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To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 4, 1995

Mr. KYL introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To award grants to States to promote the development of alternative dispute resolution systems for medical malpractice claims, to generate knowledge about such systems through expert data gathering and assessment activities, to promote uniformity and to curb excesses in State liability systems through federally-mandated liability reforms, and for other purposes.

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 Care Injury Compensation Reform Act of 1995''.

SEC. 2. FINDINGS; PURPOSE.

(a) FINDINGS.—Congress finds that—

(1) the health care and insurance industries are industries affecting interstate commerce and the medical malpractice litigation systems existing throughout the United States affect interstate commerce by contributing to the high cost of health care and premiums for malpractice insurance purchased by health care providers;

(2) the Federal Government has a major interest in health care as a direct provider of health care through the Public Health Service, as a source of payment for health care through Medicare, Medicaid, and other programs, and has a demonstrated interest in assessing the quality of care, access to care, and the costs of care through the evaluative activities of several Federal agencies;

(3) there is increasing concern that health care liability claims have significant negative effects on the health care system, including—

(A) increasing costs attributable to defensive medical practices, including the rising cost of medical liability insurance and costs attributable to the inefficiencies in the civil justice system;

(B) adverse effects on the quality of health care through the encouragement of defensive health care practices including unnecessary tests and procedures; and

(C) adverse effects on patient access to care because the fear of liability discourages health care professionals from continuing to practice in high risk specialties and certain geographic regions of the country;

(4) it has been demonstrated that the civil justice system is a costly, inefficient, and inequitable mechanism for resolving claims against health care providers and producers;

(5) a disproportionately large percentage of funds expended to compensate patients who suffer health care injuries is distributed to a few individuals, while others are denied adequate compensation;

(6) an exorbitant portion of awards in medical malpractice actions goes towards paying the transaction costs of the judicial system rather than compensating individuals for health care injuries; and

(7) there is optimism that alternative dispute resolution systems have the potential to significantly improve the adverse effects of the medical liability environment; however, more data and analysis is

necessary to fully understand the benefits of various procedural devices.

(b) PURPOSE.—The purposes of this Act are to—

(1) provide incentives to States to develop alternative dispute resolution procedures to attain a more efficient, expeditious, and equitable resolution of health care malpractice disputes;

(2) enhance general knowledge concerning the benefits of different forms of alternative dispute resolution mechanisms; and

(3) establish uniformity and curb excesses in the State-based medical liability systems through federally-mandated reforms.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) ALTERNATIVE DISPUTE RESOLUTION SYSTEM.—The term ''alternative dispute resolution system'' means a system that is enacted or adopted by a State to resolve medical malpractice claims or medical product liability claims instead of resorting to a judicial proceeding in a State court.

(2) CLAIMANT.—The term ''claimant'' means any person who brings a health care liability action and, in the case of an individual who is deceased, in-

competent, or a minor, the person on whose behalf such an action is brought.

(3) CLEAR AND CONVINCING EVIDENCE.—The term ''clear and convincing evidence'' is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, except that such measure or degree of proof is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt.

(4) ECONOMIC LOSSES.—The term ''economic losses'' means losses for hospital and other medical expenses, lost wages, lost employment, and other pecuniary losses.

(5) HEALTH CARE LIABILITY ACTION.—The term ''health care liability action'' means any civil action brought pursuant to State law in which a plaintiff alleges a medical malpractice claim against a health care provider, health care professional, or medical product producer.

(6) HEALTH CARE PROFESSIONAL.—The term ''health care professional'' means any individual who provides health care services in a State and who is required by State law or regulation to be licensed or

certified by the State to provide such services in the State.

(7) HEALTH CARE PROVIDER.—The term ''health care provider'' means any organization or institution that is engaged in the delivery of health care services in a State that is required by State law or regulation to be licensed or certified by the State to engage in the delivery of such services in the State.

(8) INJURY.—The term ''injury'' means any illness, disease, or other harm that is the subject of a medical malpractice claim or a medical product liability claim.

(9) MEDICAL MALPRACTICE CLAIM.—The term ''medical malpractice claim'' means any claim relating to the provision of (or the failure to provide) health care services without regard to the theory of liability asserted, and includes any third-party claim, cross-claim, counterclaim, or contribution claim in a health care liability action.

(10) MEDICAL PRODUCT.—The term ''medical product'' means a device (as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act) or a drug (as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act).

(11) MEDICAL PRODUCT LIABILITY CLAIM.—The term ''medical product liability claim'' means any claim in which a claimant alleges an injury arising from or relating to the use of a medical product.

