*
16 *health care services or medical products, such as past*
17 *and future medical expenses, loss of past and future*
18 *earnings, cost of obtaining domestic services, loss of*
19 *employment, and loss of business or employment op-*
20 *portunities.*

21 (6) *HEALTH CARE LAWSUIT.*—*The term “health*
22 *care lawsuit” means any health care liability claim*
23 *concerning the provision of health care goods or serv-*
24 *ices or any medical product affecting interstate com-*
25 *merce, or any health care liability action concerning*

1 *the provision of health care goods or services or any*
2 *medical product affecting interstate commerce,*
3 *brought in a State or Federal court or pursuant to*
4 *an alternative dispute resolution system, against a*
5 *health care provider, a health care organization, or*
6 *the manufacturer, distributor, supplier, marketer,*
7 *promoter, or seller of a medical product, regardless of*
8 *the theory of liability on which the claim is based, or*
9 *the number of claimants, plaintiffs, defendants, or*
10 *other parties, or the number of claims or causes of ac-*
11 *tion, in which the claimant alleges a health care li-*
12 *ability claim. Such term does not include a claim or*
13 *action which is based on criminal liability; which*
14 *seeks civil fines or penalties paid to Federal, State, or*
15 *local government; or which is grounded in antitrust.*

16 (7) *HEALTH CARE LIABILITY ACTION.*—*The term*
17 *“health care liability action” means a civil action*
18 *brought in a State or Federal court or pursuant to*
19 *an alternative dispute resolution system, against a*
20 *health care provider, a health care organization, or*
21 *the manufacturer, distributor, supplier, marketer,*
22 *promoter, or seller of a medical product, regardless of*
23 *the theory of liability on which the claim is based, or*
24 *the number of plaintiffs, defendants, or other parties,*

1 or the number of causes of action, in which the claim-
2 ant alleges a health care liability claim.

3 (8) *HEALTH CARE LIABILITY CLAIM.*—The term
4 “health care liability claim” means a demand by any
5 person, whether or not pursuant to ADR, against a
6 health care provider, health care organization, or the
7 manufacturer, distributor, supplier, marketer, pro-
8 moter, or seller of a medical product, including, but
9 not limited to, third-party claims, cross-claims,
10 counter-claims, or contribution claims, which are
11 based upon the provision of, use of, or payment for
12 (or the failure to provide, use, or pay for) health care
13 services or medical products, regardless of the theory
14 of liability on which the claim is based, or the num-
15 ber of plaintiffs, defendants, or other parties, or the
16 number of causes of action.

17 (9) *HEALTH CARE ORGANIZATION.*—The term
18 “health care organization” means any person or enti-
19 ty which is obligated to provide or pay for health ben-
20 efits under any health plan, including any person or
21 entity acting under a contract or arrangement with
22 a health care organization to provide or administer
23 any health benefit.

24 (10) *HEALTH CARE PROVIDER.*—The term
25 “health care provider” means any person or entity re-

1 *quired by State or Federal laws or regulations to be*
2 *licensed, registered, or certified to provide health care*
3 *services, and being either so licensed, registered, or*
4 *certified, or exempted from such requirement by other*
5 *statute or regulation.*

6 (11) *HEALTH CARE GOODS OR SERVICES.—The*
7 *term “health care goods or services” means any goods*
8 *or services provided by a health care organization,*
9 *provider, or by any individual working under the su-*
10 *per vision of a health care provider, that relates to the*
11 *diagnosis, prevention, or treatment of any human dis-*
12 *ease or impairment, or the assessment or care of the*
13 *health of human beings.*

14 (12) *MALICIOUS INTENT TO INJURE.—The term*
15 *“malicious intent to injure” means intentionally*
16 *causing or attempting to cause physical injury other*
17 *than providing health care goods or services.*

18 (13) *MEDICAL PRODUCT.—The term “medical*
19 *product” means a drug, device, or biological product*
20 *intended for humans, and the terms “drug”, “device”,*
21 *and “biological product” have the meanings given*
22 *such terms in sections 201(g)(1) and 201(h) of the*
23 *Federal Food, Drug and Cosmetic Act (21 U.S.C.*
24 *321(g)(1) and (h)) and section 351(a) of the Public*
25 *Health Service Act (42 U.S.C. 262(a)), respectively,*

