

110TH CONGRESS
1ST SESSION

S. 243

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 SENATE OF THE UNITED STATES

JANUARY 10, 2007

Mr. ENSIGN (for himself, Mr. McCONNELL, Mr. GREGG, Mr. CORNYN, Mr. SESSIONS, Mr. DEMINT, Mr. INHOFE, Mr. COBURN, Mr. VITTER, Mrs. DOLE, Mr. VOINOVICH, Mr. THUNE, Mr. ALLARD, Mr. ALEXANDER, and Mr. BURR) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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.**

4 This Act may be cited as the “Medical Care Access
5 Protection Act of 2007” or the “MCAP Act”.

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) FINDINGS.—

21 (3) EFFECT ON FEDERAL SPENDING.—Con-
22 gress finds that the health care liability litigation
23 systems existing throughout the United States have
24 a significant effect on the amount, distribution, and
25 use of Federal funds because of—

(A) the large number of individuals who receive health care benefits under programs operated or financed by the Federal Government;

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

(C) the large number of health care providers who provide items or services for which 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—

9 SEC. 3. DEFINITIONS.

10 In this Act:

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

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

20 (D) any other publicly or privately funded
21 program.

22 (4) COMPENSATORY DAMAGES.—The term
23 “compensatory damages” means objectively
24 verifiable monetary losses incurred as a result of the
25 provision of, use of, or payment for (or failure to

1 provide, use, or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities, damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature. Such term includes economic damages and noneconomic damages, as such terms are defined in this section.

15 (5) CONTINGENT FEE.—The term “contingent fee” includes all compensation to any person or persons which is payable only if a recovery is effected on behalf of one or more claimants.

19 (6) ECONOMIC DAMAGES.—The term “economic damages” means objectively verifiable monetary losses incurred as a result of the provision of, use of, or payment for (or failure to provide, use, or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services,

1 loss of employment, and loss of business or employ-
2 ment opportunities.

3 (7) HEALTH CARE GOODS OR SERVICES.—The
4 term “health care goods or services” means any
5 goods or services provided by a health care institu-
6 tion, provider, or by any individual working under
7 the supervision of a health care provider, that relates
8 to the diagnosis, prevention, care, or treatment of
9 any human disease or impairment, or the assessment
10 of the health of human beings.

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

19 (9) HEALTH CARE LAWSUIT.—The term
20 “health care lawsuit” means any health care liability
21 claim concerning the provision of health care goods
22 or services affecting interstate commerce, or any
23 health care liability action concerning the provision
24 of (or the failure to provide) health care goods or
25 services affecting interstate commerce, brought in a

1 State or Federal court or pursuant to an alternative
2 dispute resolution system, against a health care pro-
3 vider or a health care institution regardless of the
4 theory of liability on which the claim is based, or the
5 number of claimants, plaintiffs, defendants, or other
6 parties, or the number of claims or causes of action,
7 in which the claimant alleges a health care liability
8 claim.

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

6 (12) HEALTH CARE PROVIDER.—

7 (A) IN GENERAL.—The term “health care
8 provider” means any person (including but not
9 limited to a physician (as defined by section
10 1861(r) of the Social Security Act (42 U.S.C.
11 1395x(r))), registered nurse, dentist, podiatrist,
12 pharmacist, chiropractor, or optometrist) re-
13 quired by State or Federal law to be licensed,
14 registered, or certified to provide health care
15 services, and being either so licensed, reg-
16 istered, or certified, or exempted from such re-
17 quirement by other statute or regulation.

18 (B) TREATMENT OF CERTAIN PROFES-
19 SIONAL ASSOCIATIONS.—For purposes of this
20 Act, a professional association that is organized
21 under State law by an individual physician or
22 group of physicians, a partnership or limited li-
23 ability partnership formed by a group of physi-
24 cians, a nonprofit health corporation certified
25 under State law, or a company formed by a

1 group of physicians under State law shall be
2 treated as a health care provider under sub-
3 paragraph (A).

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

9 (14) NONECONOMIC DAMAGES.—The term
10 “noneconomic damages” means damages for phys-
11 ical and emotional pain, suffering, inconvenience,
12 physical impairment, mental anguish, disfigurement,
13 loss of enjoyment of life, loss of society and compan-
14 ionship, loss of consortium (other than loss of do-
15 mestic service), hedonic damages, injury to reputa-
16 tion, and all other nonpecuniary losses of any kind
17 or nature.

18 (15) PUNITIVE DAMAGES.—The term “punitive
19 damages” means damages awarded, for the purpose
20 of punishment or deterrence, and not solely for com-
21 pensatory purposes, against a health care provider
22 or health care institution. Punitive damages are nei-
23 ther economic nor noneconomic damages.

24 (16) RECOVERY.—The term “recovery” means
25 the net sum recovered after deducting any disburse-

1 ments or costs incurred in connection with prosecu-
2 tion or settlement of the claim, including all costs
3 paid or advanced by any person. Costs of health care
4 incurred by the plaintiff and the attorneys' office
5 overhead costs or charges for legal services are not
6 deductible disbursements or costs for such purpose.

