

106TH CONGRESS
1ST SESSION

H. R. 2242

To establish limits on medical malpractice claims, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 1999

Mr. GREENWOOD (for himself, Mr. SHAYS, Mr. SENSENBRENNER, Mrs. JOHNSON of Connecticut, Mr. DEAL of Georgia, Mr. WHITFIELD, Mr. NORWOOD, Mr. SMITH of New Jersey, and Mr. COOKSEY) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on 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

A BILL

To establish limits on medical malpractice claims, and for other purposes.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Medical Malpractice
5 Rx Act”.

1 **SEC. 2. FEDERAL REFORM OF HEALTH CARE LIABILITY AC-**
2 **TIONS.**

3 (a) **APPLICABILITY.**—This Act shall apply with re-
4 spect to any health care liability action brought in any
5 State or Federal court and to any health care liability
6 claim subject to an ADR, except that this Act shall not
7 apply to—

8 (1) an action for damages arising from a vac-
9 cine-related injury or death to the extent that title
10 XXI of the Public Health Service Act applies to the
11 action, or

12 (2) an action under the Employee Retirement
13 Income Security Act of 1974 (29 U.S.C. 1001 et
14 seq.).

15 (b) **PREEMPTION.**—This Act shall not preempt any
16 State law that—

17 (1) provides for defenses or places limitations
18 on a person’s liability in addition to those contained
19 in this Act or otherwise imposes greater restrictions
20 than those provided in this Act; or

21 (2) imposes greater restrictions on liability or
22 damages than those provided in this Act.

23 No provision of this Act shall be construed to preempt or
24 displace the implementation of any State sponsored or pri-
25 vate ADR system.

1 (c) LIMITATIONS.—This Act supersedes chapter 171
2 of title 28, United States Code, (relating to tort claims
3 procedure) and preempts State law with respect to both
4 procedural and substantive matters only to the extent that
5 such chapter or State law differs from any provision of
6 this Act or provision established under this Act. Section
7 5 shall supersede or preempt any provision of such chapter
8 or State law which prohibits the introduction of evidence
9 regarding collateral source benefits or mandates or per-
10 mits subrogation or a lien on the plaintiff’s award for the
11 cost of providing collateral source benefits. Any issue that
12 is not governed by any provision of this Act shall be gov-
13 erned by otherwise applicable Federal or State law.

14 (d) EFFECT ON SOVEREIGN IMMUNITY AND CHOICE
15 OF LAW OR VENUE.—Nothing in subsection (c) shall be
16 construed to—

17 (1) waive or affect any defense of sovereign im-
18 munity asserted by any State under any provision of
19 law;

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

22 (3) affect the applicability of any provision of
23 the Foreign Sovereign Immunities Act of 1976;

1 (4) preempt State choice-of-law rules with re-
2 spect to claims brought by a foreign nation or a cit-
3 izen of a foreign nation; or

4 (5) affect the right of any court to transfer
5 venue or to apply the law of a foreign nation or to
6 dismiss a claim of a foreign nation or of a citizen
7 of a foreign nation on the ground of inconvenient
8 forum.

9 (e) AMOUNT IN CONTROVERSY.—In an action to
10 which this Act applies and which is brought under section
11 1332 of title 28, United States Code, the amount of non-
12 economic damages or punitive damages, and attorneys’
13 fees or costs, shall not be included in determining whether
14 the matter in controversy exceeds the sum or value of
15 \$50,000.

16 (f) FEDERAL COURT JURISDICTION NOT ESTAB-
17 LISHED ON FEDERAL QUESTION GROUNDS.—Nothing in
18 this Act shall be construed to establish any jurisdiction
19 in the district courts of the United States over health care
20 liability actions on the basis of section 1331 or 1337 of
21 title 28, United States Code.

22 **SEC. 3. STATUTE OF LIMITATIONS.**

23 A health care liability action may not be brought
24 after the expiration of the 2-year period that begins on
25 the date on which the alleged injury that is the subject

1 of the action was discovered or should reasonably have
2 been discovered, but in no case after the expiration of the
3 5-year period that begins on the date the alleged injury
4 occurred.

5 **SEC. 4. CALCULATION AND PAYMENT OF DAMAGES.**

6 (a) **JOINT AND SEVERAL LIABILITY.**—In any health
7 care liability action, a defendant shall be liable only for
8 the amount of noneconomic damages attributable to such
9 defendant in direct proportion to such defendant's share
10 of fault or responsibility for the claimant's actual dam-
11 ages, as determined by the trier of fact. In all such cases,
12 the liability of a defendant for noneconomic damages shall
13 be several and not joint.