1 *including any component or raw material used there-*
2 *in, but excluding health care services.*

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

11 (15) *PUNITIVE DAMAGES.*—*The term “punitive*
12 *damages” means damages awarded, for the purpose of*
13 *punishment or deterrence, and not solely for compen-*
14 *satory purposes, against a health care provider,*
15 *health care organization, or a manufacturer, dis-*
16 *tributor, or supplier of a medical product. Punitive*
17 *damages are neither economic nor noneconomic dam-*
18 *ages.*

19 (16) *RECOVERY.*—*The term “recovery” means*
20 *the net sum recovered after deducting any disburse-*
21 *ments or costs incurred in connection with prosecu-*
22 *tion or settlement of the claim, including all costs*
23 *paid or advanced by any person. Costs of health care*
24 *incurred by the plaintiff and the attorneys’ office*

1 *overhead costs or charges for legal services are not de-*
2 *ductible disbursements or costs for such purpose.*

3 (17) *STATE.—The term “State” means each of*
4 *the several States, the District of Columbia, the Com-*
5 *monwealth of Puerto Rico, the Virgin Islands, Guam,*
6 *American Samoa, the Northern Mariana Islands, the*
7 *Trust Territory of the Pacific Islands, and any other*
8 *territory or possession of the United States, or any*
9 *political subdivision thereof.*

10 **SEC. 9. EFFECT ON OTHER LAWS.**

11 (a) *VACCINE INJURY.—*

12 (1) *To the extent that title XXI of the Public*
13 *Health Service Act establishes a Federal rule of law*
14 *applicable to a civil action brought for a vaccine-re-*
15 *lated injury or death—*

16 (A) *this Act does not affect the application*
17 *of the rule of law to such an action; and*

18 (B) *any rule of law prescribed by this Act*
19 *in conflict with a rule of law of such title XXI*
20 *shall not apply to such action.*

21 (2) *If there is an aspect of a civil action brought*
22 *for a vaccine-related injury or death to which a Fed-*
23 *eral rule of law under title XXI of the Public Health*
24 *Service Act does not apply, then this Act or otherwise*

1 applicable law (as determined under this Act) will
2 apply to such aspect of such action.

3 (b) *OTHER FEDERAL LAW.*—Except as provided in
4 this section, nothing in this Act shall be deemed to affect
5 any defense available to a defendant in a health care law-
6 suit or action under any other provision of Federal law.

7 **SEC. 10. STATE FLEXIBILITY AND PROTECTION OF STATES'**
8 **RIGHTS.**

9 (a) *HEALTH CARE LAWSUITS.*—The provisions gov-
10 erning health care lawsuits set forth in this Act preempt,
11 subject to subsections (b) and (c), State law to the extent
12 that State law prevents the application of any provisions
13 of law established by or under this Act. The provisions gov-
14 erning health care lawsuits set forth in this Act supersede
15 chapter 171 of title 28, United States Code, to the extent
16 that such chapter—

17 (1) provides for a greater amount of damages or
18 contingent fees, a longer period in which a health care
19 lawsuit may be commenced, or a reduced applica-
20 bility or scope of periodic payment of future damages,
21 than provided in this Act; or

22 (2) prohibits the introduction of evidence regard-
23 ing collateral source benefits, or mandates or permits
24 subrogation or a lien on collateral source benefits.

1 (b) *PROTECTION OF STATES' RIGHTS AND OTHER*
2 *LAWS.—(1) Any issue that is not governed by any provision*
3 *of law established by or under this Act (including State*
4 *standards of negligence) shall be governed by otherwise ap-*
5 *plicable State or Federal law.*

6 (2) *This Act shall not preempt or supersede any State*
7 *or Federal law that imposes greater procedural or sub-*
8 *stantive protections for health care providers and health*
9 *care organizations from liability, loss, or damages than*
10 *those provided by this Act or create a cause of action.*

11 (c) *STATE FLEXIBILITY.—No provision of this Act*
12 *shall be construed to preempt—*

