

105TH CONGRESS  
2D SESSION

# H. R. 3535

To establish limits on medical malpractice claims, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 24, 1998

Mr. ENSIGN (for himself, Mr. NEY, Mr. CHRISTENSEN, Mr. GIBBONS, and Mr. SHAYS) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Commerce, 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 limits on medical malpractice claims, and for other purposes.

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

3       **SECTION 1. FEDERAL REFORM OF HEALTH CARE LIABIL-**  
4       **ITY ACTIONS.**

5       (a) **APPLICABILITY.**—This Act shall apply with re-  
6       spect to any health care liability action brought in any  
7       State or Federal court and to any health care liability  
8       claim subject to an ADR, except that this Act shall not  
9       apply to—

1           (1) an action for damages arising from a vac-  
2           cine-related injury or death to the extent that title  
3           XXI of the Public Health Service Act applies to the  
4           action, or

5           (2) an action under the Employee Retirement  
6           Income Security Act of 1974 (29 U.S.C. 1001 et  
7           seq.).

8           (b) PREEMPTION.—This Act shall not preempt any  
9           State law that—

10           (1) provides for defenses or places limitations  
11           on a person’s liability in addition to those contained  
12           in this Act or otherwise imposes greater restrictions  
13           than those provided in this Act; or

14           (2) imposes greater restrictions on liability or  
15           damages than those provided in this Act.

16           No provision of this Act shall be construed to preempt or  
17           displace the implementation of any State sponsored or pri-  
18           vate ADR system.

19           (c) LIMITATIONS.—This Act supersedes chapter 171  
20           of title 28, United States Code, (relating to tort claims  
21           procedure) and preempts State law with respect to both  
22           procedural and substantive matters only to the extent that  
23           such chapter or State law differs from any provision of  
24           this Act or provision established under this Act. Section  
25           4 shall supersede or preempt any provision of such chapter

1 or State law which prohibits the introduction of evidence  
2 regarding collateral source benefits or mandates or per-  
3 mits subrogation or a lien on the plaintiff's award for the  
4 cost of providing collateral source benefits. Any issue that  
5 is not governed by any provision of this Act shall be gov-  
6 erned by otherwise applicable Federal or State law.

7 (d) EFFECT ON SOVEREIGN IMMUNITY AND CHOICE  
8 OF LAW OR VENUE.—Nothing in subsection (c) shall be  
9 construed to—

10 (1) waive or affect any defense of sovereign im-  
11 munity asserted by any State under any provision of  
12 law;

13 (2) waive or affect any defense of sovereign im-  
14 munity asserted by the United States;

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

17 (4) preempt State choice-of-law rules with re-  
18 spect to claims brought by a foreign nation or a citi-  
19 zen of a foreign nation; or

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

1 (e) AMOUNT IN CONTROVERSY.—In an action to  
2 which this Act applies and which is brought under section  
3 1332 of title 28, United States Code, the amount of non-  
4 economic damages or punitive damages, and attorneys'  
5 fees or costs, shall not be included in determining whether  
6 the matter in controversy exceeds the sum or value of  
7 \$75,000.

8 (f) FEDERAL COURT JURISDICTION NOT ESTAB-  
9 LISHED ON FEDERAL QUESTION GROUNDS.—Nothing in  
10 this Act shall be construed to establish any jurisdiction  
11 in the district courts of the United States over health care  
12 liability actions on the basis of section 1331 or 1337 of  
13 title 28, United States Code.

14 **SEC. 2. STATUTE OF LIMITATIONS.**

15 A health care liability action may not be brought  
16 after the expiration of the 2-year period that begins on  
17 the date on which the alleged injury that is the subject  
18 of the action was discovered or should reasonably have  
19 been discovered, but in no case after the expiration of the  
20 5-year period that begins on the date the alleged injury  
21 occurred.

22 **SEC. 3. CALCULATION AND PAYMENT OF DAMAGES.**

23 (a) JOINT AND SEVERAL LIABILITY.—In any health  
24 care liability action, a defendant shall be liable only for  
25 the amount of noneconomic damages attributable to such

1 defendant in direct proportion to such defendant's share  
2 of fault or responsibility for the claimant's actual dam-  
3 ages, as determined by the trier of fact. In all such cases,  
4 the liability of a defendant for noneconomic damages shall  
5 be several and not joint.

6 (b) TREATMENT OF PUNITIVE DAMAGES.—

7 (1) GENERAL RULE.—Punitive damages may,  
8 to the extent permitted by applicable State law, be  
9 awarded in any health care liability action for harm  
10 in any Federal or State court against a defendant if  
11 the claimant establishes by clear and convincing evi-  
12 dence that the harm suffered was the result of con-  
13 duct—

14 (A) specifically intended to cause harm, or

15 (B) conduct manifesting a conscious, fla-  
16 grant indifference to the rights or safety of oth-  
17 ers.

18 (2) APPLICABILITY.—This subsection shall  
19 apply to any health care liability action brought in  
20 any Federal or State court on any theory where pu-  
21 nitive damages are sought. This subsection does not  
22 create a cause of action for punitive damages. This  
23 subsection does not preempt or supersede any State  
24 or Federal law to the extent that such law would  
25 further limit the award of punitive damages.

