

110TH CONGRESS  
1ST SESSION

# S. 244

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

---

## IN THE SENATE OF THE UNITED STATES

JANUARY 10, 2007

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

---

## A BILL

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

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

### 3   **SECTION 1. SHORT TITLE.**

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

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

7       (a) FINDINGS.—

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

3           (A) the current civil justice system is erod-  
4 ing women’s access to obstetrical and gynecolo-  
5 gical services;

6           (B) the American College of Obstetricians  
7 and Gynecologists (ACOG) has identified nearly  
8 half of the States as having a medical liability  
9 insurance crisis that is threatening access to  
10 high-quality obstetrical and gynecological serv-  
11 ices;

12           (C) because of the high cost of medical li-  
13 ability insurance and the risk of being sued, one  
14 in seven obstetricians and gynecologists have  
15 stopped practicing obstetrics and one in five has  
16 decreased their number of high-risk obstetrics  
17 patients; and

18           (D) because of the lack of availability of  
19 obstetrical services, women—

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

22           (ii) have longer waiting periods (in  
23 some cases months) for appointments;

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

1 (iv) have less access to maternal-fetal  
 2 medicine specialists, physicians with the  
 3 most experience and training in the care of  
 4 women with high-risk pregnancies; and

5 (v) have fewer hospitals with mater-  
 6 nity wards where they can deliver their  
 7 child, potentially endangering the lives and  
 8 health of the woman and her unborn child.

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

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

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

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

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

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

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

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

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

23 (4) improve the fairness and cost-effectiveness  
24 of our current health care liability system to resolve  
25 disputes over, and provide compensation for, health

1 care liability by reducing uncertainty in the amount  
2 of compensation provided to injured individuals; and  
3 (5) provide an increased sharing of information  
4 in the health care system which will reduce unin-  
5 tended injury and improve patient care.

6 **SEC. 3. DEFINITIONS.**

7 In this Act:

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

14 (2) CLAIMANT.—The term “claimant” means  
15 any person who brings a health care lawsuit, includ-  
16 ing a person who asserts or claims a right to legal  
17 or equitable contribution, indemnity or subrogation,  
18 arising out of a health care liability claim or action,  
19 and any person on whose behalf such a claim is as-  
20 serted or such an action is brought, whether de-  
21 ceased, incompetent, or a minor.

22 (3) COLLATERAL SOURCE BENEFITS.—The  
23 term “collateral source benefits” means any amount  
24 paid or reasonably likely to be paid in the future to  
25 or on behalf of the claimant, or any service, product

1 or other benefit provided or reasonably likely to be  
 2 provided in the future to or on behalf of the claim-  
 3 ant, as a result of the injury or wrongful death, pur-  
 4 suant to—

5 (A) any State or Federal health, sickness,  
 6 income-disability, accident, or workers' com-  
 7 pensation law;

8 (B) any health, sickness, income-disability,  
 9 or accident insurance that provides health bene-  
 10 fits or income-disability coverage;

11 (C) any contract or agreement of any  
 12 group, organization, partnership, or corporation  
 13 to provide, pay for, or reimburse the cost of  
 14 medical, hospital, dental, or income disability  
 15 benefits; and

16 (D) any other publicly or privately funded  
 17 program.

18 (4) COMPENSATORY DAMAGES.—The term  
 19 “compensatory damages” means objectively  
 20 verifiable monetary losses incurred as a result of the  
 21 provision of, use of, or payment for (or failure to  
 22 provide, use, or pay for) health care services or med-  
 23 ical products, such as past and future medical ex-  
 24 penses, loss of past and future earnings, cost of ob-  
 25 taining domestic services, loss of employment, and

1       loss of business or employment opportunities, dam-  
 2       ages for physical and emotional pain, suffering, in-  
 3       convenience, physical impairment, mental anguish,  
 4       disfigurement, loss of enjoyment of life, loss of soci-  
 5       ety and companionship, loss of consortium (other  
 6       than loss of domestic service), hedonic damages, in-  
 7       jury to reputation, and all other nonpecuniary losses  
 8       of any kind or nature. Such term includes economic  
 9       damages and noneconomic damages, as such terms  
 10      are defined in this section.