13 (1) *any State law (whether effective before, on, or*
14 *after the date of the enactment of this Act) that speci-*
15 *fies a particular monetary amount of compensatory*
16 *or punitive damages (or the total amount of damages)*
17 *that may be awarded in a health care lawsuit, re-*
18 *gardless of whether such monetary amount is greater*
19 *or lesser than is provided for under this Act, notwith-*
20 *standing section 4(a); or*

21 (2) *any defense available to a party in a health*
22 *care lawsuit under any other provision of State or*
23 *Federal law.*

1 **SEC. 11. 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 any*
 6 *health care lawsuit arising from an injury occurring prior*
 7 *to the date of the enactment of this Act shall be governed*
 8 *by the applicable statute of limitations provisions in effect*
 9 *at the time the injury occurred.*

10 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

11 (a) SHORT TITLE.—This Act may be cited as the
 12 “Help Efficient, Accessible, Low-cost, Timely Healthcare
 13 (HEALTH) Act of 2011”.

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

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purpose.
- Sec. 3. Encouraging speedy resolution of claims.
- Sec. 4. Compensating patient injury.
- Sec. 5. Maximizing patient recovery.
- Sec. 6. Additional HEALTH benefits.
- Sec. 7. Punitive damages.
- Sec. 8. Authorization of payment of future damages to claimants in HEALTH
care lawsuits.
- Sec. 9. Definitions.
- Sec. 10. Effect on other laws.
- Sec. 11. State flexibility and protection of States’ rights.
- Sec. 12. Applicability; effective date.

16 **SEC. 2. FINDINGS AND PURPOSE.**

17 (a) FINDINGS.—

18 (1) EFFECT ON HEALTH CARE ACCESS AND
 19 COSTS.—Congress finds that our current civil justice

1 system is adversely affecting patient access to health
2 care services, better patient care, and cost-efficient
3 health care, in that the health care liability system
4 is a costly and ineffective mechanism for resolving
5 claims of health care liability and compensating in-
6 jured patients, and is a deterrent to the sharing of
7 information among health care professionals which
8 impedes efforts to improve patient safety and quality
9 of care.

10 (2) EFFECT ON INTERSTATE COMMERCE.—

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

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

20 gress finds that the health care liability litigation
21 systems existing throughout the United States have
22 a significant effect on the amount, distribution, and
23 use of Federal funds because of—

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

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

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

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

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

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

22 (3) ensure that persons with meritorious health
23 care injury claims receive fair and adequate com-
24 pensation, including reasonable noneconomic dam-
25 ages;

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

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

9 **SEC. 3. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

10 The time for the commencement of a health care law-
11 suit shall be 3 years after the date of manifestation of
12 injury or 1 year after the claimant discovers, or through
13 the use of reasonable diligence should have discovered, the
14 injury, whichever occurs first. In no event shall the time
15 for commencement of a health care lawsuit exceed 3 years
16 after the date of manifestation of injury unless tolled for
17 any of the following—

18 (1) upon proof of fraud;

19 (2) intentional concealment; or

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

23 Actions by a minor shall be commenced within 3 years
24 from the date of the alleged manifestation of injury except
25 that actions by a minor under the full age of 6 years shall

1 be commenced within 3 years of manifestation of injury
2 or prior to the minor's 8th birthday, whichever provides
3 a longer period. Such time limitation shall be tolled for
4 minors for any period during which a parent or guardian
5 and a health care provider or health care organization
6 have committed fraud or collusion in the failure to bring
7 an action on behalf of the injured minor.

8 **SEC. 4. COMPENSATING PATIENT INJURY.**

9 (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL
10 ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any
11 health care lawsuit, nothing in this Act shall limit a claim-
12 ant's recovery of the full amount of the available economic
13 damages, notwithstanding the limitation in subsection (b).

14 (b) ADDITIONAL NONECONOMIC DAMAGES.—In any
15 health care lawsuit, the amount of noneconomic damages,
16 if available, may be as much as \$250,000, regardless of
17 the number of parties against whom the action is brought
18 or the number of separate claims or actions brought with
19 respect to the same injury.

