

## Calendar No. 338

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2<sup>D</sup> SESSION

# H. R. 5

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IN THE SENATE OF THE UNITED STATES

MARCH 22, 2012

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Read the second time and placed on the calendar

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## AN ACT

To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Access to  
5 Healthcare Act”.

1                   **TITLE I—HEALTH ACT**

2   **SEC. 101. SHORT TITLE.**

3           This title may be cited as the “Help Efficient, Acces-  
4 sible, Low-cost, Timely Healthcare (HEALTH) Act of  
5 2012”.

6   **SEC. 102. FINDINGS AND PURPOSE.**

7           It is the purpose of this title to implement reasonable,  
8 comprehensive, and effective health care liability reforms  
9 designed to—

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

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

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

22           (4) improve the fairness and cost-effectiveness  
23 of our current health care liability system to resolve  
24 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. 103. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

7 The time for the commencement of a health care law-  
8 suit shall be 3 years after the date of manifestation of  
9 injury or 1 year after the claimant discovers, or through  
10 the use of reasonable diligence should have discovered, the  
11 injury, whichever occurs first. In no event shall the time  
12 for commencement of a health care lawsuit exceed 3 years  
13 after the date of manifestation of injury unless tolled for  
14 any of the following—

15 (1) upon proof of fraud;

16 (2) intentional concealment; or

17 (3) the presence of a foreign body, which has no  
18 therapeutic or diagnostic purpose or effect, in the  
19 person of the injured person.

20 Actions by a minor shall be commenced within 3 years  
21 from the date of the alleged manifestation of injury except  
22 that actions by a minor under the full age of 6 years shall  
23 be commenced within 3 years of manifestation of injury  
24 or prior to the minor's 8th birthday, whichever provides  
25 a longer period. Such time limitation shall be tolled for

1 minors for any period during which a parent or guardian  
2 and a health care provider or health care organization  
3 have committed fraud or collusion in the failure to bring  
4 an action on behalf of the injured minor.

5 **SEC. 104. COMPENSATING PATIENT INJURY.**

6 (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL  
7 ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any  
8 health care lawsuit, nothing in this title shall limit a claim-  
9 ant’s recovery of the full amount of the available economic  
10 damages, notwithstanding the limitation in subsection (b).

11 (b) ADDITIONAL NONECONOMIC DAMAGES.—In any  
12 health care lawsuit, the amount of noneconomic damages,  
13 if available, may be as much as \$250,000, regardless of  
14 the number of parties against whom the action is brought  
15 or the number of separate claims or actions brought with  
16 respect to the same injury.

17 (c) NO DISCOUNT OF AWARD FOR NONECONOMIC  
18 DAMAGES.—For purposes of applying the limitation in  
19 subsection (b), future noneconomic damages shall not be  
20 discounted to present value. The jury shall not be in-  
21 formed about the maximum award for noneconomic dam-  
22 ages. An award for noneconomic damages in excess of  
23 \$250,000 shall be reduced either before the entry of judg-  
24 ment, or by amendment of the judgment after entry of  
25 judgment, and such reduction shall be made before ac-

1 counting for any other reduction in damages required by  
2 law. If separate awards are rendered for past and future  
3 noneconomic damages and the combined awards exceed  
4 \$250,000, the future noneconomic damages shall be re-  
5 duced first.

6 (d) FAIR SHARE RULE.—In any health care lawsuit,  
7 each party shall be liable for that party’s several share  
8 of any damages only and not for the share of any other  
9 person. Each party shall be liable only for the amount of  
10 damages allocated to such party in direct proportion to  
11 such party’s percentage of responsibility. Whenever a  
12 judgment of liability is rendered as to any party, a sepa-  
13 rate judgment shall be rendered against each such party  
14 for the amount allocated to such party. For purposes of  
15 this section, the trier of fact shall determine the propor-  
16 tion of responsibility of each party for the claimant’s  
17 harm.

18 **SEC. 105. MAXIMIZING PATIENT RECOVERY.**

19 (a) COURT SUPERVISION OF SHARE OF DAMAGES  
20 ACTUALLY PAID TO CLAIMANTS.—In any health care law-  
21 suit, the court shall supervise the arrangements for pay-  
22 ment of damages to protect against conflicts of interest  
23 that may have the effect of reducing the amount of dam-  
24 ages awarded that are actually paid to claimants. In par-  
25 ticular, in any health care lawsuit in which the attorney

1 for a party claims a financial stake in the outcome by vir-  
2 tue of a contingent fee, the court shall have the power  
3 to restrict the payment of a claimant's damage recovery  
4 to such attorney, and to redirect such damages to the  
5 claimant based upon the interests of justice and principles  
6 of equity. In no event shall the total of all contingent fees  
7 for representing all claimants in a health care lawsuit ex-  
8 ceed the following limits:

9           (1) Forty percent of the first \$50,000 recovered  
10       by the claimant(s).

