

111TH CONGRESS  
1ST SESSION

# S. 1734

To reduce the cost of health care and ensure patient access to doctors by ending excessive malpractice verdicts through common-sense lawsuit reform.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 30, 2009

Mr. KYL (for himself and Mr. CORNYN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To reduce the cost of health care and ensure patient access to doctors by ending excessive malpractice verdicts through common-sense lawsuit reform.

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 Liability Re-  
5 form Act of 2009”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

1           (1) Medical liability laws create a significant  
2           portion of the overall costs of health care, and con-  
3           tribute to Americans' lack of access to health care.

4           (2) A 2006 study by PriceWaterhouse Coopers  
5           found that medical liability laws and the practice of  
6           defensive medicine contribute to 10 percent of all  
7           health care costs.

8           (3) The non-partisan Congressional Budget Of-  
9           fice estimated that the Federal Government could di-  
10          rectly save about \$5,600,000,000 by enacting certain  
11          medical liability reforms, and that total health care  
12          spending could be reduced even further if these re-  
13          forms reduced the practice of defensive medicine.

14          (4) According to economists Daniel P. Kessler  
15          and Mark B. McClellan, defensive medicine alone  
16          costs Americans more than \$100,000,000,000 every  
17          year.

18          (5) Medicaid and Medicare costs must be low-  
19          ered to keep these crucial programs solvent.

20          (6) In part because of the costs of medical li-  
21          ability, 40 percent of physicians refuse to see new  
22          Medicaid patients.

23          (7) Reform of the medical liability laws has  
24          been proven to increase access to doctors and spe-  
25          cialists while lowering health care costs.

1           (8) In 2003, Texas adopted medical liability re-  
2 forms that placed a cap on non-economic damages in  
3 medical liability cases and combated junk science by  
4 raising the standards of qualification for expert wit-  
5 nesses.

6           (9) After Texas passed this reform, premiums  
7 for medical malpractice liability insurance fell by 27  
8 percent on average, and in some cases, by more than  
9 50 percent.

10          (10) Because the Texas reforms led to more af-  
11 fordable health insurance premiums, more than  
12 400,000 additional Texans are covered by health in-  
13 surance than if reform had not passed.

14          (11) Because of the Texas reforms, Texas saw  
15 an overall growth rate of 31 percent in the number  
16 of new physicians.

17          (12) The growth rate in the number of physi-  
18 cians in Texas was particularly pronounced in long-  
19 underserved geographic areas such as the rural and  
20 border regions, and in key specialties such as obstet-  
21 rics, neurosurgery, and orthopedic surgery.

22          (13) Arizona adopted medical liability reforms  
23 that deterred frivolous litigation by requiring expert  
24 opinion testimony at the threshold of medical liabil-

1       ity suits and by raising the standards of qualifica-  
2       tion for expert witnesses.

3           (14) The health care and insurance industries  
4       are industries affecting interstate commerce and the  
5       health care liability litigation systems existing  
6       throughout the United States are activities that af-  
7       fect interstate commerce by contributing to the high  
8       costs of health care and premiums for health care li-  
9       ability insurance purchased by health care system  
10      providers.

11          (15) The health care liability litigation systems  
12      existing throughout the United States have a signifi-  
13      cant effect on the amount, distribution, and use of  
14      Federal funds because of—

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

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

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

1 **SEC. 3. DEFINITIONS.**

2 In this Act:

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

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

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

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

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

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

1           (6) HEALTH CARE INSTITUTION.—The term  
2           “health care institution” means any entity licensed  
3           under Federal or State law to provide health care  
4           services (including but not limited to ambulatory  
5           surgical centers, assisted living facilities, emergency  
6           medical services providers, hospices, hospitals and  
7           hospital systems, nursing homes, or other entities li-  
8           censed to provide such services).

9           (7) HEALTH CARE LAWSUIT.—The term  
10          “health care lawsuit” means any health care liability  
11          claim concerning the provision of health care goods  
12          or services affecting interstate commerce, or any  
13          health care liability action concerning the provision  
14          of (or the failure to provide) health care goods or  
15          services affecting interstate commerce, brought in a  
16          State or Federal court or pursuant to an alternative  
17          dispute resolution system, against a health care pro-  
18          vider or a health care institution regardless of the  
19          theory of liability on which the claim is based, or the  
20          number of claimants, plaintiffs, defendants, or other  
21          parties, or the number of claims or causes of action,  
22          in which the claimant alleges a health care liability  
23          claim.

24          (8) HEALTH CARE LIABILITY ACTION.—The  
25          term “health care liability action” means a civil ac-

1       tion brought in a State or Federal Court or pursu-  
2       ant to an alternative dispute resolution system,  
3       against a health care provider or a health care insti-  
4       tution regardless of the theory of liability on which  
5       the claim is based, or the number of plaintiffs, de-  
6       fendants, or other parties, or the number of causes  
7       of action, in which the claimant alleges a health care  
8       liability claim.