20 (c) NO DISCOUNT OF AWARD FOR NONECONOMIC
21 DAMAGES.—For purposes of applying the limitation in
22 subsection (b), future noneconomic damages shall not be
23 discounted to present value. The jury shall not be in-
24 formed about the maximum award for noneconomic dam-
25 ages. An award for noneconomic damages in excess of

1 \$250,000 shall be reduced either before the entry of judg-
2 ment, or by amendment of the judgment after entry of
3 judgment, and such reduction shall be made before ac-
4 counting for any other reduction in damages required by
5 law. If separate awards are rendered for past and future
6 noneconomic damages and the combined awards exceed
7 \$250,000, the future noneconomic damages shall be re-
8 duced first.

9 (d) FAIR SHARE RULE.—In any health care lawsuit,
10 each party shall be liable for that party’s several share
11 of any damages only and not for the share of any other
12 person. Each party shall be liable only for the amount of
13 damages allocated to such party in direct proportion to
14 such party’s percentage of responsibility. Whenever a
15 judgment of liability is rendered as to any party, a sepa-
16 rate judgment shall be rendered against each such party
17 for the amount allocated to such party. For purposes of
18 this section, the trier of fact shall determine the propor-
19 tion of responsibility of each party for the claimant’s
20 harm.

21 **SEC. 5. MAXIMIZING PATIENT RECOVERY.**

22 (a) COURT SUPERVISION OF SHARE OF DAMAGES
23 ACTUALLY PAID TO CLAIMANTS.—In any health care law-
24 suit, the court shall supervise the arrangements for pay-
25 ment of damages to protect against conflicts of interest

1 that may have the effect of reducing the amount of dam-
2 ages awarded that are actually paid to claimants. In par-
3 ticular, in any health care lawsuit in which the attorney
4 for a party claims a financial stake in the outcome by vir-
5 tue of a contingent fee, the court shall have the power
6 to restrict the payment of a claimant's damage recovery
7 to such attorney, and to redirect such damages to the
8 claimant based upon the interests of justice and principles
9 of equity. In no event shall the total of all contingent fees
10 for representing all claimants in a health care lawsuit ex-
11 ceed the following limits:

12 (1) Forty percent of the first \$50,000 recovered
13 by the claimant(s).

14 (2) Thirty-three and one-third percent of the
15 next \$50,000 recovered by the claimant(s).

16 (3) Twenty-five percent of the next \$500,000
17 recovered by the claimant(s).

18 (4) Fifteen percent of any amount by which the
19 recovery by the claimant(s) is in excess of \$600,000.

20 (b) APPLICABILITY.—The limitations in this section
21 shall apply whether the recovery is by judgment, settle-
22 ment, mediation, arbitration, or any other form of alter-
23 native dispute resolution. In a health care lawsuit involv-
24 ing a minor or incompetent person, a court retains the
25 authority to authorize or approve a fee that is less than

1 the maximum permitted under this section. The require-
2 ment for court supervision in the first two sentences of
3 subsection (a) applies only in civil actions.

4 **SEC. 6. ADDITIONAL HEALTH BENEFITS.**

5 In any health care lawsuit involving injury or wrong-
6 ful death, any party may introduce evidence of collateral
7 source benefits. If a party elects to introduce such evi-
8 dence, any opposing party may introduce evidence of any
9 amount paid or contributed or reasonably likely to be paid
10 or contributed in the future by or on behalf of the oppos-
11 ing party to secure the right to such collateral source bene-
12 fits. No provider of collateral source benefits shall recover
13 any amount against the claimant or receive any lien or
14 credit against the claimant's recovery or be equitably or
15 legally subrogated to the right of the claimant in a health
16 care lawsuit involving injury or wrongful death. This sec-
17 tion shall apply to any health care lawsuit that is settled
18 as well as a health care lawsuit that is resolved by a fact
19 finder. This section shall not apply to section 1862(b) (42
20 U.S.C. 1395y(b)) or section 1902(a)(25) (42 U.S.C.
21 1396a(a)(25)) of the Social Security Act.