11           (2) Thirty-three and one-third percent of the  
12       next \$50,000 recovered by the claimant(s).

13           (3) Twenty-five percent of the next \$500,000  
14       recovered by the claimant(s).

15           (4) Fifteen percent of any amount by which the  
16       recovery by the claimant(s) is in excess of \$600,000.

17       (b) APPLICABILITY.—The limitations in this section  
18 shall apply whether the recovery is by judgment, settle-  
19 ment, mediation, arbitration, or any other form of alter-  
20 native dispute resolution. In a health care lawsuit involv-  
21 ing a minor or incompetent person, a court retains the  
22 authority to authorize or approve a fee that is less than  
23 the maximum permitted under this section. The require-  
24 ment for court supervision in the first two sentences of  
25 subsection (a) applies only in civil actions.

1 **SEC. 106. PUNITIVE DAMAGES.**

2 (a) IN GENERAL.—Punitive damages may, if other-  
3 wise permitted by applicable State or Federal law, be  
4 awarded against any person in a health care lawsuit only  
5 if it is proven by clear and convincing evidence that such  
6 person acted with malicious intent to injure the claimant,  
7 or that such person deliberately failed to avoid unneces-  
8 sary injury that such person knew the claimant was sub-  
9 stantially certain to suffer. In any health care lawsuit  
10 where no judgment for compensatory damages is rendered  
11 against such person, no punitive damages may be awarded  
12 with respect to the claim in such lawsuit. No demand for  
13 punitive damages shall be included in a health care lawsuit  
14 as initially filed. A court may allow a claimant to file an  
15 amended pleading for punitive damages only upon a mo-  
16 tion by the claimant and after a finding by the court, upon  
17 review of supporting and opposing affidavits or after a  
18 hearing, after weighing the evidence, that the claimant has  
19 established by a substantial probability that the claimant  
20 will prevail on the claim for punitive damages. At the re-  
21 quest of any party in a health care lawsuit, the trier of  
22 fact shall consider in a separate proceeding—

23 (1) whether punitive damages are to be award-  
24 ed and the amount of such award; and

25 (2) the amount of punitive damages following a  
26 determination of punitive liability.

1 If a separate proceeding is requested, evidence relevant  
2 only to the claim for punitive damages, as determined by  
3 applicable State law, shall be inadmissible in any pro-  
4 ceeding to determine whether compensatory damages are  
5 to be awarded.

6 (b) DETERMINING AMOUNT OF PUNITIVE DAM-  
7 AGES.—

8 (1) FACTORS CONSIDERED.—In determining  
9 the amount of punitive damages, if awarded, in a  
10 health care lawsuit, the trier of fact shall consider  
11 only the following—

12 (A) the severity of the harm caused by the  
13 conduct of such party;

14 (B) the duration of the conduct or any  
15 concealment of it by such party;

16 (C) the profitability of the conduct to such  
17 party;

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

23 (E) any criminal penalties imposed on such  
24 party, as a result of the conduct complained of  
25 by the claimant; and



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

4 (2) MAXIMUM AWARD.—The amount of punitive  
5 damages, if awarded, in a health care lawsuit may  
6 be as much as \$250,000 or as much as two times  
7 the amount of economic damages awarded, which-  
8 ever is greater. The jury shall not be informed of  
9 this limitation.

10 (c) NO PUNITIVE DAMAGES FOR PRODUCTS THAT  
11 COMPLY WITH FDA STANDARDS.—

12 (1) IN GENERAL.—

13 (A) No punitive damages may be awarded  
14 against the manufacturer or distributor of a  
15 medical product, or a supplier of any compo-  
16 nent or raw material of such medical product,  
17 based on a claim that such product caused the  
18 claimant's harm where—

19 (i)(I) such medical product was sub-  
20 ject to premarket approval, clearance, or li-  
21 censure by the Food and Drug Administra-  
22 tion with respect to the safety of the for-  
23 mulation or performance of the aspect of  
24 such medical product which caused the  
25 claimant's harm or the adequacy of the

1 packaging or labeling of such medical  
2 product; and

3 (II) such medical product was so ap-  
4 proved, cleared, or licensed; or

5 (ii) such medical product is generally  
6 recognized among qualified experts as safe  
7 and effective pursuant to conditions estab-  
8 lished by the Food and Drug Administra-  
9 tion and applicable Food and Drug Admin-  
10 istration regulations, including without  
11 limitation those related to packaging and  
12 labeling, unless the Food and Drug Admin-  
13 istration has determined that such medical  
14 product was not manufactured or distrib-  
15 uted in substantial compliance with appli-  
16 cable Food and Drug Administration stat-  
17 utes and regulations.