7 (17) STATE.—The term “State” means each of
8 the several States, the District of Columbia, the
9 Commonwealth of Puerto Rico, the Virgin Islands,
10 Guam, American Samoa, the Northern Mariana Is-
11 lands, the Trust Territory of the Pacific Islands, and
12 any other territory or possession of the United
13 States, or any political subdivision thereof.

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

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

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

25 (1) fraud;

5 (c) MINORS.—An action by a minor shall be com-
6 menced within 3 years from the date of the alleged mani-
7 festation of injury except that if such minor is under the
8 full age of 6 years, such action shall be commenced within
9 3 years of the manifestation of injury, or prior to the
10 eighth birthday of the minor, whichever provides a longer
11 period. Such time limitation shall be tolled for minors for
12 any period during which a parent or guardian and a health
13 care provider or health care institution have committed
14 fraud or collusion in the failure to bring an action on be-
15 half of the injured minor.

16 (d) RULE 11 SANCTIONS.—Whenever a Federal or
17 State court determines (whether by motion of the parties
18 or whether on the motion of the court) that there has been
19 a violation of Rule 11 of the Federal Rules of Civil Pro-
20 dure (or a similar violation of applicable State court rules)
21 in a health care liability action to which this Act applies,
22 the court shall impose upon the attorneys, law firms, or
23 pro se litigants that have violated Rule 11 or are respon-
24 sible for the violation, an appropriate sanction, which shall
25 include an order to pay the other party or parties for the

1 reasonable expenses incurred as a direct result of the filing
2 of the pleading, motion, or other paper that is the subject
3 of the violation, including a reasonable attorneys' fee.
4 Such sanction shall be sufficient to deter repetition of such
5 conduct or comparable conduct by others similarly situ-
6 ated, and to compensate the party or parties injured by
7 such conduct.

8 **SEC. 5. 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 the re-
12 covery by a claimant of the full amount of the available
13 economic damages, notwithstanding the limitation con-
14 tained in subsection (b).

15 (b) ADDITIONAL NONECONOMIC DAMAGES.—

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

1 (2) HEALTH CARE INSTITUTIONS.—

2 (A) SINGLE INSTITUTION.—In any health
3 care lawsuit where final judgment is rendered
4 against a single health care institution, the
5 amount of noneconomic damages recovered
6 from the institution, if otherwise available
7 under applicable Federal or State law, may be
8 as much as \$250,000, regardless of the number
9 of parties against whom the action is brought
10 or the number of separate claims or actions
11 brought with respect to the same occurrence.

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

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

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

5 (2) the jury shall not be informed about the
6 maximum award for noneconomic damages under
7 subsection (b);

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

15 (4) if separate awards are rendered for past
16 and future noneconomic damages and the combined
17 awards exceed the limitations described in subsection
18 (b), the future noneconomic damages shall be re-
19 duced first.

20 (d) FAIR SHARE RULE.—In any health care lawsuit,
21 each party shall be liable for that party's several share
22 of any damages only and not for the share of any other
23 person. Each party shall be liable only for the amount of
24 damages allocated to such party in direct proportion to
25 such party's percentage of responsibility. A separate judg-

1 ment shall be rendered against each such party for the
2 amount allocated to such party. For purposes of this sec-
3 tion, the trier of fact shall determine the proportion of
4 responsibility of each party for the claimant's harm.

5 **SEC. 6. MAXIMIZING PATIENT RECOVERY.**

6 (a) **COURT SUPERVISION OF SHARE OF DAMAGES**
7 **ACTUALLY PAID TO CLAIMANTS.—**

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

14 (2) **CONTINGENCY FEES.—**

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

23 (B) **LIMITATION.**—The total of all contin-
24 gent fees for representing all claimants in a

1 health care lawsuit shall not exceed the fol-
2 lowing limits:

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

5 (ii) 33⅓ percent of the next \$50,000
6 recovered by the claimant(s).

12 (b) APPLICABILITY.—

13 (1) IN GENERAL.—The limitations in subsection

14 (a) shall apply whether the recovery is by judgment,
15 settlement, mediation, arbitration, or any other form
16 of alternative dispute resolution.

21 (c) EXPERT WITNESSES.—

22 (1) REQUIREMENT.—No individual shall be
23 qualified to testify as an expert witness concerning
24 issues of negligence in any health care lawsuit
25 against a defendant unless such individual—

1 cerning such treatment unless such individual is a
2 physician.

3 (3) SPECIALTIES AND SUBSPECIALTIES.—With
4 respect to a lawsuit described in paragraph (1), a
5 court shall not permit an expert in one medical spe-
6 cialty or subspecialty to testify against a defendant
7 in another medical specialty or subspecialty unless,
8 in addition to a showing of substantial familiarity in
9 accordance with paragraph (1)(B), there is a show-
10 ing that the standards of care and practice in the
11 two specialty or subspecialty fields are similar.