14 (b) **LIMITATION ON NONECONOMIC DAMAGES.**—

15 (1) **IN GENERAL.**—The total amount of non-
16 economic damages that may be awarded to a claim-
17 ant for losses resulting from the injury which is the
18 subject of a health care liability action may not ex-
19 ceed \$250,000, regardless of the number of parties
20 against whom the action is brought or the number
21 of actions brought with respect to the injury. The
22 limitation under this paragraph shall not apply to an
23 action for damages based solely on intentional denial
24 of medical treatment necessary to preserve a pa-
25 tient's life that the patient is otherwise qualified to

1 receive, against the wishes of a patient, or if the pa-
2 tient is incompetent, against the wishes of the pa-
3 tient's guardian, on the basis of the patient's
4 present or predicated age, disability, degree of med-
5 ical dependency, or quality of life.

6 (2) CAP INCREASE.—The limit prescribed by
7 paragraph (1) on the total amount of noneconomic
8 damages that may be awarded shall be adjusted an-
9 nually by changes in the Consumer Price Index for
10 all urban consumers published by the Department of
11 Labor.

12 (c) TREATMENT OF PUNITIVE DAMAGES.—

13 (1) GENERAL RULE.—Punitive damages may,
14 to the extent permitted by applicable State law, be
15 awarded in any health care liability action for harm
16 in any Federal or State court against a defendant if
17 the claimant establishes by clear and convincing evi-
18 dence that the harm suffered was the result of
19 conduct—

20 (A) specifically intended to cause harm, or

21 (B) conduct manifesting a conscious, fla-
22 grant indifference to the rights or safety of oth-
23 ers.

24 (2) APPLICABILITY.—This subsection shall
25 apply to any health care liability action brought in

1 any Federal or State court on any theory where pu-
2 nitive damages are sought. This subsection does not
3 create a cause of action for punitive damages. This
4 subsection does not preempt or supersede any State
5 or Federal law to the extent that such law would
6 further limit the award of punitive damages.

7 (3) BIFURCATION.—At the request of any
8 party, the trier of fact shall consider in a separate
9 proceeding whether punitive damages are to be
10 awarded and the amount of such award. If a sepa-
11 rate proceeding is requested, evidence relevant only
12 to the claim of punitive damages, as determined by
13 applicable State law, shall be inadmissible in any
14 proceeding to determine whether actual damages are
15 to be awarded.

16 (4) DRUGS AND DEVICES.—

17 (A) IN GENERAL.—(i) Punitive damages
18 shall not be awarded against a manufacturer or
19 product seller of a drug or medical device which
20 caused the claimant's harm where—

21 (I) such drug or device was subject to
22 premarket approval by the Food and Drug
23 Administration with respect to the safety
24 of the formulation or performance of the
25 aspect of such drug or device which caused

1 the claimant's harm, or the adequacy of
2 the packaging or labeling of such drug or
3 device which caused the harm, and such
4 drug, device, packaging, or labeling was
5 approved by the Food and Drug Adminis-
6 tration; or

7 (II) the drug is generally recognized
8 as safe and effective pursuant to conditions
9 established by the Food and Drug Admin-
10 istration and applicable regulations, includ-
11 ing packaging and labeling regulations.

12 (ii) Clause (i) shall not apply in any case
13 in which the defendant, before or after pre-
14 market approval of a drug or device—

15 (I) intentionally and wrongfully with-
16 held from or misrepresented to the Food
17 and Drug Administration information con-
18 cerning such drug or device required to be
19 submitted under the Federal Food, Drug,
20 and Cosmetic Act (21 U.S.C. 301 et seq.)
21 or section 351 of the Public Health Service
22 Act (42 U.S.C. 262) that is material and
23 relevant to the harm suffered by the claim-
24 ant, or

1 (II) made an illegal payment to an of-
2 ficial or employee of the Food and Drug
3 Administration for the purpose of securing
4 or maintaining approval of such drug or
5 device.