18 (B) RULE OF CONSTRUCTION.—Subpara-  
19 graph (A) may not be construed as establishing  
20 the obligation of the Food and Drug Adminis-  
21 tration to demonstrate affirmatively that a  
22 manufacturer, distributor, or supplier referred  
23 to in such subparagraph meets any of the con-  
24 ditions described in such subparagraph.

1           (2) LIABILITY OF HEALTH CARE PROVIDERS.—

2           A health care provider who prescribes, or who dis-  
3           penses pursuant to a prescription, a medical product  
4           approved, licensed, or cleared by the Food and Drug  
5           Administration shall not be named as a party to a  
6           product liability lawsuit involving such product and  
7           shall not be liable to a claimant in a class action  
8           lawsuit against the manufacturer, distributor, or  
9           seller of such product. Nothing in this paragraph  
10          prevents a court from consolidating cases involving  
11          health care providers and cases involving products li-  
12          ability claims against the manufacturer, distributor,  
13          or product seller of such medical product.

14          (3) PACKAGING.—In a health care lawsuit for  
15          harm which is alleged to relate to the adequacy of  
16          the packaging or labeling of a drug which is required  
17          to have tamper-resistant packaging under regula-  
18          tions of the Secretary of Health and Human Serv-  
19          ices (including labeling regulations related to such  
20          packaging), the manufacturer or product seller of  
21          the drug shall not be held liable for punitive dam-  
22          ages unless such packaging or labeling is found by  
23          the trier of fact by clear and convincing evidence to  
24          be substantially out of compliance with such regula-  
25          tions.

1           (4) EXCEPTION.—Paragraph (1) shall not  
2 apply in any health care lawsuit in which—

3           (A) a person, before or after premarket ap-  
4 proval, clearance, or licensure of such medical  
5 product, knowingly misrepresented to or with-  
6 held from the Food and Drug Administration  
7 information that is required to be submitted  
8 under the Federal Food, Drug, and Cosmetic  
9 Act (21 U.S.C. 301 et seq.) or section 351 of  
10 the Public Health Service Act (42 U.S.C. 262)  
11 that is material and is causally related to the  
12 harm which the claimant allegedly suffered;

13           (B) a person made an illegal payment to  
14 an official of the Food and Drug Administra-  
15 tion for the purpose of either securing or main-  
16 taining approval, clearance, or licensure of such  
17 medical product; or

18           (C) the defendant caused the medical prod-  
19 uct which caused the claimant's harm to be  
20 misbranded or adulterated (as such terms are  
21 used in chapter V of the Federal Food, Drug,  
22 and Cosmetic Act (21 U.S.C. 351 et seq.)).

1 **SEC. 107. AUTHORIZATION OF PAYMENT OF FUTURE DAM-**  
2 **AGES TO CLAIMANTS IN HEALTH CARE LAW-**  
3 **SUITS.**

4 (a) **IN GENERAL.**—In any health care lawsuit, if an  
5 award of future damages, without reduction to present  
6 value, equaling or exceeding \$50,000 is made against a  
7 party with sufficient insurance or other assets to fund a  
8 periodic payment of such a judgment, the court shall, at  
9 the request of any party, enter a judgment ordering that  
10 the future damages be paid by periodic payments, in ac-  
11 cordance with the Uniform Periodic Payment of Judg-  
12 ments Act promulgated by the National Conference of  
13 Commissioners on Uniform State Laws.

14 (b) **APPLICABILITY.**—This section applies to all ac-  
15 tions which have not been first set for trial or retrial be-  
16 fore the effective date of this title.

17 **SEC. 108. DEFINITIONS.**

18 In this title:

19 (1) **ALTERNATIVE DISPUTE RESOLUTION SYS-**  
20 **TEM; ADR.**—The term “alternative dispute resolution  
21 system” or “ADR” means a system that provides  
22 for the resolution of health care lawsuits in a man-  
23 ner other than through a civil action brought in a  
24 State or Federal court.

25 (2) **CLAIMANT.**—The term “claimant” means  
26 any person who brings a health care lawsuit, includ-

1       ing a person who asserts or claims a right to legal  
2       or equitable contribution, indemnity, or subrogation,  
3       arising out of a health care liability claim or action,  
4       and any person on whose behalf such a claim is as-  
5       serted or such an action is brought, whether de-  
6       ceased, incompetent, or a minor.