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

15           (6) ECONOMIC DAMAGES.—The term “economic  
 16      damages” means objectively verifiable monetary  
 17      losses incurred as a result of the provision of, use  
 18      of, or payment for (or failure to provide, use, or pay  
 19      for) health care services or medical products, such as  
 20      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.

24           (7) HEALTH CARE GOODS OR SERVICES.—The  
 25      term “health care goods or services” means any ob-

1       stetrical or gynecological goods or services provided  
2       by a health care institution, provider, or by any indi-  
3       vidual working under the supervision of a health  
4       care provider, that relates to the diagnosis, preven-  
5       tion, care, or treatment of any obstetrical or gyneco-  
6       logical-related human disease or impairment, or the  
7       assessment of the health of human beings.

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

16             (9) HEALTH CARE LAWSUIT.—The term  
17      “health care lawsuit” means any health care liability  
18      claim concerning the provision of obstetrical or gynecological  
19      goods or services affecting interstate com-  
20      merce, or any health care liability action concerning  
21      the provision of (or the failure to provide) obstetrical  
22      or gynecological goods or services affecting interstate  
23      commerce, brought in a State or Federal court or  
24      pursuant to an alternative dispute resolution system,  
25      against a physician or other health care provider



1 who delivers obstetrical or gynecological services or  
 2 a health care institution (only with respect to obstet-  
 3 rical or gynecological services) regardless of the the-  
 4 ory 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.

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

21 (11) HEALTH CARE LIABILITY CLAIM.—The  
 22 term “health care liability claim” means a demand  
 23 by any person, whether or not pursuant to ADR,  
 24 against a health care provider who delivers obstet-  
 25 rical or gynecological services or a health care insti-

1       tution (only with respect to obstetrical or gynecological services), including third-party claims, cross-claims, counter-claims, or contribution claims, which  
2       are based upon the provision of, use of, or payment  
3       for (or the failure to provide, use, or pay for) obstetrical or gynecological services, regardless of the 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.

10       (12) HEALTH CARE PROVIDER.—

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

22               (B) TREATMENT OF CERTAIN PROFESSIONAL ASSOCIATIONS.—For purposes of this  
23       Act, a professional association that is organized  
24       under State law by an individual physician or  
25

1 group of physicians, a partnership or limited li-  
2 ability partnership formed by a group of physi-  
3 cians, a nonprofit health corporation certified  
4 under State law, or a company formed by a  
5 group of physicians under State law shall be  
6 treated as a health care provider under sub-  
7 paragraph (A).

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

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

22 (15) OBSTETRICAL OR GYNECOLOGICAL SERV-  
23 ICES.—The term “obstetrical or gynecological serv-  
24 ices” means services for pre-natal care or labor and  
25 delivery, including the immediate postpartum period

1 (as determined in accordance with the definition of  
2 postpartum used for purposes of title XIX of the So-  
3 cial Security Act (42 U.S.C. 1396 et seq.)).

4 (16) PUNITIVE DAMAGES.—The term “punitive  
5 damages” means damages awarded, for the purpose  
6 of punishment or deterrence, and not solely for com-  
7 pensatory purposes, against a health care provider  
8 who delivers obstetrical or gynecological services or  
9 a health care institution. Punitive damages are nei-  
10 ther economic nor noneconomic 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. 4. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

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

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

12 (1) fraud;

13 (2) intentional concealment; or

14 (3) the presence of a foreign body, which has no  
15 therapeutic or diagnostic purpose or effect, in the  
16 person of the injured person.

17 (c) MINORS.—An action by a minor shall be com-  
18 menced within 3 years from the date of the alleged mani-  
19 festation of injury except that if such minor is under the  
20 full age of 6 years, such action shall be commenced within  
21 3 years of the manifestation of injury, or prior to the  
22 eighth birthday of the minor, whichever provides a longer  
23 period. Such time limitation shall be tolled for minors for  
24 any period during which a parent or guardian and a health  
25 care provider or health care institution have committed

1 fraud or collusion in the failure to bring an action on be-  
 2 half of the injured minor.

