

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 3372

To establish Medicare performance-based quality measures, to establish an affirmative defense in medical malpractice actions based on compliance with best practices guidelines, and to provide grants to States for administrative health care tribunals.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 29, 2009

Mr. PRICE of Georgia introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To establish Medicare performance-based quality measures, to establish an affirmative defense in medical malpractice actions based on compliance with best practices guidelines, and to provide grants to States for administrative health care tribunals.

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 “Health Care OverUse  
5 Reform Today Act (HealthCOURT Act) of 2009”.

1 **SEC. 2. ESTABLISHMENT OF PERFORMANCE-BASED QUAL-**  
2 **ITY MEASURES.**

3 Not later than January 1, 2010, the Secretary of  
4 Health and Human Services shall submit to Congress a  
5 proposal for a formalized process for the development of  
6 performance-based quality measures that could be applied  
7 to physicians' services under the Medicare program under  
8 title XVIII of the Social Security Act. Such proposal shall  
9 be in concert and agreement with the Physician Consor-  
10 tium for Performance Improvement and shall only utilize  
11 measures agreed upon by each physician specialty organi-  
12 zation.

13 **SEC. 3. AFFIRMATIVE DEFENSE BASED ON COMPLIANCE**  
14 **WITH BEST PRACTICE GUIDELINES.**

15 (a) SELECTION AND ISSUANCE OF BEST PRACTICES  
16 GUIDELINES.—

17 (1) IN GENERAL.—The Secretary of Health and  
18 Human Services (in this section referred to as the  
19 “Secretary”) shall provide for the selection and  
20 issuance of best practice guidelines (each in this sub-  
21 section referred to as a “guideline”) in accordance  
22 with paragraphs (2) and (3).

23 (2) DEVELOPMENT PROCESS.—Not later than  
24 90 days after the date of the enactment of this Act,  
25 the Secretary shall enter into a contract with a  
26 qualified physician consensus-building organization

1 (such as the Physician Consortium for Performance  
2 Improvement), in concert and agreement with physi-  
3 cian specialty organizations, to develop guidelines for  
4 treatment of medical conditions for application  
5 under subsection (b). Under the contract, the orga-  
6 nization shall take into consideration any endorsed  
7 performance-based quality measures described in  
8 section 2. Under the contract and not later than 18  
9 months after the date of the enactment of this Act,  
10 the organization shall submit best practice guidelines  
11 for issuance as guidelines under paragraph (3).

12 (3) ISSUANCE.—

13 (A) IN GENERAL.—Not later than 2 years  
14 after the date of the enactment of this Act, the  
15 Secretary shall issue, by regulation, after notice  
16 and opportunity for public comment, guidelines  
17 that have been recommended under paragraph  
18 (2) for application under subsection (b).

19 (B) LIMITATION.—The Secretary may not  
20 issue guidelines unless they have been approved  
21 or endorsed by qualified physician consensus-  
22 building organization involved and physician  
23 specialty organizations.

24 (C) DISSEMINATION.—The Secretary shall  
25 broadly disseminate the guidelines so issued.

1 (b) LIMITATION ON DAMAGES.—

2 (1) LIMITATION ON NONECONOMIC DAMAGES.—

3 In any health care lawsuit, no noneconomic damages  
4 may awarded with respect to treatment that is with-  
5 in a guideline issued under subsection (a).

6 (2) LIMITATION ON PUNITIVE DAMAGES.—In  
7 any health care lawsuit, no punitive damages may be  
8 awarded against a health care practitioner based on  
9 a claim that such treatment caused the claimant  
10 harm if—

11 (A) such treatment was subject to the  
12 quality review by a qualified physician con-  
13 sensus-building organization;

14 (B) such treatment was approved in a  
15 guideline that underwent full review by such or-  
16 ganization, public comment, approval by the  
17 Secretary, and dissemination as described in  
18 subparagraph (a); and

19 (C) such medical treatment is generally  
20 recognized among qualified experts (including  
21 medical providers and relevant physician spe-  
22 cialty organizations) as safe, effective, and ap-  
23 propriate.

24 (c) USE.—

1           (1) INTRODUCTION AS EVIDENCE.—Guidelines  
2           under subsection (a) may not be introduced as evi-  
3           dence of negligence or deviation in the standard of  
4           care in any civil action unless they have previously  
5           been introduced by the defendant.

6           (2) NO PRESUMPTION OF NEGLIGENCE.—There  
7           would be no presumption of negligence if a partici-  
8           pating physician does not adhere to such guidelines.