(12) MEDICAL PRODUCT PRODUCER.—The term ''medical product producer'' means any entity that is the designer, manufacturer, producer, or seller of a medical product that is the subject of a medical product liability claim.

(13) NONECONOMIC LOSSES.—The term ''noneconomic losses'' means losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary losses.

(14) SECRETARY.—The term ''Secretary'' means the Secretary of Health and Human Services.

(15) STATE.—The term ''State'' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

TITLE I—GRANTS TO STATES FOR ALTERNATIVE DISPUTE RESOLUTION SYSTEMS

SEC. 101. GRANTS TO STATES.

(a) IN GENERAL.—The Secretary shall make grants to States for the implementation and evaluation of alternative dispute resolution systems.

(b) ELIGIBILITY.—A State is eligible to receive a grant under this section if the State submits to the Secretary an application at such time, in such form, and containing such information and assurances as the Secretary may require, including—

(1) a description of the alternative dispute resolution system that the State intends to implement with amounts received under the grant;

(2) assurances that the State will comply with all data gathering requirements promulgated by the Secretary under section 102(a); and

(3) any information and assurances necessary to enable the Secretary to determine whether the State's alternative dispute resolution system meets the qualification standards for such systems developed by the Secretary under section 102(a).

(c) NUMBER OF GRANTS.—

(1) IN GENERAL.—Except as provided in paragraph (2), the Secretary shall award not less than 10 grants each fiscal year under this section.

(2) EXCEPTION.—Notwithstanding paragraph (1), the Secretary may award less than 10 grants under this section in a fiscal year if the Secretary determines that there are an inadequate number of applications submitted that meet the eligibility and approval requirements of this section in such fiscal year.

(d) DESIGNATION OF MODEL STATES.—

(1) IN GENERAL.—The Secretary shall designate each State receiving a grant under this section as a model alternative dispute resolution State.

(2) EXTENSION OF PERIOD OF GRANT.—Upon application to the Secretary, a State designated under paragraph (1) shall be eligible for a 2-year extension of the grant received under this section.

(3) DISSEMINATION OF INFORMATION TO OTHER STATES.—The Secretary shall disseminate information on the alternative dispute resolution systems implemented by the States designated under paragraph (1) to other States, health care professionals, health care providers, and other interested parties.

SEC. 102. ADMINISTRATION.

(a) STANDARDS AND REGULATIONS FOR ALTERNATIVE DISPUTE RESOLUTION GRANT PROGRAM.—

(1) IN GENERAL.—In consultation with the Director of the Agency for Health Care Policy and Research, the Secretary shall develop and promulgate standards and regulations necessary to carry out the grant program established under section 101, including—

(A) qualification standards for alternative dispute resolution systems that States must meet in order to receive grants under such section; and

(B) regulations establishing data gathering requirements for States receiving grants under such section.

(2) CRITERIA FOR PROGRAMS.—In developing qualification standards for alternative dispute resolution systems under paragraph (1)(A), the Secretary shall take into account the effectiveness of such systems in—

(A) supporting access to health care;

(B) encouraging improvements in the quality of health care;

(C) enhancing and not impairing the physician-patient relationship;

(D) encouraging innovation that leads to an improved level of health care;

(E) compensating for avoidable medical injury due to provider fault and not compensating for injury which is unavoidable by standard medical practice;

(F) resolving claims promptly and in amounts proportional to the injury;

(G) providing predictable outcomes; and

(H) operating efficiently in terms of financial costs, professional energies, and governmental processes.

(b) TECHNICAL ASSISTANCE.—The Secretary shall provide States with technical assistance to enable States to submit applications for grants under section 101, including information on the establishment and operation of alternative dispute resolution systems.

(c) EVALUATION OF ALTERNATIVE DISPUTE RESOLUTION SYSTEMS.—Not later than 4 years after awarding the first grant to a State under section 101, the Secretary shall prepare and submit to Congress a report describing and evaluating the alternative dispute resolution systems implemented by States with funds provided under such grants, and shall include in the report—

(1) information on—

(A) the effect of such systems on the cost of health care within the State,

(B) the impact of such systems on the access of individuals to health care within the State, and

(C) the effect of such systems on the quality of health care provided within such State; and

(2) an analysis of the feasibility and desirability of establishing a national alternative dispute resolution system.

TITLE II—UNIFORM STANDARDS FOR MALPRACTICE CLAIMS

SEC. 201. APPLICABILITY.