22 **SEC. 7. PUNITIVE DAMAGES.**

23 (a) IN GENERAL.—Punitive damages may, if other-
24 wise permitted by applicable State or Federal law, be
25 awarded against any person in a health care lawsuit only

1 if it is proven by clear and convincing evidence that such
2 person acted with malicious intent to injure the claimant,
3 or that such person deliberately failed to avoid unneces-
4 sary injury that such person knew the claimant was sub-
5 stantially certain to suffer. In any health care lawsuit
6 where no judgment for compensatory damages is rendered
7 against such person, no punitive damages may be awarded
8 with respect to the claim in such lawsuit. No demand for
9 punitive damages shall be included in a health care lawsuit
10 as initially filed. A court may allow a claimant to file an
11 amended pleading for punitive damages only upon a mo-
12 tion by the claimant and after a finding by the court, upon
13 review of supporting and opposing affidavits or after a
14 hearing, after weighing the evidence, that the claimant has
15 established by a substantial probability that the claimant
16 will prevail on the claim for punitive damages. At the re-
17 quest of any party in a health care lawsuit, the trier of
18 fact shall consider in a separate proceeding—

19 (1) whether punitive damages are to be award-
20 ed and the amount of such award; and

21 (2) the amount of punitive damages following a
22 determination of punitive liability.

23 If a separate proceeding is requested, evidence relevant
24 only to the claim for punitive damages, as determined by
25 applicable State law, shall be inadmissible in any pro-

1 ceeding to determine whether compensatory damages are
2 to be awarded.

3 (b) DETERMINING AMOUNT OF PUNITIVE DAM-
4 AGES.—

5 (1) FACTORS CONSIDERED.—In determining
6 the amount of punitive damages, if awarded, in a
7 health care lawsuit, the trier of fact shall consider
8 only the following—

9 (A) the severity of the harm caused by the
10 conduct of such party;

11 (B) the duration of the conduct or any
12 concealment of it by such party;

13 (C) the profitability of the conduct to such
14 party;

15 (D) the number of products sold or med-
16 ical procedures rendered for compensation, as
17 the case may be, by such party, of the kind
18 causing the harm complained of by the claim-
19 ant;

20 (E) any criminal penalties imposed on such
21 party, as a result of the conduct complained of
22 by the claimant; and

23 (F) the amount of any civil fines assessed
24 against such party as a result of the conduct
25 complained of by the claimant.

1 (2) MAXIMUM AWARD.—The amount of punitive
2 damages, if awarded, in a health care lawsuit may
3 be as much as \$250,000 or as much as two times
4 the amount of economic damages awarded, which-
5 ever is greater. The jury shall not be informed of
6 this limitation.

7 (c) NO PUNITIVE DAMAGES FOR PRODUCTS THAT
8 COMPLY WITH FDA STANDARDS.—

9 (1) IN GENERAL.—

10 (A) No punitive damages may be awarded
11 against the manufacturer or distributor of a
12 medical product, or a supplier of any compo-
13 nent or raw material of such medical product,
14 based on a claim that such product caused the
15 claimant's harm where—

16 (i)(I) such medical product was sub-
17 ject to premarket approval, clearance, or li-
18 censure by the Food and Drug Administra-
19 tion with respect to the safety of the for-
20 mulation or performance of the aspect of
21 such medical product which caused the
22 claimant's harm or the adequacy of the
23 packaging or labeling of such medical
24 product; and

1 (II) such medical product was so ap-
2 proved, cleared, or licensed; or

3 (ii) such medical product is generally
4 recognized among qualified experts as safe
5 and effective pursuant to conditions estab-
6 lished by the Food and Drug Administra-
7 tion and applicable Food and Drug Admin-
8 istration regulations, including without
9 limitation those related to packaging and
10 labeling, unless the Food and Drug Admin-
11 istration has determined that such medical
12 product was not manufactured or distrib-
13 uted in substantial compliance with appli-
14 cable Food and Drug Administration stat-
15 utes and regulations.

16 (B) RULE OF CONSTRUCTION.—Subpara-
17 graph (A) may not be construed as establishing
18 the obligation of the Food and Drug Adminis-
19 tration to demonstrate affirmatively that a
20 manufacturer, distributor, or supplier referred
21 to in such subparagraph meets any of the con-
22 ditions described in such subparagraph.