9           (9) HEALTH CARE LIABILITY CLAIM.—The  
10       term “health care liability claim” means a demand  
11       by any person, whether or not pursuant to ADR,  
12       against a health care provider or health care institu-  
13       tion, including third-party claims, cross-claims,  
14       counter-claims, or contribution claims, which are  
15       based upon the provision of, use of, or payment for  
16       (or the failure to provide, use, or pay for) health  
17       care services, regardless of the theory of liability on  
18       which the claim is based, or the number of plaintiffs,  
19       defendants, or other parties, or the number of  
20       causes of action.

21           (10) HEALTH CARE PROVIDER.—

22           (A) IN GENERAL.—The term “health care  
23       provider” means any person (including but not  
24       limited to a physician (as defined by section  
25       1861(r) of the Social Security Act (42 U.S.C.

1 1395x(r)), registered nurse, dentist, podiatrist,  
2 pharmacist, chiropractor, or optometrist) re-  
3 quired by State or Federal law to be licensed,  
4 registered, or certified to provide health care  
5 services, and being either so licensed, reg-  
6 istered, or certified, or exempted from such re-  
7 quirement by other statute or regulation.

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

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

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

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

10 **SEC. 4. COMPENSATING PATIENT INJURY.**

11       (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL  
12       ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any  
13       health care lawsuit, nothing in this Act shall limit the re-  
14       covery by a claimant of the full amount of the available  
15       economic damages, notwithstanding the limitation con-  
16       tained in subsection (b).

17       (b) ADDITIONAL NONECONOMIC DAMAGES.—

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

1 ber of separate claims or actions brought with re-  
2 spect to the same occurrence.

3 (2) HEALTH CARE INSTITUTIONS.—

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

14 (B) MULTIPLE INSTITUTIONS.—In any  
15 health care lawsuit where final judgment is ren-  
16 dered against more than one health care insti-  
17 tution, the amount of noneconomic damages re-  
18 covered from each institution, if otherwise avail-  
19 able under applicable Federal or State law, may  
20 be as much as \$250,000, regardless of the  
21 number of parties against whom the action is  
22 brought or the number of separate claims or ac-  
23 tions brought with respect to the same occur-  
24 rence, except that the total amount recovered

1 from all such institutions in such lawsuit shall  
2 not exceed \$500,000.

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

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

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

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

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

22 (d) FAIR SHARE RULE.—In any health care lawsuit,  
23 each party shall be liable for that party's several share  
24 of any damages only and not for the share of any other  
25 person. Each party shall be liable only for the amount of

1 damages allocated to such party in direct proportion to  
2 such party's percentage of responsibility. A separate judg-  
3 ment shall be rendered against each such party for the  
4 amount allocated to such party. For purposes of this sec-  
5 tion, the trier of fact shall determine the proportion of  
6 responsibility of each party for the claimant's harm.

7 **SEC. 5. ENSURING RELIABLE EXPERT TESTIMONY.**

8 (a) **EXPERT WITNESS QUALIFICATIONS.—**

9 (1) **IN GENERAL.—**In any health care lawsuit,  
10 an individual shall not give expert testimony on the  
11 appropriate standard of practice or care involved un-  
12 less the individual is licensed as a health profes-  
13 sional in 1 or more States and the individual meets  
14 the following criteria:

15 (A) If the party against whom or on whose  
16 behalf the testimony is to be offered is or  
17 claims to be a specialist, the expert witness  
18 shall specialize at the time of the occurrence  
19 that is the basis for the lawsuit in the same  
20 specialty or claimed specialty as the party  
21 against whom or on whose behalf the testimony  
22 is to be offered. If the party against whom or  
23 on whose behalf the testimony is to be offered  
24 is or claims to be a specialist who is board cer-  
25 tified, the expert witness shall be a specialist

1 who is board certified in that specialty or  
2 claimed specialty.

3 (B) During the 1-year period immediately  
4 preceding the occurrence of the action that gave  
5 rise to the lawsuit, the expert witness shall have  
6 devoted a majority of the individual's profes-  
7 sional time to one or more of the following:

8 (i) The active clinical practice of the  
9 same health profession as the defendant  
10 and, if the defendant is or claims to be a  
11 specialist, in the same specialty or claimed  
12 specialty.

13 (ii) The instruction of students in an  
14 accredited health professional school or ac-  
15 credited residency or clinical research pro-  
16 gram in the same health profession as the  
17 defendant and, if the defendant is or  
18 claims to be a specialist, in an accredited  
19 health professional school or accredited  
20 residency or clinical research program in  
21 the same specialty or claimed specialty.

22 (C) If the defendant is a general practi-  
23 tioner, the expert witness shall have devoted a  
24 majority of the witness's professional time in  
25 the 1-year period preceding the occurrence of

1 the action giving rise to the lawsuit to one or  
2 more of the following:

3 (i) Active clinical practice as a general  
4 practitioner.

5 (ii) Instruction of students in an ac-  
6 credited health professional school or ac-  
7 credited residency or clinical research pro-  
8 gram in the same health profession as the  
9 defendant.

10 (2) HEALTH CARE INSTITUTIONS.—If the de-  
11 fendant in a health care lawsuit is a health care in-  
12 stitution that employs a health professional against  
13 whom or on whose behalf the testimony is offered,  
14 the provisions of paragraph (1) apply as if the  
15 health professional were the party or defendant  
16 against whom or on whose behalf the testimony is  
17 offered.