6 (B) PACKAGING.—In a health care liability
7 action for harm which is alleged to relate to the
8 adequacy of the packaging or labeling of a drug
9 which is required to have tamper-resistant
10 packaging under regulations of the Secretary of
11 Health and Human Services (including labeling
12 regulations related to such packaging), the
13 manufacturer or product seller of the drug shall
14 not be held liable for punitive damages unless
15 such packaging or labeling is found by the court
16 by clear and convincing evidence to be substan-
17 tially out of compliance with such regulations.

18 (d) PERIODIC PAYMENTS FOR FUTURE LOSSES.—

19 (1) GENERAL RULE.—In any health care liabil-
20 ity action in which the damages awarded for future
21 economic and noneconomic loss exceeds \$50,000, a
22 person shall not be required to pay such damages in
23 a single, lump-sum payment, but shall be permitted
24 to make such payments periodically based on when

1 the damages are found likely to occur, as such pay-
2 ments are determined by the court.

3 (2) FINALITY OF JUDGMENT.—The judgment
4 of the court awarding periodic payments under this
5 subsection may not, in the absence of fraud, be re-
6 opened at any time to contest, amend, or modify the
7 schedule or amount of the payments.

8 (3) LUMP-SUM SETTLEMENTS.—This sub-
9 section shall not be construed to preclude a settle-
10 ment providing for a single, lump-sum payment.

11 (e) TREATMENT OF COLLATERAL SOURCE PAY-
12 MENTS.—

13 (1) INTRODUCTION INTO EVIDENCE.—In any
14 health care liability action, any defendant may intro-
15 duce evidence of collateral source payments. If any
16 defendant elects to introduce such evidence, the
17 claimant may introduce evidence of any amount paid
18 or contributed or reasonably likely to be paid or con-
19 tributed in the future by or on behalf of the claim-
20 ant to secure the right to such collateral source pay-
21 ments.

22 (2) NO SUBROGATION.—No provider of collat-
23 eral source payments shall recover any amount
24 against the claimant or receive any lien or credit
25 against the claimant's recovery or be equitably or le-

1 gally subrogated the right of the claimant in a
2 health care liability action.

3 (3) APPLICATION TO SETTLEMENTS.—This sub-
4 section shall apply to an action that is settled as well
5 as an action that is resolved by a fact finder.

6 **SEC. 5. AWARD OF ATTORNEY'S FEES.**

7 (a) GENERAL RULE.—If the claimant in a health
8 care liability action seeks noneconomic damages in excess
9 of \$250,000 (or the cap in effect under section 4(b)(2))
10 or 3 times the economic damages, whichever is lesser, and
11 the request for such damages in such amount is made be-
12 fore the determination of liability of one party or another
13 by verdict or order of judgment, the prevailing party in
14 such action shall be entitled to attorney's fees from the
15 non-prevailing party, except that the sum of the attorney's
16 fees to which the prevailing party is entitled shall not ex-
17 ceed the attorney's fees of the non-prevailing party.

18 (b) LIMITATION.—The court in a health care liability
19 action may, in its discretion, limit the fees authorized to
20 be recovered under subsection (a) if the amount of such
21 fees is deemed unjust.

22 (c) LIMITATIONS ON CONTINGENT FEES.—

23 (1) IN GENERAL.—The total of all contingent
24 fees for representing all claimants in a health care

1 liability claim or action shall not exceed the following
2 limits:

3 (A) 40 percent of the first \$50,000 recov-
4 ered by the claimant.

5 (B) 33 $\frac{1}{3}$ percent of the next \$50,000 re-
6 covered by the claimant.

7 (C) 25 percent of the next \$50,000 recov-
8 ered by the claimant.

9 (D) 15 percent of any amount by which
10 the recovery by the claimant exceeds \$600,000.

11 (2) APPLICABILITY.—The limitations prescribed
12 by paragraph (1) shall apply whether the recovery is
13 by judgment, settlement, mediation, arbitration, or
14 any other form of ADR. A court acting in a health
15 care liability claim or action involving a minor or in-
16 competent person retains the authority to authorize
17 or approve a fee that is less than the maximum per-
18 mitted under paragraph (1).

19 (3) DEFINITIONS.—For purposes of this sub-
20 section:

21 (A) CONTINGENT FEE.—The term “contin-
22 gent fee” includes all compensation to any per-
23 son which is payable only if a recovery is ef-
24 fected on behalf of one or more claimants.