23 (2) LIABILITY OF HEALTH CARE PROVIDERS.—
24 A health care provider who prescribes, or who dis-
25 penses pursuant to a prescription, a medical product

1 approved, licensed, or cleared by the Food and Drug
2 Administration shall not be named as a party to a
3 product liability lawsuit involving such product and
4 shall not be liable to a claimant in a class action
5 lawsuit against the manufacturer, distributor, or
6 seller of such product. Nothing in this paragraph
7 prevents a court from consolidating cases involving
8 health care providers and cases involving products li-
9 ability claims against the manufacturer, distributor,
10 or product seller of such medical product.

11 (3) PACKAGING.—In a health care lawsuit for
12 harm which is alleged to relate to the adequacy of
13 the packaging or labeling of a drug which is required
14 to have tamper-resistant packaging under regula-
15 tions of the Secretary of Health and Human Serv-
16 ices (including labeling regulations related to such
17 packaging), the manufacturer or product seller of
18 the drug shall not be held liable for punitive dam-
19 ages unless such packaging or labeling is found by
20 the trier of fact by clear and convincing evidence to
21 be substantially out of compliance with such regula-
22 tions.

23 (4) EXCEPTION.—Paragraph (1) shall not
24 apply in any health care lawsuit in which—

1 (A) a person, before or after premarket ap-
2 proval, clearance, or licensure of such medical
3 product, knowingly misrepresented to or with-
4 held from the Food and Drug Administration
5 information that is required to be submitted
6 under the Federal Food, Drug, and Cosmetic
7 Act (21 U.S.C. 301 et seq.) or section 351 of
8 the Public Health Service Act (42 U.S.C. 262)
9 that is material and is causally related to the
10 harm which the claimant allegedly suffered; ~~or~~

11 (B) a person made an illegal payment to
12 an official of the Food and Drug Administra-
13 tion for the purpose of either securing or main-
14 taining approval, clearance, or licensure of such
15 medical product; **or**

16 **(C) the defendant caused the med-**
17 **ical product which caused the claim-**
18 **ant's harm to be misbranded or adul-**
19 **terated (as such terms are used in**
20 **chapter V of the Federal Food, Drug,**
21 **and Cosmetic Act (21 U.S.C 351 et**
22 **seq.)).**

1 **SEC. 8. AUTHORIZATION OF PAYMENT OF FUTURE DAM-**
2 **AGES TO CLAIMANTS IN HEALTH CARE LAW-**
3 **SUITS.**

4 (a) **IN GENERAL.**—In any health care lawsuit, if an
5 award of future damages, without reduction to present
6 value, equaling or exceeding \$50,000 is made against a
7 party with sufficient insurance or other assets to fund a
8 periodic payment of such a judgment, the court shall, at
9 the request of any party, enter a judgment ordering that
10 the future damages be paid by periodic payments, in ac-
11 cordance with the Uniform Periodic Payment of Judg-
12 ments Act promulgated by the National Conference of
13 Commissioners on Uniform State Laws.

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

17 **SEC. 9. DEFINITIONS.**

18 In this Act:

19 (1) **ALTERNATIVE DISPUTE RESOLUTION SYS-**
20 **TEM; ADR.**—The term “alternative dispute resolution
21 system” or “ADR” means a system that provides
22 for the resolution of health care lawsuits in a man-
23 ner other than through a civil action brought in a
24 State or Federal court.

25 (2) **CLAIMANT.**—The term “claimant” means
26 any person who brings a health care lawsuit, includ-

1 ing a person who asserts or claims a right to legal
2 or equitable contribution, indemnity, or subrogation,
3 arising out of a health care liability claim or action,
4 and any person on whose behalf such a claim is as-
5 serted or such an action is brought, whether de-
6 ceased, incompetent, or a minor.