12 (4) LIMITATION.—The limitations in this sub-
13 section shall not apply to expert witnesses testifying
14 as to the degree or permanency of medical or phys-
15 ical impairment.

16 **SEC. 7. ADDITIONAL HEALTH BENEFITS.**

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

24 (b) PRESERVATION OF CURRENT LAW.—Where a
25 payor of collateral source benefits has a right of recovery

1 by reimbursement or subrogation and such right is per-
2 mitted under Federal or State law, subsection (a) shall
3 not apply.

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

7 **SEC. 8. PUNITIVE DAMAGES.**

8 (a) PUNITIVE DAMAGES PERMITTED.—

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

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

1 substantial probability that the claimant will prevail
2 on the claim for punitive damages.

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

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

8 (B) the amount of punitive damages fol-
9 lowing a determination of punitive liability.

10 If a separate proceeding is requested, evidence rel-
11 evant only to the claim for punitive damages, as de-
12 termined by applicable State law, shall be inadmis-
13 sible in any proceeding to determine whether com-
14 pensatory damages are to be awarded.

15 (4) LIMITATION WHERE NO COMPENSATORY
16 DAMAGES ARE AWARDED.—In any health care law-
17 suit where no judgment for compensatory damages
18 is rendered against a person, no punitive damages
19 may be awarded with respect to the claim in such
20 lawsuit against such person.

21 (b) DETERMINING AMOUNT OF PUNITIVE DAM-
22 AGES.—

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

3 (B) the duration of the conduct or any
4 concealment of it by such party;

5 (C) the profitability of the conduct to such
6 party;

12 (E) any criminal penalties imposed on such
13 party, as a result of the conduct complained of
14 by the claimant; and

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

25 (c) LIABILITY OF HEALTH CARE PROVIDERS —

(2) MEDICAL PRODUCT.—The term “medical product” means a drug or device intended for humans. The terms “drug” and “device” have the meanings given such terms in sections 201(g)(1) and 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321), respectively, including any component or raw material used therein, but excluding health care services.

20 SEC. 9. AUTHORIZATION OF PAYMENT OF FUTURE DAM-
21 AGES TO CLAIMANTS IN HEALTH CARE LAW-
22 SUITS.

23 (a) IN GENERAL.—In any health care lawsuit, if an
24 award of future damages, without reduction to present
25 value, equaling or exceeding \$50,000 is made against a

1 party with sufficient insurance or other assets to fund a
2 periodic payment of such a judgment, the court shall, at
3 the request of any party, enter a judgment ordering that
4 the future damages be paid by periodic payments in ac-
5 cordance with the Uniform Periodic Payment of Judg-
6 ments Act promulgated by the National Conference of
7 Commissioners on Uniform State Laws.

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

11 SEC. 10. EFFECT ON OTHER LAWS.

12 (a) GENERAL VACCINE INJURY.—

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

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

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

22 (2) EXCEPTION.—If there is an aspect of a civil
23 action brought for a vaccine-related injury or death
24 to which a Federal rule of law under title XXI of
25 the Public Health Service Act does not apply, then

1 this Act or otherwise applicable law (as determined
2 under this Act) will apply to such aspect of such ac-
3 tion.

4 (b) SMALLPOX VACCINE INJURY.—

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

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

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

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

22 (c) OTHER FEDERAL LAW.—Except as provided in
23 this section, nothing in this Act shall be deemed to affect
24 any defense available, or any limitation on liability that

1 applies to, a defendant in a health care lawsuit or action
2 under any other provision of Federal law.

3 **SEC. 11. STATE FLEXIBILITY AND PROTECTION OF STATES'**

4 **RIGHTS.**

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

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

18 (2) prohibits the introduction of evidence re-
19 garding collateral source benefits.

20 (b) **PREEMPTION OF CERTAIN STATE LAWS.**—No
21 provision of this Act shall be construed to preempt any
22 State law (whether effective before, on, or after the date
23 of the enactment of this Act) that specifies a particular
24 monetary amount of compensatory or punitive damages
25 (or the total amount of damages) that may be awarded

1 in a health care lawsuit, regardless of whether such mone-
2 tary amount is greater or lesser than is provided for under
3 this Act, notwithstanding section 5(a).

4 (c) PROTECTION OF STATE'S RIGHTS AND OTHER
5 LAWS.—

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

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

13 (A) preempt or supersede any Federal or
14 State law that imposes greater procedural or
15 substantive protections (such as a shorter stat-
16 ute of limitations) for a health care provider or
17 health care institution from liability, loss, or
18 damages than those provided by this Act;

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

1 (C) create a cause of action that is not
2 otherwise available under Federal or State law;
3 or

4 (D) affect the scope of preemption of any
5 other Federal law.

6 SEC. 12. APPLICABILITY; EFFECTIVE DATE.

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

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