9           (d) CONSTRUCTION.—Nothing in this section shall be  
10          construed as preventing a State from—

11           (1) replacing their current medical malpractice  
12           rules with rules that rely, as a defense, upon a  
13           health care provider’s compliance with a guideline  
14           issued under subsection (a); or

15           (2) applying additional guidelines or safe-har-  
16           bors that are in addition to, but not in lieu of, the  
17           guidelines issued under subsection (a).

18 **SEC. 4. STATE GRANTS TO CREATE ADMINISTRATIVE**  
19 **HEALTH CARE TRIBUNALS.**

20          Part P of title III of the Public Health Service Act  
21          (42 U.S.C. 280g et seq.) is amended by adding at the end  
22          the following:

1 **“SEC. 399T. STATE GRANTS TO CREATE ADMINISTRATIVE**  
2 **HEALTH CARE TRIBUNALS.**

3 “(a) IN GENERAL.—The Secretary may award grants  
4 to States for the development, implementation, and eval-  
5 uation of administrative health care tribunals that comply  
6 with this section, for the resolution of disputes concerning  
7 injuries allegedly caused by health care providers.

8 “(b) CONDITIONS FOR DEMONSTRATION GRANTS.—  
9 To be eligible to receive a grant under this section, a State  
10 shall submit to the Secretary an application at such time,  
11 in such manner, and containing such information as may  
12 be required by the Secretary. A grant shall be awarded  
13 under this section on such terms and conditions as the  
14 Secretary determines appropriate.

15 “(c) REPRESENTATION BY COUNSEL.—A State that  
16 receives a grant under this section may not preclude any  
17 party to a dispute before an administrative health care tri-  
18 bunal operated under such grant from obtaining legal rep-  
19 resentation during any review by the expert panel under  
20 subsection (d), the administrative health care tribunal  
21 under subsection (e), or a State court under subsection  
22 (f).

23 “(d) EXPERT PANEL REVIEW AND EARLY OFFER  
24 GUIDELINES.—

25 “(1) IN GENERAL.—Prior to the submission of  
26 any dispute concerning injuries allegedly caused by

1 health care providers to an administrative health  
2 care tribunal under this section, such allegations  
3 shall first be reviewed by an expert panel.

4 “(2) COMPOSITION.—

5 “(A) IN GENERAL.—The members of each  
6 expert panel under this subsection shall be ap-  
7 pointed by the head of the State agency respon-  
8 sible for health. Each expert panel shall be  
9 composed of no fewer than 3 members and not  
10 more than 7 members. At least one-half of such  
11 members shall be medical experts (either physi-  
12 cians or health care professionals).

13 “(B) LICENSURE AND EXPERTISE.—Each  
14 physician or health care professional appointed  
15 to an expert panel under subparagraph (A)  
16 shall—

17 “(i) be appropriately credentialed or  
18 licensed in 1 or more States to deliver  
19 health care services; and

20 “(ii) typically treat the condition,  
21 make the diagnosis, or provide the type of  
22 treatment that is under review.

23 “(C) INDEPENDENCE.—

1           “(i) IN GENERAL.—Subject to clause  
2           (ii), each individual appointed to an expert  
3           panel under this paragraph shall—

4                   “(I) not have a material familial,  
5                   financial, or professional relationship  
6                   with a party involved in the dispute  
7                   reviewed by the panel; and

8                   “(II) not otherwise have a con-  
9                   flict of interest with such a party.

10           “(ii) EXCEPTION.—Nothing in clause  
11           (i) shall be construed to prohibit an indi-  
12           vidual who has staff privileges at an insti-  
13           tution where the treatment involved in the  
14           dispute was provided from serving as a  
15           member of an expert panel merely on the  
16           basis of such affiliation, if the affiliation is  
17           disclosed to the parties and neither party  
18           objects.

19           “(D) PRACTICING HEALTH CARE PROFES-  
20           SIONAL IN SAME FIELD.—

21                   “(i) IN GENERAL.—In a dispute be-  
22                   fore an expert panel that involves treat-  
23                   ment, or the provision of items or serv-  
24                   ices—



1           “(I) by a physician, the medical  
2 experts on the expert panel shall be  
3 practicing physicians (allopathic or os-  
4 teopathic) of the same or similar spe-  
5 cialty as a physician who typically  
6 treats the condition, makes the diag-  
7 nosis, or provides the type of treat-  
8 ment under review; or

9           “(II) by a health care profes-  
10 sional other than a physician, at least  
11 two medical experts on the expert  
12 panel shall be practicing physicians  
13 (allopathic or osteopathic) of the same  
14 or similar specialty as the health care  
15 professional who typically treats the  
16 condition, makes the diagnosis, or  
17 provides the type of treatment under  
18 review, and, if determined appropriate  
19 by the State agency, an additional  
20 medical expert shall be a practicing  
21 health care professional (other than  
22 such a physician) of such a same or  
23 similar specialty.