7           (3)   COMPENSATORY   DAMAGES.—The   term  
8       “compensatory   damages”   means   objectively  
9       verifiable monetary losses incurred as a result of the  
10      provision of, use of, or payment for (or failure to  
11      provide, use, or pay for) health care services or med-  
12      ical products, such as past and future medical ex-  
13      penses, loss of past and future earnings, cost of ob-  
14      taining domestic services, loss of employment, and  
15      loss of business or employment opportunities, dam-  
16      ages for physical and emotional pain, suffering, in-  
17      convenience, physical impairment, mental anguish,  
18      disfigurement, loss of enjoyment of life, loss of soci-  
19      ety and companionship, loss of consortium (other  
20      than loss of domestic service), hedonic damages, in-  
21      jury to reputation, and all other nonpecuniary losses  
22      of any kind or nature. The term “compensatory  
23      damages” includes economic damages and non-  
24      economic damages, as such terms are defined in this  
25      section.

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

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

14           (6) HEALTH CARE LAWSUIT.—The term  
15 “health care lawsuit” means any health care liability  
16 claim concerning the provision of health care goods  
17 or services or any medical product affecting inter-  
18 state commerce, or any health care liability action  
19 concerning the provision of health care goods or  
20 services or any medical product affecting interstate  
21 commerce, brought in a State or Federal court or  
22 pursuant to an alternative dispute resolution system,  
23 against a health care provider, a health care organi-  
24 zation, or the manufacturer, distributor, supplier,  
25 marketer, promoter, or seller of a medical product,

1 regardless of the theory of liability on which the  
2 claim is based, or the number of claimants, plain-  
3 tiffs, defendants, or other parties, or the number of  
4 claims or causes of action, in which the claimant al-  
5 leges a health care liability claim. Such term does  
6 not include a claim or action which is based on  
7 criminal liability; which seeks civil fines or penalties  
8 paid to Federal, State, or local government; or which  
9 is grounded in antitrust.

10 (7) HEALTH CARE LIABILITY ACTION.—The  
11 term “health care liability action” means a civil ac-  
12 tion brought in a State or Federal court or pursuant  
13 to an alternative dispute resolution system, against  
14 a health care provider, a health care organization, or  
15 the manufacturer, distributor, supplier, marketer,  
16 promoter, or seller of a medical product, regardless  
17 of the theory of liability on which the claim is based,  
18 or the number of plaintiffs, defendants, or other par-  
19 ties, or the number of causes of action, in which the  
20 claimant alleges a health care liability claim.

21 (8) 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, health care organiza-  
25 tion, or the manufacturer, distributor, supplier, mar-



1 keter, promoter, or seller of a medical product, in-  
2 cluding, but not limited to, third-party claims, cross-  
3 claims, counter-claims, or contribution claims, which  
4 are based upon the provision of, use of, or payment  
5 for (or the failure to provide, use, or pay for) health  
6 care services or medical products, regardless of the  
7 theory of liability on which the claim is based, or the  
8 number of plaintiffs, defendants, or other parties, or  
9 the number of causes of action.

10 (9) HEALTH CARE ORGANIZATION.—The term  
11 “health care organization” means any person or en-  
12 tity which is obligated to provide or pay for health  
13 benefits under any health plan, including any person  
14 or entity acting under a contract or arrangement  
15 with a health care organization to provide or admin-  
16 ister any health benefit.

17 (10) HEALTH CARE PROVIDER.—The term  
18 “health care provider” means any person or entity  
19 required by State or Federal laws or regulations to  
20 be licensed, registered, or certified to provide health  
21 care services, and being either so licensed, reg-  
22 istered, or certified, or exempted from such require-  
23 ment by other statute or regulation.

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

1 goods or services provided by a health care organiza-  
2 tion, provider, or by any individual working under  
3 the supervision of a health care provider, that relates  
4 to the diagnosis, prevention, or treatment of any  
5 human disease or impairment, or the assessment or  
6 care of the health of human beings.

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

12 (13) MEDICAL PRODUCT.—The term “medical  
13 product” means a drug, device, or biological product  
14 intended for humans, and the terms “drug”, “de-  
15 vice”, and “biological product” have the meanings  
16 given such terms in sections 201(g)(1) and 201(h)  
17 of the Federal Food, Drug and Cosmetic Act (21  
18 U.S.C. 321(g)(1) and (h)) and section 351(a) of the  
19 Public Health Service Act (42 U.S.C. 262(a)), re-  
20 spectively, including any component or raw material  
21 used therein, but excluding health care services.

22 (14) NONECONOMIC DAMAGES.—The term  
23 “noneconomic damages” means damages for phys-  
24 ical and emotional pain, suffering, inconvenience,  
25 physical impairment, mental anguish, disfigurement,

1 loss of enjoyment of life, loss of society and compan-  
2 ionship, loss of consortium (other than loss of do-  
3 mestic service), hedonic damages, injury to reputa-  
4 tion, and all other nonpecuniary losses of any kind  
5 or nature.