18 (3) POWER OF COURT.—Nothing in this sub-  
19 section shall limit the power of the trial court in a  
20 health care lawsuit to disqualify an expert witness  
21 on grounds other than the qualifications set forth  
22 under this subsection.

23 (4) LIMITATION.—An expert witness in a health  
24 care lawsuit shall not be permitted to testify if the

1 fee of the witness is in any way contingent on the  
2 outcome of the lawsuit.

3 (b) PRELIMINARY EXPERT OPINION TESTIMONY  
4 AGAINST HEALTH CARE PROFESSIONALS.—

5 (1) CERTIFICATION.—In any health care law-  
6 suit, the claimant (or its attorney) shall certify in a  
7 written statement that is filed and served with the  
8 claim whether or not expert opinion testimony is  
9 necessary to prove the health care professional's  
10 standard of care or liability for the claim.

11 (2) PRELIMINARY EXPERT OPINION.—

12 (A) IN GENERAL.—If the claimant in any  
13 health care lawsuit certifies that expert opinion  
14 testimony is necessary as required under para-  
15 graph (1), the claimant shall serve a prelimi-  
16 nary expert opinion affidavit. The claimant may  
17 provide affidavits from as many experts as the  
18 claimant determines to be necessary.

19 (B) REQUIREMENTS.—A preliminary ex-  
20 pert opinion affidavit under subparagraph (A)  
21 shall contain at least the following information:

22 (i) The expert's qualifications to ex-  
23 press an opinion on the health care profes-  
24 sionals standard of care or liability for the  
25 claim.

1           (ii) The factual basis for each claim  
2           against a health care professional.

3           (iii) The health care professional's  
4           acts, errors or omissions that the expert  
5           considers to be a violation of the applicable  
6           standard of care resulting in liability.

7           (iv) The manner in which the health  
8           care professional's acts, errors, or omis-  
9           sions caused or contributed to the damages  
10          or other relief sought by the claimant.

11          (3) DISPUTES.—If the claimant in any health  
12          care lawsuit or its attorney certifies that expert tes-  
13          timony is not required for the claim and the defend-  
14          ant disputes that certification in good faith, the de-  
15          fendant may apply by motion to the court for an  
16          order requiring the claimant to obtain and serve a  
17          preliminary expert opinion affidavit under this sub-  
18          section, and such motion may be granted by the  
19          court.

20          (4) DISMISSALS.—The court in a health care  
21          lawsuit, on its own motion or the motion of the de-  
22          fendant, shall dismiss the claim against the defend-  
23          ant without prejudice if the claimant fails to file and  
24          serve a preliminary expert opinion affidavit after the  
25          claimant (or its attorney) has certified that an affi-

1       davit is necessary or the court has ordered the  
2       claimant to file and serve an affidavit.

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

4       (a) GENERAL VACCINE INJURY.—

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

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

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

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

21       (b) SMALLPOX VACCINE INJURY.—

22           (1) IN GENERAL.—To the extent that part C of  
23       title II of the Public Health Service Act establishes  
24       a Federal rule of law applicable to a civil action

1 brought for a smallpox vaccine-related injury or  
2 death—

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

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

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

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

20 **SEC. 7. STATE FLEXIBILITY AND PROTECTION OF STATES'**  
21 **RIGHTS.**

22 (a) HEALTH CARE LAWSUITS.—The provisions gov-  
23 erning health care lawsuits set forth in this Act shall pre-  
24 empt, subject to subsections (b) and (c), State law to the  
25 extent that State law prevents the application of any pro-

1 visions of law established by or under this Act. The provi-  
2 sions governing health care lawsuits set forth in this Act  
3 supersede chapter 171 of title 28, United States Code, to  
4 the extent that such chapter provides for a greater amount  
5 of damages than provided in this Act.

6 (b) PREEMPTION OF CERTAIN STATE LAWS.—No  
7 provision of this Act shall be construed to preempt any  
8 State law (whether effective before, on, or after the date  
9 of the enactment of this Act) that specifies a particular  
10 monetary amount of compensatory or punitive damages  
11 (or the total amount of damages) that may be awarded  
12 in a health care lawsuit, regardless of whether such mone-  
13 tary amount is greater or lesser than is provided for under  
14 this Act, notwithstanding section 4(a).

15 (c) PROTECTION OF STATE’S RIGHTS AND OTHER  
16 LAWS.—

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

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

24 (A) preempt or supersede any Federal or  
25 State law that imposes greater procedural or

1 substantive protections for a health care pro-  
2 vider or health care institution from liability,  
3 loss, or damages than those provided by this  
4 Act;

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

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

13 (D) affect the scope of preemption of any  
14 other Federal law.

15 **SEC. 8. APPLICABILITY; EFFECTIVE DATE.**

16 This Act shall apply to any health care lawsuit  
17 brought in a Federal or State court, or subject to an alter-  
18 native dispute resolution system, that is initiated on or  
19 after the date of the enactment of this Act.

○