

111TH CONGRESS  
1ST SESSION

# S. 2662

To establish Federal standards for the resolution of health care malpractice claims, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 2009

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

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## A BILL

To establish Federal standards for the resolution of health care 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 “Fair Resolution of  
5       Medical Liability Disputes Act of 2009”.

6       **SEC. 2. FINDINGS.**

7       Congress finds that—

8               (1) the health care and insurance industries are  
9       industries affecting interstate commerce, and the  
10      health care malpractice litigation systems through-

1 out the United States affect interstate commerce by  
 2 contributing to the high cost of health care and pre-  
 3 miums for malpractice insurance purchased by  
 4 health care providers; and

5 (2) the Federal Government, as a direct pro-  
 6 vider of health care and as a source of payment for  
 7 health care, has a major interest in health care and  
 8 a demonstrated interest in assessing the quality of  
 9 care, access to care, and the costs of care through  
 10 the evaluative activities of several Federal agencies.

11 **SEC. 3. DEFINITIONS.**

12 In this Act:

13 (1) ALTERNATIVE DISPUTE RESOLUTION SYS-  
 14 TEM; ADR.—The term “alternative dispute resolution  
 15 system” or “ADR” means a system established  
 16 under this Act that provides for the resolution of  
 17 covered health care malpractice claims in a manner  
 18 other than through a civil action in Federal or State  
 19 court.

20 (2) COVERED HEALTH CARE MALPRACTICE AC-  
 21 TION.—The term “covered health care malpractice  
 22 action” means a civil action in which a covered  
 23 health care malpractice claim is made against a  
 24 health care provider or health care professional.

1           (3) COVERED HEALTH CARE MALPRACTICE  
 2 CLAIM.—The term “covered health care malpractice  
 3 claim” means a malpractice claim (excluding product  
 4 liability claims) relating to the provision of, or the  
 5 failure to provide, health care services involving a  
 6 defendant covered health care professional or pro-  
 7 vider.

8           (4) COVERED HEALTH CARE PROFESSIONAL.—  
 9 The term “covered health care professional” means  
 10 an individual, including a physician, nurse, chiro-  
 11 practor, nurse midwife, physical therapist, social  
 12 worker, or physician assistant—

13                 (A) who provides health care services in a  
 14 State;

15                 (B) for whom individuals entitled to, or en-  
 16 rolled for, benefits under part A of title XVIII  
 17 of the Social Security Act (42 U.S.C. 1395c et  
 18 seq.), or enrolled for benefits under part B of  
 19 such Act (42 U.S.C. 1395j et seq.) comprise  
 20 not less than 25 percent of the total patients of  
 21 such professional, as determined by the Sec-  
 22 retary; and

23                 (C) who is required by State law or regula-  
 24 tion to be licensed or certified by a State a con-  
 25 dition for providing such services in the State.

1           (5) COVERED HEALTH CARE PROVIDER.—The  
2       term “covered health care provider” means an orga-  
3       nization or institution—

4           (A) that is engaged in the delivery of  
5       health care services in a State;

6           (B) for which individuals entitled to, or en-  
7       rolled for, benefits under part A of title XVIII  
8       of the Social Security Act (42 U.S.C. 1395c et  
9       seq.), or enrolled for benefits under part B of  
10      such Act (42 U.S.C. 1395j et seq.) comprise  
11      not less than 25 percent of the total patients of  
12      such organization or institution, as determined  
13      by the Secretary; and

14          (C) that is required by State law or regula-  
15      tion to be licensed or certified by the State as  
16      a condition for engaging in the delivery of such  
17      services in the State.

18          (6) SECRETARY.—The term “Secretary” means  
19      the Secretary of Health and Human Services.

20          (7) STATE.—The term “State” means each of  
21      the several States, the District of Columbia, Puerto  
22      Rico, the Virgin Islands, Guam, American Samoa,  
23      and the Northern Mariana Islands.