6 (15) PUNITIVE DAMAGES.—The term “punitive  
7 damages” means damages awarded, for the purpose  
8 of punishment or deterrence, and not solely for com-  
9 pensatory purposes, against a health care provider,  
10 health care organization, or a manufacturer, dis-  
11 tributor, or supplier of a medical product. Punitive  
12 damages are neither economic nor noneconomic  
13 damages.

14 (16) RECOVERY.—The term “recovery” means  
15 the net sum recovered after deducting any disburse-  
16 ments or costs incurred in connection with prosecu-  
17 tion or settlement of the claim, including all costs  
18 paid or advanced by any person. Costs of health care  
19 incurred by the plaintiff and the attorneys’ office  
20 overhead costs or charges for legal services are not  
21 deductible disbursements or costs for such purpose.

22 (17) STATE.—The term “State” means each of  
23 the several States, the District of Columbia, the  
24 Commonwealth of Puerto Rico, the Virgin Islands,  
25 Guam, American Samoa, the Northern Mariana Is-

1 lands, the Trust Territory of the Pacific Islands, and  
2 any other territory or possession of the United  
3 States, or any political subdivision thereof.

4 **SEC. 109. EFFECT ON OTHER LAWS.**

5 (a) VACCINE INJURY.—

6 (1) To the extent that title XXI of the Public  
7 Health Service Act establishes a Federal rule of law  
8 applicable to a civil action brought for a vaccine-re-  
9 lated injury or death—

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

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

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

22 (b) OTHER FEDERAL LAW.—Except as provided in  
23 this section, nothing in this title shall be deemed to affect  
24 any defense available to a defendant in a health care law-  
25 suit or action under any other provision of Federal law.

1 **SEC. 110. STATE FLEXIBILITY AND PROTECTION OF**  
2 **STATES' RIGHTS.**

3 (a) **HEALTH CARE LAWSUITS.**—The provisions gov-  
4 erning health care lawsuits set forth in this title preempt,  
5 subject to subsections (b) and (c), State law to the extent  
6 that State law prevents the application of any provisions  
7 of law established by or under this title. The provisions  
8 governing health care lawsuits set forth in this title super-  
9 sede chapter 171 of title 28, United States Code, to the  
10 extent that such chapter—

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

16 (2) prohibits the introduction of evidence re-  
17 garding collateral source benefits, or mandates or  
18 permits subrogation or a lien on collateral source  
19 benefits.

20 (b) **PROTECTION OF STATES' RIGHTS AND OTHER**  
21 **LAWS.**—(1) Any issue that is not governed by any provi-  
22 sion of law established by or under this title (including  
23 State standards of negligence) shall be governed by other-  
24 wise applicable State or Federal law.

25 (2) This title shall not preempt or supersede any  
26 State or Federal law that imposes greater procedural or

1 substantive protections for health care providers and  
2 health care organizations from liability, loss, or damages  
3 than those provided by this title or create a cause of ac-  
4 tion.

5 (c) STATE FLEXIBILITY.—No provision of this title  
6 shall be construed to preempt—

7 (1) any State law (whether effective before, on,  
8 or after the date of the enactment of this title) that  
9 specifies a particular monetary amount of compen-  
10 satory or punitive damages (or the total amount of  
11 damages) that may be awarded in a health care law-  
12 suit, regardless of whether such monetary amount is  
13 greater or lesser than is provided for under this title,  
14 notwithstanding section 4(a); or

15 (2) any defense available to a party in a health  
16 care lawsuit under any other provision of State or  
17 Federal law.

18 **SEC. 111. APPLICABILITY; EFFECTIVE DATE.**

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

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

3 **TITLE II—REPEAL OF INDE-**  
4 **PENDENT PAYMENT ADVI-**  
5 **SORY BOARD**

6 **SEC. 201. SHORT TITLE.**

7 This title may be cited as the “Medicare Decisions  
8 Accountability Act of 2012”.

9 **SEC. 202. REPEAL OF THE INDEPENDENT PAYMENT ADVI-**  
10 **SORY BOARD.**

11 Effective as of the enactment of the Patient Protec-  
12 tion and Affordable Care Act (Public Law 111–148), sec-  
13 tions 3403 and 10320 of such Act (including the amend-  
14 ments made by such sections, but excluding subsection (d)  
15 of section 1899A of the Social Security Act, as added and  
16 amended by such sections) are repealed, and any provision  
17 of law amended by such sections is hereby restored as if  
18 such sections had not been enacted into law.