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

15 (A) any State or Federal health, sickness,
16 income-disability, accident, or workers’ com-
17 pensation law;

18 (B) any health, sickness, income-disability,
19 or accident insurance that provides health bene-
20 fits or income-disability coverage;

21 (C) any contract or agreement of any
22 group, organization, partnership, or corporation
23 to provide, pay for, or reimburse the cost of
24 medical, hospital, dental, or income-disability
25 benefits; and

1 (D) any other publicly or privately funded
2 program.

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

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

1 (6) ECONOMIC DAMAGES.—The term “economic
2 damages” means objectively verifiable monetary
3 losses incurred as a result of the provision of, use
4 of, or payment for (or failure to provide, use, or pay
5 for) health care services or medical products, such as
6 past and future medical expenses, loss of past and
7 future earnings, cost of obtaining domestic services,
8 loss of employment, and loss of business or employ-
9 ment opportunities.

10 (7) HEALTH CARE LAWSUIT.—The term
11 “health care lawsuit” means any health care liability
12 claim concerning the provision of health care goods
13 or services or any medical product affecting inter-
14 state commerce, or any health care liability action
15 concerning the provision of health care goods or
16 services or any medical product affecting interstate
17 commerce, brought in a State or Federal court or
18 pursuant to an alternative dispute resolution system,
19 against a health care provider, a health care organi-
20 zation, or the manufacturer, distributor, supplier,
21 marketer, promoter, or seller of a medical product,
22 regardless of the theory of liability on which the
23 claim is based, or the number of claimants, plain-
24 tiffs, defendants, or other parties, or the number of
25 claims or causes of action, in which the claimant al-

1 leges a health care liability claim. Such term does
2 not include a claim or action which is based on
3 criminal liability; which seeks civil fines or penalties
4 paid to Federal, State, or local government; or which
5 is grounded in antitrust.

6 (8) HEALTH CARE LIABILITY ACTION.—The
7 term “health care liability action” means a civil ac-
8 tion brought in a State or Federal court or pursuant
9 to an alternative dispute resolution system, against
10 a health care provider, a health care organization, or
11 the manufacturer, distributor, supplier, marketer,
12 promoter, or seller of a medical product, regardless
13 of the theory of liability on which the claim is based,
14 or the number of plaintiffs, defendants, or other par-
15 ties, or the number of causes of action, in which the
16 claimant alleges a health care liability claim.

17 (9) HEALTH CARE LIABILITY CLAIM.—The
18 term “health care liability claim” means a demand
19 by any person, whether or not pursuant to ADR,
20 against a health care provider, health care organiza-
21 tion, or the manufacturer, distributor, supplier, mar-
22 keter, promoter, or seller of a medical product, in-
23 cluding, but not limited to, third-party claims, cross-
24 claims, counter-claims, or contribution claims, which
25 are based upon the provision of, use of, or payment

1 for (or the failure to provide, use, or pay for) health
2 care services or medical products, regardless of the
3 theory of liability on which the claim is based, or the
4 number of plaintiffs, defendants, or other parties, or
5 the number of causes of action.

6 (10) HEALTH CARE ORGANIZATION.—The term
7 “health care organization” means any person or en-
8 tity which is obligated to provide or pay for health
9 benefits under any health plan, including any person
10 or entity acting under a contract or arrangement
11 with a health care organization to provide or admin-
12 ister any health benefit.

13 (11) HEALTH CARE PROVIDER.—The term
14 “health care provider” means any person or entity
15 required by State or Federal laws or regulations to
16 be licensed, registered, or certified to provide health
17 care services, and being either so licensed, reg-
18 istered, or certified, or exempted from such require-
19 ment by other statute or regulation.

20 (12) HEALTH CARE GOODS OR SERVICES.—The
21 term “health care goods or services” means any
22 goods or services provided by a health care organiza-
23 tion, provider, or by any individual working under
24 the supervision of a health care provider, that relates
25 to the diagnosis, prevention, or treatment of any

1 human disease or impairment, or the assessment or
2 care of the health of human beings.

3 (13) MALICIOUS INTENT TO INJURE.—The
4 term “malicious intent to injure” means inten-
5 tionally causing or attempting to cause physical in-
6 jury other than providing health care goods or serv-
7 ices.