1 **SEC. 4. REQUIREMENT FOR INITIAL RESOLUTION OF AC-**  
2 **TION THROUGH ALTERNATIVE DISPUTE RES-**  
3 **OLUTION.**

4 (a) IN GENERAL.—

5 (1) STATE CASES.—A covered health care mal-  
6 practice action may not be brought in any State  
7 court during a calendar year unless the covered  
8 health care malpractice claim that is the subject of  
9 the action has been initially resolved under an alter-  
10 native dispute resolution system certified for the  
11 year by the Attorney General under section 6(a), or,  
12 in the case of a State in which such a system is not  
13 in effect for the year, under the alternative Federal  
14 system established under section 6(b).

15 (2) FEDERAL DIVERSITY ACTIONS.—A covered  
16 health care malpractice action may not be brought  
17 in a Federal court under section 1332 of title 28,  
18 United States Code, during a calendar year unless  
19 the covered health care malpractice claim that is the  
20 subject of the action has been initially resolved  
21 under the alternative dispute resolution system de-  
22 scribed in paragraph (1) that applied in the State  
23 whose law applies in such action.

24 (b) INITIAL RESOLUTION OF CLAIMS UNDER  
25 ADR.—For purposes of subsection (a), an action is “ini-

1 tially resolved” under an alternative dispute resolution  
 2 system if—

3 (1) the ADR reaches a decision on whether the  
 4 defendant is liable to the plaintiff for damages; and

5 (2) if the ADR determines that the defendant  
 6 is liable, the ADR reaches a decision regarding the  
 7 amount of damages assessed against the defendant.

8 (c) PROCEDURES FOR FILING ACTIONS.—

9 (1) NOTICE OF INTENT TO CONTEST DECISION.—  
 10

11 (A) IN GENERAL.—Not later than 60 days  
 12 after a decision is issued with respect to a covered  
 13 health care malpractice claim under an alternative  
 14 dispute resolution system, each party  
 15 affected by the decision shall submit a sealed  
 16 statement to a court of competent jurisdiction,  
 17 selected by the arbitrator, indicating whether  
 18 the party intends to contest the decision.

19 (B) SEALED STATEMENTS.—Each sealed  
 20 statement submitted to a court under subparagraph  
 21 (A) shall remain sealed until the earlier  
 22 of—

23 (i) the date on which all affected parties  
 24 have submitted such statement; or

1 (ii) the submission deadline described  
2 in subparagraph (A).

3 (2) REQUIREMENTS FOR FILING ACTION.—A  
4 covered health care malpractice action may not be  
5 brought by a party unless—

6 (A) such party files the action in a court  
7 of competent jurisdiction not later than 90 days  
8 after the decision resolving the covered health  
9 care malpractice claim that is the subject of the  
10 action is issued under the applicable alternative  
11 dispute resolution system; and

12 (B) any party has filed the notice of intent  
13 required by paragraph (1).

14 (3) COURT OF COMPETENT JURISDICTION.—  
15 For purposes of this subsection, the term “court of  
16 competent jurisdiction” means—

17 (A) with respect to actions filed in a State  
18 court, the appropriate State trial court; and

19 (B) with respect to actions filed in a Fed-  
20 eral court, the appropriate United States dis-  
21 trict court.

22 (d) LEGAL EFFECT OF UNCONTESTED ADR DECI-  
23 SION.—A decision reached under an alternative dispute  
24 resolution system that is not contested under subsection  
25 (c) shall, for purposes of enforcement by a court of com-

1 petent jurisdiction, have the same status in the court as  
 2 the verdict of a covered health care malpractice action ad-  
 3 judicated in a State or Federal trial court.

4 (e) STANDARD OF JUDICIAL REVIEW.—The standard  
 5 of judicial review of a claim filed under subsection (c) shall  
 6 be de novo.