Except as provided in section 209, this title shall apply to any health care liability action brought in a Federal or State court and to any medical malpractice claim or medical product liability claim subject to an alternative dispute resolution system.

SEC. 202. CALCULATION AND PAYMENT OF DAMAGES.

(a) PERIODIC PAYMENTS FOR FUTURE LOSSES.—No person may be required to pay more than $100,000 in a single payment in damages (whether for economic or noneconomic losses) for expenses to be incurred in the future, but shall be permitted to make such payments on a peri-

odic basis. The periods for such payments shall be determined by the court, based upon projections of when such expenses are likely to be incurred.

(b) LIMITATION ON NONECONOMIC LOSSES.—The total amount of damages that may be awarded to an individual and the family members of such individual for noneconomic losses resulting from an injury which is the subject of an action or claim may not exceed $250,000, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

(c) MANDATORY OFFSETS FOR DAMAGES PAID BY A COLLATERAL SOURCE.—

(1) IN GENERAL.—The total amount of damages received by an individual shall be reduced (in accordance with paragraph (2)) by any other payment that has been or will be made to the individual to compensate the individual for the injury that was the subject of the action or claim.

(2) AMOUNT OF REDUCTION.—The amount by which an award of damages to an individual shall be reduced under paragraph (1) shall be—

(A) the total amount of any payments (other than such award) that have been made

or that will be made to the individual to compensate the individual for the injury that was the subject of the action or claim; minus

(B) the amount paid by the individual (or by the spouse, parent, or legal guardian of the individual) to secure the payments described in subparagraph (A).

(d) ATTORNEY'S FEES.—A claimant's attorney's fees may not exceed—

(1) 25 percent of the first $150,000 of any award or settlement paid to the claimant; or

(2) 15 percent of any additional amounts paid to the claimant.

(e) LIMITATION ON PUNITIVE DAMAGES.—The total amount of punitive damages that may be assessed with respect to an action or claim may not exceed twice the total amount of the damages awarded to compensate the claimant for losses resulting from the injury which is the subject of the claim or action, regardless of the number of health care professionals, health care providers, and health care producers against whom the action or claim is brought or the number of actions or claims brought with respect to the injury.

SEC. 203. JOINT AND SEVERAL LIABILITY FOR NON-ECONOMIC LOSSES.

The liability of each defendant for noneconomic losses shall be several only and shall not be joint, and each defendant shall be liable only for the amount of noneconomic losses allocated to the defendant in direct proportion to the defendant's percentage of responsibility (as determined by the trier of fact).

SEC. 204. UNIFORM STATUTE OF LIMITATIONS.

(a) IN GENERAL.—No medical malpractice claim or medical product liability claim may be initiated after the expiration of the 2-year period that begins on the earlier of the date which the alleged injury that is the subject of such action was discovered or the date on which such injury should reasonably have been discovered, but in no event after the expiration of the 4-year period that begins on the date the alleged injury occurred.

(b) EXCEPTION FOR MINORS.—In the case of an alleged injury suffered by a minor who has not attained 6 years of age, no medical malpractice liability claim or medical product liability claim may be brought after the expiration of the 2-year period that begins on the date the alleged injury that is the subject of the action should reasonably have been discovered, but in no event after the date on which the minor attains 10 years of age.

SEC. 205. SPECIAL PROVISION FOR CERTAIN OBSTETRIC SERVICES.

(a) IN GENERAL.—In the case of a medical malpractice claim or medical product liability claim relating to services provided during labor or the delivery of a baby, if the defendant health care professional did not previously treat the plaintiff for the pregnancy, the trier of fact may not find that the defendant committed malpractice and may not assess damages against the defendant unless the malpractice is proven by clear and convincing evidence.

(b) APPLICABILITY TO GROUP PRACTICES OR AGREEMENTS AMONG PROVIDERS.—For purposes of subsection (a), a health care professional shall be considered to have previously treated an individual for a pregnancy if the professional is a member of a group practice whose members previously treated the individual for the pregnancy or is providing services to the individual during labor or the delivery of a baby pursuant to an agreement with another professional.

SEC. 206. UNIFORM STANDARD FOR DETERMINING NEGLIGENCE.

(a) STANDARD OF REASONABLENESS.—Except as provided in subsection (b), a defendant may not be found to have committed malpractice unless the defendant's conduct at the time of providing the health care services that are the subject of the action was not reasonable.