19 **TITLE III—HEALTH CARE**  
20 **SAFETY NET ENHANCEMENT**

21 **SEC. 301. SHORT TITLE.**

22 This title may be cited as the “Health Care Safety  
23 Net Enhancement Act of 2012”.

1 **SEC. 302. PROTECTION FOR EMERGENCY AND RELATED**  
2 **SERVICES FURNISHED PURSUANT TO**  
3 **EMTALA.**

4 Section 224(g) of the Public Health Service Act (42  
5 U.S.C. 233(g)) is amended—

6 (1) in paragraph (4), by striking “An entity”  
7 and inserting “Subject to paragraph (6), an entity”;  
8 and

9 (2) by adding at the end the following:

10 “(6)(A) For purposes of this section—

11 (i) an entity described in subparagraph  
12 (B) shall be considered to be an entity de-  
13 scribed in paragraph (4); and

14 (ii) the provisions of this section shall  
15 apply to an entity described in subparagraph  
16 (B) in the same manner as such provisions  
17 apply to an entity described in paragraph (4),  
18 except that—

19 (I) notwithstanding paragraph  
20 (1)(B), the deeming of any entity described  
21 in subparagraph (B), or of an officer, gov-  
22 erning board member, employee, con-  
23 tractor, or on-call provider of such an enti-  
24 ty, to be an employee of the Public Health  
25 Service for purposes of this section shall  
26 apply only with respect to items and serv-



1           ices that are furnished to an individual  
2           pursuant to section 1867 of the Social Se-  
3           curity Act and to post stabilization services  
4           (as defined in subparagraph (D)) furnished  
5           to such an individual;

6           “(II) nothing in paragraph (1)(D)  
7           shall be construed as preventing a physi-  
8           cian or physician group described in sub-  
9           paragraph (B)(ii) from making the appli-  
10          cation referred to in such paragraph or as  
11          conditioning the deeming of a physician or  
12          physician group that makes such an appli-  
13          cation upon receipt by the Secretary of an  
14          application from the hospital or emergency  
15          department that employs or contracts with  
16          the physician or group, or enlists the phy-  
17          sician or physician group as an on-call pro-  
18          vider;

19          “(III) notwithstanding paragraph (3),  
20          this paragraph shall apply only with re-  
21          spect to causes of action arising from acts  
22          or omissions that occur on or after Janu-  
23          ary 1, 2012;

1           “(IV) paragraph (5) shall not apply to  
2 a physician or physician group described in  
3 subparagraph (B)(ii);

4           “(V) the Attorney General, in con-  
5 sultation with the Secretary, shall make  
6 separate estimates under subsection (k)(1)  
7 with respect to entities described in sub-  
8 paragraph (B) and entities described in  
9 paragraph (4) (other than those described  
10 in subparagraph (B)), and the Secretary  
11 shall establish separate funds under sub-  
12 section (k)(2) with respect to such groups  
13 of entities, and any appropriations under  
14 this subsection for entities described in  
15 subparagraph (B) shall be separate from  
16 the amounts authorized by subsection  
17 (k)(2);

18           “(VI) notwithstanding subsection  
19 (k)(2), the amount of the fund established  
20 by the Secretary under such subsection  
21 with respect to entities described in sub-  
22 paragraph (B) may exceed a total of  
23 \$10,000,000 for a fiscal year; and

24           “(VII) subsection (m) shall not apply  
25 to entities described in subparagraph (B).

1           “(B) An entity described in this subparagraph  
2       is—

3           “(i) a hospital or an emergency depart-  
4           ment to which section 1867 of the Social Secu-  
5           rity Act applies; and

6           “(ii) a physician or physician group that is  
7           employed by, is under contract with, or is an  
8           on-call provider of such hospital or emergency  
9           department, to furnish items and services to in-  
10          dividuals under such section.

11          “(C) For purposes of this paragraph, the term  
12          ‘on-call provider’ means a physician or physician  
13          group that—

14          “(i) has full, temporary, or locum tenens  
15          staff privileges at a hospital or emergency de-  
16          partment to which section 1867 of the Social  
17          Security Act applies; and

18          “(ii) is not employed by or under contract  
19          with such hospital or emergency department,  
20          but agrees to be ready and available to provide  
21          services pursuant to section 1867 of the Social  
22          Security Act or post-stabilization services to in-  
23          dividuals being treated in the hospital or emer-  
24          gency department with or without compensation  
25          from the hospital or emergency department.

1           “(D) For purposes of this paragraph, the term  
2           ‘post stabilization services’ means, with respect to an  
3           individual who has been treated by an entity de-  
4           scribed in subparagraph (B) for purposes of com-  
5           plying with section 1867 of the Social Security Act,  
6           services that are—

7                   “(i) related to the condition that was so  
8                   treated; and

9                   “(ii) provided after the individual is sta-  
10                  bilized in order to maintain the stabilized condi-  
11                  tion or to improve or resolve the condition of  
12                  the individual.

13           “(E)(i) Nothing in this paragraph (or in any  
14           other provision of this section as such provision ap-  
15           plies to entities described in subparagraph (B) by  
16           operation of subparagraph (A)) shall be construed as  
17           authorizing or requiring the Secretary to make pay-  
18           ments to such entities, the budget authority for  
19           which is not provided in advance by appropriation  
20           Acts.