7 (f) AWARD OF COSTS AND ATTORNEYS' FEES AFTER  
 8 INITIAL ADR RESOLUTION.—

9 (1) IN GENERAL.—In the case of a covered  
 10 health care malpractice action brought in any State  
 11 or Federal court after ADR, if the final judgment or  
 12 order issued (exclusive of costs, expenses, and attor-  
 13 neys' fees incurred after judgment or trial) in the  
 14 action is not more favorable to a party contesting  
 15 the ADR decision than the ADR decision, the oppos-  
 16 ing party may file with the court, not later than 10  
 17 days after the final judgment or order is issued, a  
 18 petition for payment of costs and expenses, including  
 19 attorneys' fees, incurred with respect to the claim or  
 20 claims after the date of the ADR decision.

21 (2) AWARD OF COSTS AND EXPENSES.—If the  
 22 court finds, under a petition filed under paragraph  
 23 (1), with respect to a claim or claims, that the judg-  
 24 ment or order finally obtained is not more favorable  
 25 to the party contesting the ADR decision with re-



1 spect to the claim or claims than the ADR decision,  
2 the court shall order the contesting party to pay the  
3 costs and expenses of the opposing party, including  
4 attorneys' fees, incurred with respect to the claim or  
5 claims after the date of the ADR decision, unless the  
6 court finds that requiring the payment of such costs  
7 and expenses would be manifestly unjust.

8 (3) LIMITATION.—Attorneys' fees awarded  
9 under this subsection shall be in an amount reason-  
10 ably attributable to the claim or claims involved, cal-  
11 culated on the basis of an hourly rate of the attor-  
12 ney, which may not exceed that which the court con-  
13 siders acceptable in the community in which the at-  
14 torney practices law, taking into account the attor-  
15 ney's qualifications and experience and the com-  
16 plexity of the case. Attorneys' fees under this sub-  
17 section may not exceed—

18 (A) the actual cost incurred by the party  
19 for attorneys' fees payable to an attorney for  
20 services in connection with the claim or claims;  
21 or

22 (B) if no such cost was incurred by the  
23 party due to a contingency fee agreement, a  
24 reasonable cost that would have been incurred  
25 by the party for noncontingent attorneys' fees

1 payable to an attorney for services in connec-  
 2 tion with the claim or claims.

3 (g) APPLICABILITY.—The requirements of this sec-  
 4 tion shall apply only to each covered health care mal-  
 5 practice claim arising out of an event (or events) occurring  
 6 on or after the date that is 270 days after the date of  
 7 enactment of this Act.

8 **SEC. 5. BASIC REQUIREMENTS FOR STATE ALTERNATIVE**  
 9 **DISPUTE RESOLUTION SYSTEMS.**

10 The alternative dispute resolution system of a State  
 11 meets the requirements of this section if the system—

12 (1) applies to all covered health care mal-  
 13 practice claims under the jurisdiction of the courts  
 14 of such State;

15 (2) requires that a written opinion resolving the  
 16 dispute be issued not later than 180 days after the  
 17 date on which each party against whom the claim is  
 18 filed has received notice of the claim (other than in  
 19 exceptional cases for which a longer period is re-  
 20 quired for the issuance of such an opinion), and that  
 21 the opinion contain—

22 (A) findings of fact relating to the dispute;  
 23 and

24 (B) a description of the costs incurred in  
 25 resolving the dispute under the system (includ-

1 ing any fees paid to the individuals hearing and  
2 resolving the claim), together with an appro-  
3 priate assessment of the costs against any of  
4 the parties;

5 (3) requires individuals who hear and resolve  
6 claims under the system to meet such qualifications  
7 as the State may require (in accordance with regula-  
8 tions of the Attorney General);

9 (4) is approved by the State or by local govern-  
10 ments in the State;

11 (5) with respect to a State system that consists  
12 of multiple dispute resolution procedures—