(b) ACTIONS BROUGHT UNDER STRICT LIABILITY.—Subsection (a) shall not apply to any action in which the claimant asserts that the defendant is liable under a theory of strict liability.

SEC. 207. RESTRICTIONS ON PUNITIVE DAMAGES RELATING TO MEDICAL PRODUCT LIABILITY CLAIMS.

(a) RESTRICTIONS FOR APPROVED PRODUCTS OR DEVICES.—

(1) IN GENERAL.—Punitive damages otherwise permitted by applicable law shall not be awarded with respect to any medical product liability claim alleged against a medical product producer if—

(A) the drug or device that is the subject of such claim—

(i) was subject to approval under section 505 or premarket approval under section 515 of the Federal Food, Drug, and Cosmetic Act by the Food and Drug Administration with respect to—

(I) the safety of the formulation or performance of the aspect of the drug or device; or

(II) the adequacy of the packaging or labeling of the drug or device, and

(ii) was approved by the Food and Drug Administration; or

(B) the drug or device is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration and applicable regulations, including packaging and labeling regulations.

(2) EXCEPTION IN CASE OF WITHHELD INFORMATION, MISREPRESENTATION, OR ILLEGAL PAYMENT.—The provisions of paragraph (1) shall not apply if it is determined on the basis of clear and convincing evidence that the medical product producer—

(A) withheld from or misrepresented to the Food and Drug Administration information concerning such drug or device that is required to be submitted under the Federal Food, Drug, and Cosmetic Act or section 352 of the Public Health Service Act that is material and relevant to the action; or

(B) made an illegal payment to an official of the Food and Drug Administration for the

purpose of securing approval of the drug or device.

(b) SEPARATE PROCEEDING TO DETERMINE PUNITIVE DAMAGES.—

(1) CONSIDERATIONS.—At the request of a medical product producer in a health care liability action in which a medical product liability claim is alleged against the producer, the trier of fact shall consider in a separate proceeding—

(A) whether punitive damages are to be awarded and the amount of the award; or

(B) the amount of punitive damages following a determination of punitive liability.

(2) EVIDENCE.—If a separate proceeding is requested in accordance with paragraph (1), evidence relevant only to the claim of punitive damages (as determined by applicable State law) shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded to the claimant.

(c) CRITERIA FOR DETERMINING AMOUNT OF PUNITIVE DAMAGES.—Subject to the limitation on punitive damages provided in section 202(e), all relevant evidence shall be considered in determining the amount of punitive

damages assessed with respect to a medical product liability claim, including—

(1) the financial condition of the medical product producer;

(2) the severity of the harm caused by the conduct of the medical product producer;

(3) the duration of the conduct or any concealment of the conduct by the medical product producer;

(4) the profitability of the conduct to the medical product producer;

(5) the number of products sold by the medical product producer of the kind causing the harm complained of by the claimant;

(6) awards of punitive or exemplary damages to persons similarly situated to the claimant;

(7) prospective awards of compensatory damages to persons similarly situated to the claimant;

(8) any criminal penalties imposed on the medical product producer as a result of the conduct complained of by the claimant; and

(9) the amount of any civil fines assessed against the defendant as a result of the conduct complained of by the claimant.

SEC. 208. JURISDICTION OF FEDERAL COURTS.

The district courts of the United States shall not have jurisdiction of any health care liability action based on sections 1331 or 1337 of title 28, United States Code.

SEC. 209. PREEMPTION.

(a) IN GENERAL.—This title supersedes any State law only to the extent that the State law permits the recovery by a claimant or the assessment against a defendant of a greater amount of damages, permits the awarding of a greater amount of attorneys' fees, establishes a longer period during which a medical malpractice claim or medical product liability claim may be initiated, or establishes a less strict standard of proof for determining whether a defendant has committed malpractice, than the provisions of this title.

(b) EFFECT ON SOVEREIGN IMMUNITY AND CHOICE OF LAW OR VENUE.—Nothing in this title shall be construed to—

(1) waive or affect any defense of sovereign immunity asserted by any State under any provision of law;

(2) waive or affect any defense of sovereign immunity asserted by the United States;

(3) affect the applicability of any provision of the Foreign Sovereign Immunities Act of 1976;

(4) preempt State choice-of-law rules with respect to claims brought by a foreign nation or a citizen of a foreign nation; or

(5) affect the right of any court to transfer venue or to apply the law of a foreign nation or to dismiss a claim of a foreign nation or of a citizen of a foreign nation on the ground in inconvenient forum.

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