24           “(ii) PRACTICING DEFINED.—In this  
25 paragraph, the term ‘practicing’ means,

1 with respect to an individual who is a phy-  
2 sician or other health care professional,  
3 that the individual provides health care  
4 services to individual patients on average  
5 at least 2 days a week.

6 “(E) PEDIATRIC EXPERTISE.—In the case  
7 of dispute relating to a child, at least 1 medical  
8 expert on the expert panel shall have expertise  
9 described in subparagraph (D)(i) in pediatrics.

10 “(3) DETERMINATION.—After a review under  
11 paragraph (1), an expert panel shall make a deter-  
12 mination as to the liability of the parties involved  
13 and compensation.

14 “(4) ACCEPTANCE.—If the parties to a dispute  
15 before an expert panel under this subsection accept  
16 the determination of the expert panel concerning li-  
17 ability and compensation, such compensation shall  
18 be paid to the claimant and the claimant shall agree  
19 to forgo any further action against the health care  
20 providers involved.

21 “(5) FAILURE TO ACCEPT.—If any party de-  
22 cides not to accept the expert panel’s determination,  
23 the matter shall be referred to an administrative  
24 health care tribunal created pursuant to this section.

25 “(e) ADMINISTRATIVE HEALTH CARE TRIBUNALS.—

1           “(1) IN GENERAL.—Upon the failure of any  
2 party to accept the determination of an expert panel  
3 under subsection (d), the parties shall have the right  
4 to request a hearing concerning the liability or com-  
5 pensation involved by an administrative health care  
6 tribunal established by the State involved.

7           “(2) REQUIREMENTS.—In establishing an ad-  
8 ministrative health care tribunal under this section,  
9 a State shall—

10           “(A) ensure that such tribunals are pre-  
11 sided over by special judges with health care ex-  
12 pertise;

13           “(B) provide authority to such judges to  
14 make binding rulings, rendered in written deci-  
15 sions, on standards of care, causation, com-  
16 pensation, and related issues with reliance on  
17 independent expert witnesses commissioned by  
18 the tribunal;

19           “(C) establish gross negligence as the legal  
20 standard for the tribunal;

21           “(D) allow the admission into evidence of  
22 the recommendation made by the expert panel  
23 under subsection (d); and

24           “(E) provide for an appeals process to  
25 allow for review of decisions by State courts.

1       “(f) REVIEW BY STATE COURT AFTER EXHAUSTION  
2 OF ADMINISTRATIVE REMEDIES.—

3               “(1) RIGHT TO FILE.—If any party to a dispute  
4 before a health care tribunal under subsection (e) is  
5 not satisfied with the determinations of the tribunal,  
6 the party shall have the right to file their claim in  
7 a State court of competent jurisdiction.

8               “(2) FORFEIT OF AWARDS.—Any party filing  
9 an action in a State court in accordance with para-  
10 graph (1) shall forfeit any compensation award  
11 made under subsection (e).

12               “(3) ADMISSIBILITY.—The determinations of  
13 the expert panel and the administrative health care  
14 tribunal pursuant to subsections (d) and (e) with re-  
15 spect to a State court proceeding under paragraph  
16 (1) shall be admissible into evidence in any such  
17 State court proceeding.

18               “(g) DEFINITION.—In this section, the term ‘health  
19 care provider’ has the meaning given such term for pur-  
20 poses of part A of title VII.

21               “(h) AUTHORIZATION OF APPROPRIATIONS.—There  
22 are authorized to be appropriated for any fiscal year such  
23 sums as may be necessary for purposes of making grants  
24 to States under this section.”.

1 **SEC. 5. SENSE OF CONGRESS REGARDING HEALTH IN-**  
2 **SURER LIABILITY.**

3 It is the sense of Congress that a health insurance  
4 issuer should be liable for damages for harm caused when  
5 it makes a decision as to what care is medically necessary  
6 and appropriate.

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