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

20 **SEC. 5. COMPENSATING PATIENT INJURY.**

21 (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL  
 22 ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any  
 23 health care lawsuit, nothing in this Act shall limit the re-  
 24 covery by a claimant of the full amount of the available

1 economic damages, notwithstanding the limitation con-  
2 tained in subsection (b).

3 (b) ADDITIONAL NONECONOMIC DAMAGES.—

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

14 (2) HEALTH CARE INSTITUTIONS.—

15 (A) SINGLE INSTITUTION.—In any health  
16 care lawsuit where final judgment is rendered  
17 against a single health care institution, the  
18 amount of noneconomic damages recovered  
19 from the institution, if otherwise available  
20 under applicable Federal or State law, may be  
21 as much as \$250,000, regardless of the number  
22 of parties against whom the action is brought  
23 or the number of separate claims or actions  
24 brought with respect to the same occurrence.

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

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

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

18           (2) the jury shall not be informed about the  
19 maximum award for noneconomic damages under  
20 subsection (b);

21           (3) an award for noneconomic damages in ex-  
22 cess of the limitations provided for in subsection (b)  
23 shall be reduced either before the entry of judgment,  
24 or by amendment of the judgment after entry of  
25 judgment, and such reduction shall be made before



1 accounting for any other reduction in damages re-  
 2 quired by law; and

3 (4) if separate awards are rendered for past  
 4 and future noneconomic damages and the combined  
 5 awards exceed the limitations provided for in sub-  
 6 section (b), the future noneconomic damages shall be  
 7 reduced first.

8 (d) FAIR SHARE RULE.—In any health care lawsuit,  
 9 each party shall be liable for that party's several share  
 10 of any damages only and not for the share of any other  
 11 person. Each party shall be liable only for the amount of  
 12 damages allocated to such party in direct proportion to  
 13 such party's percentage of responsibility. A separate judg-  
 14 ment shall be rendered against each such party for the  
 15 amount allocated to such party. For purposes of this sec-  
 16 tion, the trier of fact shall determine the proportion of  
 17 responsibility of each party for the claimant's harm.

18 **SEC. 6. MAXIMIZING PATIENT RECOVERY.**

19 (a) COURT SUPERVISION OF SHARE OF DAMAGES  
 20 ACTUALLY PAID TO CLAIMANTS.—

21 (1) IN GENERAL.—In any health care lawsuit,  
 22 the court shall supervise the arrangements for pay-  
 23 ment of damages to protect against conflicts of in-  
 24 terest that may have the effect of reducing the

1 amount of damages awarded that are actually paid  
2 to claimants.

3 (2) CONTINGENCY FEES.—

4 (A) IN GENERAL.—In any health care law-  
5 suit in which the attorney for a party claims a  
6 financial stake in the outcome by virtue of a  
7 contingent fee, the court shall have the power  
8 to restrict the payment of a claimant's damage  
9 recovery to such attorney, and to redirect such  
10 damages to the claimant based upon the inter-  
11 ests of justice and principles of equity.

12 (B) LIMITATION.—The total of all contin-  
13 gent fees for representing all claimants in a  
14 health care lawsuit shall not exceed the fol-  
15 lowing limits:

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

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

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

22 (iv) 15 percent of any amount by  
23 which the recovery by the claimant(s) is in  
24 excess of \$600,000.

25 (b) APPLICABILITY.—

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

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

9           (c) EXPERT WITNESSES.—

10           (1) REQUIREMENT.—No individual shall be  
 11           qualified to testify as an expert witness concerning  
 12           issues of negligence in any health care lawsuit  
 13           against a defendant unless such individual—

14                   (A) except as required under paragraph  
 15           (2), is a health care professional who—

16                           (i) is appropriately credentialed or li-  
 17                           censed in 1 or more States to deliver  
 18                           health care services; and

19                           (ii) typically treats the diagnosis or  
 20                           condition or provides the type of treatment  
 21                           under review; and

22                   (B) can demonstrate by competent evi-  
 23           dence that, as a result of training, education,  
 24           knowledge, and experience in the evaluation, di-  
 25           agnosis, and treatment of the disease or injury

1           which is the subject matter of the lawsuit  
2           against the defendant, the individual was sub-  
3           stantially familiar with applicable standards of  
4           care and practice as they relate to the act or  
5           omission which is the subject of the lawsuit on  
6           the date of the incident.