1 (B) RECOVERY.—The term “recovery”
2 means the net sum recovered after deducting
3 any disbursements or costs incurred in connec-
4 tion with prosecution or settlement of the claim,
5 including all costs paid or advanced by any per-
6 son. Costs of health care incurred by the plain-
7 tiff and the attorney’s office overhead costs or
8 charges for legal services are not deductible dis-
9 bursements of costs for such purpose.

10 (d) HOURS WORKED.—Counsel of record in a health
11 care liability action shall maintain accurate and up-to-date
12 records of hours worked for such action regardless of the
13 fee arrangement with the attorney’s client.

14 (e) COSTS.—Nothing in this section shall affect the
15 right of a prevailing party to be awarded costs under ap-
16 plicable law.

17 (f) EFFECTIVE DATE.—This section shall apply with
18 respect to a health care liability action which is brought
19 after the date of the enactment of this Act for a claim
20 arising from an injury occurring after such date of enact-
21 ment.

22 **SEC. 6. ALTERNATIVE DISPUTE RESOLUTION.**

23 Any ADR used to resolve a health care liability action
24 or claim shall contain provisions relating to statute of limi-
25 tations, noneconomic damages, joint and several liability,

1 punitive damages, collateral source rule, periodic pay-
2 ments, and award of attorney's fees which are consistent
3 with the provisions relating to such matters in this Act.

4 **SEC. 7. DEFINITIONS.**

5 As used in this Act:

6 (1) ACTUAL DAMAGES.—The term “actual dam-
7 ages” means damages awarded to pay for economic
8 loss.

9 (2) ADR.—The term “ADR” means an alter-
10 native dispute resolution system established under
11 Federal or State law that provides for the resolution
12 of health care liability claims in a manner other than
13 through health care liability actions.

14 (3) CLAIMANT.—The term “claimant” means
15 any person who brings a health care liability action
16 and any person on whose behalf such an action is
17 brought. If such action is brought through or on be-
18 half of an estate, the term includes the claimant's
19 decedent. If such action is brought through or on be-
20 half of a minor or incompetent, the term includes
21 the claimant's legal guardian.

22 (4) CLEAR AND CONVINCING EVIDENCE.—The
23 term “clear and convincing evidence” is that meas-
24 ure or degree of proof that will produce in the mind
25 of the trier of fact a firm belief or conviction as to

1 the truth of the allegations sought to be established.
2 Such measure or degree of proof is more than that
3 required under preponderance of the evidence but
4 less than that required for proof beyond a reason-
5 able doubt.

6 (5) COLLATERAL SOURCE PAYMENTS.—The
7 term “collateral source payments” means any
8 amount paid or reasonably likely to be paid in the
9 future to or on behalf of a claimant, or any service,
10 product, or other benefit provided or reasonably like-
11 ly to be provided in the future to or on behalf of a
12 claimant, as a result of an injury or wrongful death,
13 pursuant to—

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

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

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

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

3 (6) DRUG.—The term “drug” has the meaning
4 given such term in section 201(g)(1) of the Federal
5 Food, Drug, and Cosmetic Act (21 U.S.C.
6 321(g)(1)).

7 (7) ECONOMIC DAMAGES.—The term “economic
8 damages” means objectively verifiable monetary
9 losses incurred as a result of the provision of, use
10 of, or payment for (or failure to provide, use, or pay
11 for) health care services or medical products such as
12 past and future medical expenses, loss of past and
13 future earnings, cost of obtaining domestic services,
14 loss of employment, loss due to death, burial costs,
15 and loss of business or employment opportunities.

16 (8) HARM.—The term “harm” means any le-
17 gally cognizable wrong or injury for which punitive
18 damages may be imposed.

19 (9) HEALTH BENEFIT PLAN.—The term
20 “health benefit plan” means—

21 (A) a hospital or medical expense incurred
22 policy or certificate,

23 (B) a hospital or medical service plan con-
24 tract,

1 (C) a health maintenance subscriber con-
2 tract, or

3 (D) a Medicare+Choice product (offered
4 under part C of title XVIII of the Social Secu-
5 rity Act),

6 that provides benefits with respect to health care
7 services.