13 (A) permits the parties to a dispute to se-  
14 lect the procedure to be used for the resolution  
15 of the dispute under the system; and

16 (B) if the parties do not agree on the pro-  
17 cedure to be used for the resolution of the dis-  
18 pute, assigns a particular procedure to the par-  
19 ties;

20 (6) provides for the transmittal to the State  
21 agency responsible for monitoring or disciplining  
22 health care professionals and health care providers  
23 of any findings made under the system that such a  
24 professional or provider committed malpractice, un-  
25 less, during the 90-day period beginning on the date

1 the system resolves the claim against the profes-  
 2 sional or provider, the professional or provider  
 3 brings an action contesting the decision made under  
 4 the system; and

5 (7) provides for the regular transmittal to the  
 6 Administrator of the Agency for Healthcare Re-  
 7 search and Quality of information on disputes re-  
 8 solved under the system, in a manner that assures  
 9 that the identity of the parties to a dispute shall not  
 10 be revealed.

11 **SEC. 6. CERTIFICATION OF STATE SYSTEMS; APPLICA-**  
 12 **BILITY OF ALTERNATIVE FEDERAL SYSTEM.**

13 (a) CERTIFICATION.—

14 (1) IN GENERAL.—Not later than 270 days  
 15 after the date of enactment of this Act and periodi-  
 16 cally thereafter, the Attorney General, in consulta-  
 17 tion with the Secretary, shall determine whether the  
 18 alternative dispute resolution systems of each State  
 19 meet the requirements of this Act.

20 (2) BASIS FOR CERTIFICATION.—The Attorney  
 21 General shall certify the alternative dispute resolu-  
 22 tion system of a State under this subsection for a  
 23 calendar year if the Attorney General determines  
 24 under paragraph (1) that such system meets the re-  
 25 quirements of section 5.

1 (b) APPLICABILITY OF ALTERNATIVE FEDERAL SYS-  
2 TEM.—

3 (1) ESTABLISHMENT AND APPLICABILITY.—

4 Not later than 270 days after the date of enactment  
5 of this Act, the Attorney General, in consultation  
6 with the Secretary, shall establish by rulemaking an  
7 alternative Federal ADR system for the resolution of  
8 covered health care malpractice claims during a cal-  
9 endar year, to be used for a calendar year in States  
10 that do not have an alternative dispute resolution  
11 system that is certified under subsection (a) for such  
12 year.

13 (2) REQUIREMENTS FOR SYSTEM.—Under the  
14 alternative Federal ADR system established under  
15 paragraph (1)—

16 (A) paragraphs (1), (2), (6), and (7) of  
17 section 5 shall apply to claims brought under  
18 such system;

19 (B) the claims brought under such system  
20 shall be heard and resolved by medical and legal  
21 experts appointed as arbitrators by the Attor-  
22 ney General, in consultation with the Secretary;  
23 and

24 (C) with respect to a State in which such  
25 system is in effect, the Attorney General may

(at the request of such State) modify the system to take into account the existence of dispute resolution procedures in the State that affect the resolution of health care malpractice claims.

(3) TREATMENT OF STATES WITH ALTERNATIVE SYSTEM IN EFFECT.—If the alternative Federal ADR system established under this subsection is applied with respect to a State for a calendar year such State shall reimburse the United States, at such time and in such manner as the Secretary may require, for the costs incurred by the United States during such year as a result of the application of the system with respect to the State.

**SEC. 7. GAO STUDY OF PRIVATE LITIGATION INSURANCE.**

The Comptroller General of the United States shall—

(1) undertake a study of the effectiveness of private litigation insurance markets, such as those in the United Kingdom and Germany, in providing affordable access to courts, evaluating the merit of prospective claims, and ensuring that prevailing parties in “loser pays” systems are reimbursed for attorneys’ fees; and

- 1           (2) not later than 270 days after the date of
- 2       enactment of this Act, submit to Congress a report
- 3       describing the results of such study.