8 (14) MEDICAL PRODUCT.—The term “medical
9 product” means a drug, device, or biological product
10 intended for humans, and the terms “drug”, “de-
11 vice”, and “biological product” have the meanings
12 given such terms in sections 201(g)(1) and 201(h)
13 of the Federal Food, Drug and Cosmetic Act (21
14 U.S.C. 321(g)(1) and (h)) and section 351(a) of the
15 Public Health Service Act (42 U.S.C. 262(a)), re-
16 spectively, including any component or raw material
17 used therein, but excluding health care services.

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

1 tion, and all other nonpecuniary losses of any kind
2 or nature.

3 (16) PUNITIVE DAMAGES.—The term “punitive
4 damages” means damages awarded, for the purpose
5 of punishment or deterrence, and not solely for com-
6 pensatory purposes, against a health care provider,
7 health care organization, or a manufacturer, dis-
8 tributor, or supplier of a medical product. Punitive
9 damages are neither economic nor noneconomic
10 damages.

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

19 (18) STATE.—The term “State” means each of
20 the several States, the District of Columbia, the
21 Commonwealth of Puerto Rico, the Virgin Islands,
22 Guam, American Samoa, the Northern Mariana Is-
23 lands, the Trust Territory of the Pacific Islands, and
24 any other territory or possession of the United
25 States, or any political subdivision thereof.

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

2 (a) VACCINE INJURY.—

3 (1) To the extent that title XXI of the Public
4 Health Service Act establishes a Federal rule of law
5 applicable to a civil action brought for a vaccine-re-
6 lated injury or death—

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

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

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

19 (b) OTHER FEDERAL LAW.—Except as provided in
20 this section, nothing in this Act shall be deemed to affect
21 any defense available to a defendant in a health care law-
22 suit or action under any other provision of Federal law.

23 **SEC. 11. STATE FLEXIBILITY AND PROTECTION OF STATES'**
24 **RIGHTS.**

25 (a) HEALTH CARE LAWSUITS.—The provisions gov-
26 erning health care lawsuits set forth in this Act preempt,

1 subject to subsections (b) and (c), State law to the extent
2 that State law prevents the application of any provisions
3 of law established by or under this Act. The provisions
4 governing health care lawsuits set forth in this Act super-
5 sede chapter 171 of title 28, United States Code, to the
6 extent that such chapter—

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

12 (2) prohibits the introduction of evidence re-
13 garding collateral source benefits, or mandates or
14 permits subrogation or a lien on collateral source
15 benefits.

16 (b) PROTECTION OF STATES' RIGHTS AND OTHER
17 LAWS.—(1) Any issue that is not governed by any provi-
18 sion of law established by or under this Act (including
19 State standards of negligence) shall be governed by other-
20 wise applicable State or Federal law.

21 (2) This Act shall not preempt or supersede any State
22 or Federal law that imposes greater procedural or sub-
23 stantive protections for health care providers and health
24 care organizations from liability, loss, or damages than
25 those provided by this Act or create a cause of action.

1 (c) STATE FLEXIBILITY.—No provision of this Act
2 shall be construed to preempt—

3 (1) any State law (whether effective before, on,
4 or after the date of the enactment of this Act) that
5 specifies a particular monetary amount of compen-
6 satory or punitive damages (or the total amount of
7 damages) that may be awarded in a health care law-
8 suit, regardless of whether such monetary amount is
9 greater or lesser than is provided for under this Act,
10 notwithstanding section 4(a); or

11 (2) any defense available to a party in a health
12 care lawsuit under any other provision of State or
13 Federal law.

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

15 This Act shall apply to any health care lawsuit
16 brought in a Federal or State court, or subject to an alter-
17 native dispute resolution system, that is initiated on or
18 after the date of the enactment of this Act, except that
19 any health care lawsuit arising from an injury occurring
20 prior to the date of the enactment of this Act shall be
21 governed by the applicable statute of limitations provisions
22 in effect at the time the injury occurred.

Union Calendar No. 47

112TH CONGRESS
1ST Session

H. R. 5

[Report No. 112-39, Parts I and II]

A BILL

To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.

MAY 23, 2011

Reported from the Committee on Energy and Commerce with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed