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.

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Medical Liability Reform Act of 2009''.

SEC. 2. FINDINGS.

Congress makes the following findings:

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

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

(3) The non-partisan Congressional Budget Office estimated that the Federal Government could directly save about $5,600,000,000 by enacting certain medical liability reforms, and that total health care spending could be reduced even further if these reforms reduced the practice of defensive medicine.

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

(5) Medicaid and Medicare costs must be lowered to keep these crucial programs solvent.

(6) In part because of the costs of medical liability, 40 percent of physicians refuse to see new Medicaid patients.

(7) Reform of the medical liability laws has been proven to increase access to doctors and specialists while lowering health care costs.

(8) In 2003, Texas adopted medical liability reforms that placed a cap on non-economic damages in medical liability cases and combated junk science by raising the standards of qualification for expert witnesses.

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

(10) Because the Texas reforms led to more affordable health insurance premiums, more than 400,000 additional Texans are covered by health insurance than if reform had not passed.

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

(12) The growth rate in the number of physicians in Texas was particularly pronounced in long-underserved geographic areas such as the rural and border regions, and in key specialties such as obstetrics, neurosurgery, and orthopedic surgery.

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

ity suits and by raising the standards of qualification for expert witnesses.

(14) The health care and insurance industries are industries affecting interstate commerce and the health care liability litigation systems existing throughout the United States are activities that affect interstate commerce by contributing to the high costs of health care and premiums for health care liability insurance purchased by health care system providers.

(15) The health care liability litigation systems existing throughout the United States have a significant effect on the amount, distribution, and use of Federal funds because of—

(A) the large number of individuals who receive health care benefits under programs operated or financed by the Federal Government;

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

(C) the large number of health care providers who provide items or services for which the Federal Government makes payments.

SEC. 3. DEFINITIONS.

In this Act:

(1) ALTERNATIVE DISPUTE RESOLUTION SYSTEM; ADR.—The term ''alternative dispute resolution system'' or ''ADR'' means a system that provides for the resolution of health care lawsuits in a manner other than through a civil action brought in a State or Federal court.

(2) CLAIMANT.—The term ''claimant'' means any person who brings a health care lawsuit, including a person who asserts or claims a right to legal or equitable contribution, indemnity or subrogation, arising out of a health care liability claim or action, and any person on whose behalf such a claim is asserted or such an action is brought, whether deceased, incompetent, or a minor.

(3) COMPENSATORY DAMAGES.—The term ''compensatory damages'' means objectively verifiable monetary losses incurred as a result of the provision of, use of, or payment for (or failure to provide, use, or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities, damages for physical and emotional pain, suffering, in-

convenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature. Such term includes economic damages and noneconomic damages, as such terms are defined in this section.

(4) ECONOMIC DAMAGES.—The term ''economic damages'' means objectively verifiable monetary losses incurred as a result of the provision of, use of, or payment for (or failure to provide, use, or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities.

(5) HEALTH CARE GOODS OR SERVICES.—The term ''health care goods or services'' means any goods or services provided by a health care institution, provider, or by any individual working under the supervision of a health care provider, that relates to the diagnosis, prevention, care, or treatment of any human disease or impairment, or the assessment of the health of human beings.

(6) HEALTH CARE INSTITUTION.—The term ''health care institution'' means any entity licensed under Federal or State law to provide health care services (including but not limited to ambulatory surgical centers, assisted living facilities, emergency medical services providers, hospices, hospitals and hospital systems, nursing homes, or other entities licensed to provide such services).

(7) HEALTH CARE LAWSUIT.—The term ''health care lawsuit'' means any health care liability claim concerning the provision of health care goods or services affecting interstate commerce, or any health care liability action concerning the provision of (or the failure to provide) health care goods or services affecting interstate commerce, brought in a State or Federal court or pursuant to an alternative dispute resolution system, against a health care provider or a health care institution regardless of the theory of liability on which the claim is based, or the number of claimants, plaintiffs, defendants, or other parties, or the number of claims or causes of action, in which the claimant alleges a health care liability claim.

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

tion brought in a State or Federal Court or pursuant to an alternative dispute resolution system, against a health care provider or a health care institution regardless of the theory of liability on which the claim is based, or the number of plaintiffs, defendants, or other parties, or the number of causes of action, in which the claimant alleges a health care liability claim.

(9) HEALTH CARE LIABILITY CLAIM.—The term ''health care liability claim'' means a demand by any person, whether or not pursuant to ADR, against a health care provider or health care institution, including third-party claims, cross-claims, counter-claims, or contribution claims, which are based upon the provision of, use of, or payment for (or the failure to provide, use, or pay for) health care services, regardless of the theory of liability on which the claim is based, or the number of plaintiffs, defendants, or other parties, or the number of causes of action.

(10) HEALTH CARE PROVIDER.—

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

1395x(r)), registered nurse, dentist, podiatrist, pharmacist, chiropractor, or optometrist) required by State or Federal law to be licensed, registered, or certified to provide health care services, and being either so licensed, registered, or certified, or exempted from such requirement by other statute or regulation.