7           (2) PHYSICIAN REVIEW.—In a health care law-  
8           suit, if the claim of the plaintiff involved treatment  
9           that is recommended or provided by a physician  
10          (allopathic or osteopathic), an individual shall not be  
11          qualified to be an expert witness under this sub-  
12          section with respect to issues of negligence con-  
13          cerning such treatment unless such individual is a  
14          physician.

15          (3) SPECIALTIES AND SUBSPECIALTIES.—With  
16          respect to a lawsuit described in paragraph (1), a  
17          court shall not permit an expert in one medical spe-  
18          cialty or subspecialty to testify against a defendant  
19          in another medical specialty or subspecialty unless,  
20          in addition to a showing of substantial familiarity in  
21          accordance with paragraph (1)(B), there is a show-  
22          ing that the standards of care and practice in the  
23          two specialty or subspecialty fields are similar.

24          (4) LIMITATION.—The limitations in this sub-  
25          section shall not apply to expert witnesses testifying

1 as to the degree or permanency of medical or phys-  
2 ical impairment.

3 **SEC. 7. ADDITIONAL HEALTH BENEFITS.**

4 (a) IN GENERAL.—The amount of any damages re-  
5 ceived by a claimant in any health care lawsuit shall be  
6 reduced by the court by the amount of any collateral  
7 source benefits to which the claimant is entitled, less any  
8 insurance premiums or other payments made by the claim-  
9 ant (or by the spouse, parent, child, or legal guardian of  
10 the claimant) to obtain or secure such benefits.

11 (b) PRESERVATION OF CURRENT LAW.—Where a  
12 payor of collateral source benefits has a right of recovery  
13 by reimbursement or subrogation and such right is per-  
14 mitted under Federal or State law, subsection (a) shall  
15 not apply.

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

19 **SEC. 8. PUNITIVE DAMAGES.**

20 (a) PUNITIVE DAMAGES PERMITTED.—

21 (1) IN GENERAL.—Punitive damages may, if  
22 otherwise available under applicable State or Federal  
23 law, be awarded against any person in a health care  
24 lawsuit only if it is proven by clear and convincing  
25 evidence that such person acted with malicious in-

1       tent to injure the claimant, or that such person de-  
 2       liberately failed to avoid unnecessary injury that  
 3       such person knew the claimant was substantially  
 4       certain to suffer.

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

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

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

20           (B) the amount of punitive damages fol-  
 21           lowing a determination of punitive liability.

22      If a separate proceeding is requested, evidence rel-  
 23      evant only to the claim for punitive damages, as de-  
 24      termined by applicable State law, shall be inadmis-

1       sible in any proceeding to determine whether com-  
 2       pensatory damages are to be awarded.

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

9       (b) DETERMINING AMOUNT OF PUNITIVE DAM-  
 10      AGES.—

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

14           (A) the severity of the harm caused by the  
 15       conduct of such party;

16           (B) the duration of the conduct or any  
 17       concealment of it by such party;

18           (C) the profitability of the conduct to such  
 19       party;

20           (D) the number of products sold or med-  
 21       ical procedures rendered for compensation, as  
 22       the case may be, by such party, of the kind  
 23       causing the harm complained of by the claim-  
 24       ant;

1 (E) any criminal penalties imposed on such  
 2 party, as a result of the conduct complained of  
 3 by the claimant; and

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

7 (2) MAXIMUM AWARD.—The amount of punitive  
 8 damages awarded in a health care lawsuit may not  
 9 exceed an amount equal to two times the amount of  
 10 economic damages awarded in the lawsuit or  
 11 \$250,000, whichever is greater. The jury shall not  
 12 be informed of the limitation under the preceding  
 13 sentence.