21                   “(ii) The Secretary shall limit the total amount  
22                  of payments under this paragraph for a fiscal year  
23                  to the total amount appropriated in advance by ap-  
24                  propriation Acts for such purpose for such fiscal  
25                  year. If the total amount of payments that would

1 otherwise be made under this paragraph for a fiscal  
2 year exceeds such total amount appropriated, the  
3 Secretary shall take such steps as may be necessary  
4 to ensure that the total amount of payments under  
5 this paragraph for such fiscal year does not exceed  
6 such total amount appropriated.”.

7 **SEC. 303. CONSTITUTIONAL AUTHORITY.**

8 The constitutional authority upon which this title  
9 rests is the power of the Congress to provide for the gen-  
10 eral welfare, to regulate commerce, and to make all laws  
11 which shall be necessary and proper for carrying into exe-  
12 cution Federal powers, as enumerated in section 8 of arti-  
13 cle I of the Constitution of the United States.

14 **TITLE IV—RESTORING THE AP-  
15 PPLICATION OF ANTITRUST  
16 LAWS TO HEALTH SECTOR IN-  
17 SURERS**

18 **SEC. 401. SHORT TITLE.**

19 This title may be cited as the “Health Insurance In-  
20 dustry Fair Competition Act of 2012”.

21 **SEC. 402. APPLICATION OF THE ANTITRUST LAWS TO THE  
22 BUSINESS OF HEALTH INSURANCE.**

23 (a) AMENDMENT TO McCARRAN-FERGUSON ACT.—  
24 Section 3 of the Act of March 9, 1945 (15 U.S.C. 1013),

1 commonly known as the McCarran-Ferguson Act, is  
2 amended by adding at the end the following:

3       “(c) Nothing contained in this Act shall modify, im-  
4 pair, or supersede the operation of any of the antitrust  
5 laws with respect to the business of health insurance. For  
6 purposes of the preceding sentence, the term ‘antitrust  
7 laws’ has the meaning given it in subsection (a) of the  
8 first section of the Clayton Act, except that such term in-  
9 cludes section 5 of the Federal Trade Commission Act to  
10 the extent that such section 5 applies to unfair methods  
11 of competition. For the purposes of this subsection, the  
12 term ‘business of health insurance’ shall—

13               “(1) mean ‘health insurance coverage’ offered  
14 by a ‘health insurance issuer’ as those terms are de-  
15 fined in section 9001 of the Patient Protection and  
16 Affordable Care Act, which incorporates by reference  
17 and utilizes the definitions included in section 9832  
18 of the Internal Revenue Code (26 U.S.C. 9832); and

19               “(2) not include—

20                       “(A) life insurance and annuities;

21                       “(B) property or casualty insurance, in-  
22 cluding but not limited to, automobile, medical  
23 malpractice or workers’ compensation insur-  
24 ance; or

1           “(C) any insurance or benefits defined as  
2           ‘excepted benefits’ under section 9832(c) of the  
3           Internal Revenue Code (26 U.S.C. 9832(c)),  
4           whether offered separately or in combination  
5           with products described in subparagraph (A).”.

6           (b) RELATED PROVISION.—For purposes of section  
7 5 of the Federal Trade Commission Act (15 U.S.C. 45)  
8 to the extent such section applies to unfair methods of  
9 competition, section 3(e) of the McCarran-Ferguson Act  
10 shall apply with respect to the business of health insurance  
11 without regard to whether such business is carried on for  
12 profit, notwithstanding the definition of “Corporation”  
13 contained in section 4 of the Federal Trade Commission  
14 Act.

15           (c) LIMITATION ON CLASS ACTIONS.—

16           (1) LIMITATION.—No class action may be  
17 heard in a Federal or State court on a claim against  
18 a person engaged in the business of health insurance  
19 for a violation of any of the antitrust laws (as de-  
20 fined in section 3(e) of the Act of March 9, 1945  
21 (15 U.S.C. 1013), commonly known as the  
22 McCarran-Ferguson Act).

23           (2) EXEMPTION.—Paragraph (1) shall not  
24 apply with respect to any action commenced—

25           (A) by the United States or any State; or

1 (B) by a named claimant for an injury  
2 only to itself.