(B) TREATMENT OF CERTAIN PROFESSIONAL ASSOCIATIONS.—For purposes of this Act, a professional association that is organized under State law by an individual physician or group of physicians, a partnership or limited liability partnership formed by a group of physicians, a nonprofit health corporation certified under State law, or a company formed by a group of physicians under State law shall be treated as a health care provider under subparagraph (A).

(11) NONECONOMIC DAMAGES.—The term ''noneconomic damages'' means damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputa-

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

(12) STATE.—The term ''State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SEC. 4. COMPENSATING PATIENT INJURY.

(a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any health care lawsuit, nothing in this Act shall limit the recovery by a claimant of the full amount of the available economic damages, notwithstanding the limitation contained in subsection (b).

(b) ADDITIONAL NONECONOMIC DAMAGES.—

(1) HEALTH CARE PROVIDERS.—In any health care lawsuit where final judgment is rendered against a health care provider, the amount of noneconomic damages recovered from the provider, if otherwise available under applicable Federal or State law, may be as much as $250,000, regardless of the number of parties other than a health care institution against whom the action is brought or the num-

ber of separate claims or actions brought with respect to the same occurrence.

(2) HEALTH CARE INSTITUTIONS.—

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

(B) MULTIPLE INSTITUTIONS.—In any health care lawsuit where final judgment is rendered against more than one health care institution, the amount of noneconomic damages recovered from each institution, if otherwise available under applicable Federal or State law, may be as much as $250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same occurrence, except that the total amount recovered

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

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

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

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

(3) an award for noneconomic damages in excess of the limitations provided for in subsection (b) shall be reduced either before the entry of judgment, or by amendment of the judgment after entry of judgment, and such reduction shall be made before accounting for any other reduction in damages required by law; and

(4) if separate awards are rendered for past and future noneconomic damages and the combined awards exceed the limitations described in subsection (b), the future noneconomic damages shall be reduced first.

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

damages allocated to such party in direct proportion to such party's percentage of responsibility. A separate judgment shall be rendered against each such party for the amount allocated to such party. For purposes of this section, the trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

SEC. 5. ENSURING RELIABLE EXPERT TESTIMONY.

(a) EXPERT WITNESS QUALIFICATIONS.—

(1) IN GENERAL.—In any health care lawsuit, an individual shall not give expert testimony on the appropriate standard of practice or care involved unless the individual is licensed as a health professional in 1 or more States and the individual meets the following criteria:

(A) If the party against whom or on whose behalf the testimony is to be offered is or claims to be a specialist, the expert witness shall specialize at the time of the occurrence that is the basis for the lawsuit in the same specialty or claimed specialty as the party against whom or on whose behalf the testimony is to be offered. If the party against whom or on whose behalf the testimony is to be offered is or claims to be a specialist who is board certified, the expert witness shall be a specialist

who is board certified in that specialty or claimed specialty.

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

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

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant and, if the defendant is or claims to be a specialist, in an accredited health professional school or accredited residency or clinical research program in the same specialty or claimed specialty.

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

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

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession as the defendant.

(2) HEALTH CARE INSTITUTIONS.—If the defendant in a health care lawsuit is a health care institution that employs a health professional against whom or on whose behalf the testimony is offered, the provisions of paragraph (1) apply as if the health professional were the party or defendant against whom or on whose behalf the testimony is offered.

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

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

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

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

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

(2) PRELIMINARY EXPERT OPINION.—

(A) IN GENERAL.—If the claimant in any health care lawsuit certifies that expert opinion testimony is necessary as required under paragraph (1), the claimant shall serve a preliminary expert opinion affidavit. The claimant may provide affidavits from as many experts as the claimant determines to be necessary.

(B) REQUIREMENTS.—A preliminary expert opinion affidavit under subparagraph (A) shall contain at least the following information:

(i) The expert's qualifications to express an opinion on the health care professionals standard of care or liability for the claim.

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

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

(iv) The manner in which the health care professional's acts, errors, or omissions caused or contributed to the damages or other relief sought by the claimant.

(3) DISPUTES.—If the claimant in any health care lawsuit or its attorney certifies that expert testimony is not required for the claim and the defendant disputes that certification in good faith, the defendant may apply by motion to the court for an order requiring the claimant to obtain and serve a preliminary expert opinion affidavit under this subsection, and such motion may be granted by the court.

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

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

SEC. 6. EFFECT ON OTHER LAWS.

(a) GENERAL VACCINE INJURY.—

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

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

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

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

(b) SMALLPOX VACCINE INJURY.—

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

brought for a smallpox vaccine-related injury or death—

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

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

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

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

SEC. 7. STATE FLEXIBILITY AND PROTECTION OF STATES' RIGHTS.

(a) HEALTH CARE LAWSUITS.—The provisions governing health care lawsuits set forth in this Act shall preempt, subject to subsections (b) and (c), State law to the extent that State law prevents the application of any pro-

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

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

(c) PROTECTION OF STATE'S RIGHTS AND OTHER LAWS.—

(1) IN GENERAL.—Any issue that is not governed by a provision of law established by or under this Act (including the State standards of negligence) shall be governed by otherwise applicable Federal or State law.

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

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

substantive protections for a health care provider or health care institution from liability, loss, or damages than those provided by this Act;

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

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

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

SEC. 8. APPLICABILITY; EFFECTIVE DATE.

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

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