14 (c) LIABILITY OF HEALTH CARE PROVIDERS.—

15 (1) IN GENERAL.—A health care provider who  
 16 prescribes, or who dispenses pursuant to a prescrip-  
 17 tion, a drug, biological product, or medical device  
 18 approved by the Food and Drug Administration, for  
 19 an approved indication of the drug, biological prod-  
 20 uct, or medical device, shall not be named as a party  
 21 to a product liability lawsuit invoking such drug, bi-  
 22 ological product, or medical device and shall not be  
 23 liable to a claimant in a class action lawsuit against  
 24 the manufacturer, distributor, or product seller of  
 25 such drug, biological product, or medical device.



1           (2) MEDICAL PRODUCT.—The term “medical  
 2       product” means a drug or device intended for hu-  
 3       mans. The terms “drug” and “device” have the  
 4       meanings given such terms in sections 201(g)(1) and  
 5       201(h) of the Federal Food, Drug and Cosmetic Act  
 6       (21 U.S.C. 321), respectively, including any compo-  
 7       nent or raw material used therein, but excluding  
 8       health care services.

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

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

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

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

2 (a) GENERAL VACCINE INJURY.—

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

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

19 (b) SMALLPOX VACCINE INJURY.—

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

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

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

4 (2) EXCEPTION.—If there is an aspect of a civil  
 5 action brought for a smallpox vaccine-related injury  
 6 or death to which a Federal rule of law under part  
 7 C of title II of the Public Health Service Act does  
 8 not apply, then this Act or otherwise applicable law  
 9 (as determined under this Act) will apply to such as-  
 10 pect of such action.

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

16 **SEC. 11. STATE FLEXIBILITY AND PROTECTION OF STATES'**  
 17 **RIGHTS.**

18 (a) HEALTH CARE LAWSUITS.—The provisions gov-  
 19 erning health care lawsuits set forth in this Act shall pre-  
 20 empt, subject to subsections (b) and (c), State law to the  
 21 extent that State law prevents the application of any pro-  
 22 visions of law established by or under this Act. The provi-  
 23 sions governing health care lawsuits set forth in this Act  
 24 supersede chapter 171 of title 28, United States Code, to  
 25 the extent that such chapter—

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

6           (2) prohibits the introduction of evidence re-  
 7           garding collateral source benefits.

8           (b) PREEMPTION OF CERTAIN STATE LAWS.—No  
 9           provision of this Act shall be construed to preempt any  
 10          State law (whether effective before, on, or after the date  
 11          of the enactment of this Act) that specifies a particular  
 12          monetary amount of compensatory or punitive damages  
 13          (or the total amount of damages) that may be awarded  
 14          in a health care lawsuit, regardless of whether such mone-  
 15          tary amount is greater or lesser than is provided for under  
 16          this Act, notwithstanding section 5(a).

17          (c) PROTECTION OF STATE’S RIGHTS AND OTHER  
 18          LAWS.—

19               (1) IN GENERAL.—Any issue that is not gov-  
 20               erned by a provision of law established by or under  
 21               this Act (including the State standards of neg-  
 22               ligence) shall be governed by otherwise applicable  
 23               Federal or State law.

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

1 (A) preempt or supersede any Federal or  
2 State law that imposes greater procedural or  
3 substantive protections for a health care pro-  
4 vider or health care institution from liability,  
5 loss, or damages than those provided by this  
6 Act;

7 (B) preempt or supercede any State law  
8 that permits and provides for the enforcement  
9 of any arbitration agreement related to a health  
10 care liability claim whether enacted prior to or  
11 after the date of enactment of this Act;

12 (C) create a cause of action that is not  
13 otherwise available under Federal or State law;  
14 or

15 (D) affect the scope of preemption of any  
16 other Federal law.

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

18 This Act shall apply to any health care lawsuit  
19 brought in a Federal or State court, or subject to an alter-  
20 native dispute resolution system, that is initiated on or  
21 after the date of the enactment of this Act, except that  
22 any health care lawsuit arising from an injury occurring  
23 prior to the date of enactment of this Act shall be gov-

- 1 earned by the applicable statute of limitations provisions
- 2 in effect at the time the injury occurred.

○