8 (10) HEALTH CARE LIABILITY ACTION.—The
9 term “health care liability action” means a civil ac-
10 tion brought in a State or Federal court or pursuant
11 to alternative dispute resolution against a health
12 care provider, an entity which is obligated to provide
13 or pay for health benefits under any health benefit
14 plan (including any person or entity acting under a
15 contract or arrangement to provide or administer
16 any health benefit), or the manufacturer, distributor,
17 supplier, marketer, promoter, or seller of a medical
18 product, in which the claimant alleges a claim (in-
19 cluding third party claims, cross claims, counter
20 claims, or contribution claims) based upon the provi-
21 sion of (or the failure to provide or pay for) health
22 care services or the use of a medical product, re-
23 gardless of the theory of liability on which the claim
24 is based or the number of plaintiffs, defendants, or
25 causes of action.

1 (11) HEALTH CARE LIABILITY CLAIM.—The
2 term “health care liability claim” means a claim in
3 which the claimant alleges that injury was caused by
4 the provision of (or the failure to provide) health
5 care services or medical products.

6 (12) HEALTH CARE PROVIDER.—The term
7 “health care provider” means any person that is en-
8 gaged in the delivery of health care services in a
9 State and that is required by the laws or regulations
10 of the State to be licensed or certified by the State
11 to engage in the delivery of such services in the
12 State.

13 (13) HEALTH CARE SERVICE.—The term
14 “health care service” means any service for which
15 payment may be made under a health benefit plan
16 including services related to the delivery or adminis-
17 tration of such service.

18 (14) MEDICAL PRODUCT.—The term “medical
19 product” means a drug (as defined in section
20 201(g)(1)) of the Federal Food, Drug, and Cosmetic
21 Act (21 U.S.C. 321(g)(1)) or a medical device (as
22 defined in section 201(h)) of the Federal Food,
23 Drug, and Cosmetic Act (21 U.S.C. 321(h)), includ-
24 ing any component or raw material used in a drug
25 or device but excluding health care services.

1 (15) NONECONOMIC DAMAGES.—The term
2 “noneconomic damages” means damages paid to an
3 individual for pain and suffering, inconvenience,
4 emotional distress, mental anguish, loss of consor-
5 tium, injury to reputation, humiliation, and other
6 nonpecuniary losses.

7 (16) PERSON.—The term “person” means any
8 individual, corporation, company, association, firm,
9 partnership, society, joint stock company, or any
10 other entity, including any governmental entity.

11 (17) PREVAILING PARTY.—The term “pre-
12 vailing party” means a party to a health care liabil-
13 ity action who obtains a final judgment (other than
14 by settlement) exclusive of interest on all or a por-
15 tion of the claims asserted during the litigation.

16 (18) PRODUCT SELLER.—

17 (A) IN GENERAL.—Subject to subpara-
18 graph (B), the term “product seller” means a
19 person who, in the course of a business con-
20 ducted for that purpose—

21 (i) sells, distributes, rents, leases, pre-
22 pares, blends, packages, labels, or is other-
23 wise involved in placing, a product in the
24 stream of commerce, or

1 (ii) installs, repairs, or maintains the
2 harm-causing aspect of a product.

3 (B) EXCLUSION.—Such term does not
4 include—

5 (i) a seller or lessor of real property;

6 (ii) a provider of professional services
7 in any case in which the sale or use of a
8 product is incidental to the transaction and
9 the essence of the transaction is the fur-
10 nishing of judgment, skill, or services; or

11 (iii) any person who—

12 (I) acts in only a financial capac-
13 ity with respect to the sale of a prod-
14 uct; or

15 (II) leases a product under a
16 lease arrangement in which the selec-
17 tion, possession, maintenance, and op-
18 eration of the product are controlled
19 by a person other than the lessor.

20 (19) PUNITIVE DAMAGES.—The term “punitive
21 damages” means damages awarded against any per-
22 son not to compensate for actual injury suffered, but
23 to punish or deter such person or others from en-
24 gaging in similar behavior in the future.

1 (20) STATE.—The term “State” means each of
2 the several States, the District of Columbia, Puerto
3 Rico, the Virgin Islands, Guam, American Samoa,
4 the Northern Mariana Islands, and any other terri-
5 tory or possession of the United States.

6 **SEC. 8. EFFECTIVE DATE.**

7 This Act will apply to any health care liability action
8 brought in a Federal or State court and to any health
9 care liability claim subject to an ADR system, that is initi-
10 ated on or after the date of enactment of this Act, except
11 that any health care liability claim or action arising from
12 an injury occurring prior to the date of enactment of this
13 Act shall be governed by the applicable statute of limita-
14 tions provisions in effect at the time the injury occurred.

○