3 **TITLE V—PROTECTIONS FOR**  
4 **GOOD SAMARITAN HEALTH**  
5 **PROFESSIONALS**

6 **SEC. 501. SHORT TITLE.**

7 This title may be cited as the “Good Samaritan  
8 Health Professionals Act of 2012”.

9 **SEC. 502. LIMITATION ON LIABILITY FOR VOLUNTEER**  
10 **HEALTH CARE PROFESSIONALS.**

11 (a) IN GENERAL.—Title II of the Public Health Serv-  
12 ice Act (42 U.S.C. 202 et seq.) is amended by inserting  
13 after section 224 the following:

14 **“SEC. 224A. LIMITATION ON LIABILITY FOR VOLUNTEER**  
15 **HEALTH CARE PROFESSIONALS.**

16 “(a) LIMITATION ON LIABILITY.—Except as provided  
17 in subsection (b), a health care professional shall not be  
18 liable under Federal or State law for any harm caused  
19 by an act or omission of the professional if—

20 “(1) the professional is serving as a volunteer  
21 for purposes of responding to a disaster; and

22 “(2) the act or omission occurs—

23 “(A) during the period of the disaster, as  
24 determined under the laws listed in subsection

25 (e)(1);



1           “(B) in the health care professional’s ca-  
2           capacity as such a volunteer; and

3           “(C) in a good faith belief that the indi-  
4           vidual being treated is in need of health care  
5           services.

6           “(b) EXCEPTIONS.—Subsection (a) does not apply  
7 if—

8           “(1) the harm was caused by an act or omission  
9           constituting willful or criminal misconduct, gross  
10          negligence, reckless misconduct, or a conscious fla-  
11          grant indifference to the rights or safety of the indi-  
12          vidual harmed by the health care professional; or

13          “(2) the health care professional rendered the  
14          health care services under the influence (as deter-  
15          mined pursuant to applicable State law) of intoxi-  
16          cating alcohol or an intoxicating drug.

17          “(c) STANDARD OF PROOF.—In any civil action or  
18          proceeding against a health care professional claiming that  
19          the limitation in subsection (a) applies, the plaintiff shall  
20          have the burden of proving by clear and convincing evi-  
21          dence the extent to which limitation does not apply.

22          “(d) PREEMPTION.—

23          “(1) IN GENERAL.—This section preempts the  
24          laws of a State or any political subdivision of a State  
25          to the extent that such laws are inconsistent with

1 this section, unless such laws provide greater protec-  
2 tion from liability.

3 “(2) VOLUNTEER PROTECTION ACT.—Protec-  
4 tions afforded by this section are in addition to those  
5 provided by the Volunteer Protection Act of 1997.

6 “(e) DEFINITIONS.—In this section:

7 “(1) The term ‘disaster’ means—

8 “(A) a national emergency declared by the  
9 President under the National Emergencies Act;

10 “(B) an emergency or major disaster de-  
11 clared by the President under the Robert T.  
12 Stafford Disaster Relief and Emergency Assist-  
13 ance Act; or

14 “(C) a public health emergency determined  
15 by the Secretary under section 319 of this Act.

16 “(2) The term ‘harm’ includes physical, non-  
17 physical, economic, and noneconomic losses.

18 “(3) The term ‘health care professional’ means  
19 an individual who is licensed, certified, or authorized  
20 in one or more States to practice a health care pro-  
21 fession.

22 “(4) The term ‘State’ includes each of the sev-  
23 eral States, the District of Columbia, the Common-  
24 wealth of Puerto Rico, the Virgin Islands, Guam,  
25 American Samoa, the Northern Mariana Islands,

1 and any other territory or possession of the United  
2 States.

3 “(5)(A) The term ‘volunteer’ means a health  
4 care professional who, with respect to the health  
5 care services rendered, does not receive—

6 “(i) compensation; or

7 “(ii) any other thing of value in lieu of  
8 compensation, in excess of \$500 per year.

9 “(B) For purposes of subparagraph (A), the  
10 term ‘compensation’—

11 “(i) includes payment under any insurance  
12 policy or health plan, or under any Federal or  
13 State health benefits program; and

14 “(ii) excludes—

15 “(I) reasonable reimbursement or al-  
16 lowance for expenses actually incurred;

17 “(II) receipt of paid leave; and

18 “(III) receipt of items to be used ex-  
19 clusively for rendering the health services  
20 in the health care professional’s capacity  
21 as a volunteer described in subsection  
22 (a)(1).”.

23 (b) EFFECTIVE DATE.—

1           (1) IN GENERAL.—This title and the amend-  
2           ment made by subsection (a) shall take effect 90  
3           days after the date of the enactment of this title.

4           (2) APPLICATION.—This title applies to any  
5           claim for harm caused by an act or omission of a  
6           health care professional where the claim is filed on  
7           or after the effective date of this title, but only if the  
8           harm that is the subject of the claim or the conduct  
9           that caused such harm occurred on or after such ef-  
10          fective date.

Passed the House of Representatives March 22,  
2012.

Attest:

KAREN L. HAAS,  
*Clerk.*



**Calendar No. 338**

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**H. R. 5**

**AN ACT**

To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system.

MARCH 26, 2012

Read the second time and placed on the calendar