1           (3) BIFURCATION.—At the request of any  
2 party, the trier of fact shall consider in a separate  
3 proceeding whether punitive damages are to be  
4 awarded and the amount of such award. If a sepa-  
5 rate proceeding is requested, evidence relevant only  
6 to the claim of punitive damages, as determined by  
7 applicable State law, shall be inadmissible in any  
8 proceeding to determine whether actual damages are  
9 to be awarded.

10           (4) DRUGS AND DEVICES.—

11           (A) IN GENERAL.—(i) Punitive damages  
12 shall not be awarded against a manufacturer or  
13 product seller of a drug or medical device which  
14 caused the claimant’s harm where—

15                   (I) such drug or device was subject to  
16 premarket approval by the Food and Drug  
17 Administration with respect to the safety  
18 of the formulation or performance of the  
19 aspect of such drug or device which caused  
20 the claimant’s harm, or the adequacy of  
21 the packaging or labeling of such drug or  
22 device which caused the harm, and such  
23 drug, device, packaging, or labeling was  
24 approved by the Food and Drug Adminis-  
25 tration; or

1           (II) the drug is generally recognized  
2           as safe and effective pursuant to conditions  
3           established by the Food and Drug Admin-  
4           istration and applicable regulations, includ-  
5           ing packaging and labeling regulations.

6           (ii) Clause (i) shall not apply in any case  
7           in which the defendant, before or after pre-  
8           market approval of a drug or device—

9           (I) intentionally and wrongfully with-  
10          held from or misrepresented to the Food  
11          and Drug Administration information con-  
12          cerning such drug or device required to be  
13          submitted under the Federal Food, Drug,  
14          and Cosmetic Act (21 U.S.C. 301 et seq.)  
15          or section 351 of the Public Health Service  
16          Act (42 U.S.C. 262) that is material and  
17          relevant to the harm suffered by the claim-  
18          ant, or

19          (II) made an illegal payment to an of-  
20          ficial or employee of the Food and Drug  
21          Administration for the purpose of securing  
22          or maintaining approval of such drug or  
23          device.

24          (B) PACKAGING.—In a health care liability  
25          action for harm which is alleged to relate to the

1           adequacy of the packaging or labeling of a drug  
2           which is required to have tamper-resistant  
3           packaging under regulations of the Secretary of  
4           Health and Human Services (including labeling  
5           regulations related to such packaging), the  
6           manufacturer or product seller of the drug shall  
7           not be held liable for punitive damages unless  
8           such packaging or labeling is found by the court  
9           by clear and convincing evidence to be substan-  
10          tially out of compliance with such regulations.

11          (c) PERIODIC PAYMENTS FOR FUTURE LOSSES.—

12           (1) GENERAL RULE.—In any health care liabil-  
13          ity action in which the damages awarded for future  
14          economic and noneconomic loss exceeds \$50,000, a  
15          person shall not be required to pay such damages in  
16          a single, lump-sum payment, but shall be permitted  
17          to make such payments periodically based on when  
18          the damages are found likely to occur, as such pay-  
19          ments are determined by the court.

20           (2) FINALITY OF JUDGMENT.—The judgment  
21          of the court awarding periodic payments under this  
22          subsection may not, in the absence of fraud, be re-  
23          opened at any time to contest, amend, or modify the  
24          schedule or amount of the payments.

1           (3) LUMP-SUM SETTLEMENTS.—This sub-  
2           section shall not be construed to preclude a settle-  
3           ment providing for a single, lump-sum payment.

4           (d) TREATMENT OF COLLATERAL SOURCE PAY-  
5           MENTS.—

6           (1) INTRODUCTION INTO EVIDENCE.—In any  
7           health care liability action, any defendant may intro-  
8           duce evidence of collateral source payments. If any  
9           defendant elects to introduce such evidence, the  
10          claimant may introduce evidence of any amount paid  
11          or contributed or reasonably likely to be paid or con-  
12          tributed in the future by or on behalf of the claim-  
13          ant to secure the right to such collateral source pay-  
14          ments.

15          (2) NO SUBROGATION.—No provider of collat-  
16          eral source payments shall recover any amount  
17          against the claimant or receive any lien or credit  
18          against the claimant's recovery or be equitably or le-  
19          gally subrogated the right of the claimant in a  
20          health care liability action.

21          (3) APPLICATION TO SETTLEMENTS.—This sub-  
22          section shall apply to an action that is settled as well  
23          as an action that is resolved by a fact finder.

1 **SEC. 4. AWARD OF ATTORNEY'S FEES.**

2 (a) GENERAL RULE.—If the claimant in a health  
3 care liability action seeks noneconomic damages in excess  
4 of \$250,000 or 3 times the economic damages, whichever  
5 is lesser, and the request for such damages in such  
6 amount is made before the determination of liability of  
7 one party or another by verdict or order of judgment, the  
8 prevailing party in such action shall be entitled to attor-  
9 ney's fees from the non-prevailing party, except that the  
10 sum of the attorney's fees to which the prevailing party  
11 is entitled shall not exceed the attorney's fees of the non-  
12 prevailing party.

13 (b) LIMITATION.—The court in a health care liability  
14 action may, in its discretion, limit the fees authorized to  
15 be recovered under subsection (a) if the amount of such  
16 fees is deemed unjust.

17 (c) LIMITATIONS ON CONTINGENT FEES.—

18 (1) IN GENERAL.—The total of all contingent  
19 fees for representing all claimants in a health care  
20 liability claim or action shall not exceed the following  
21 limits:

22 (A) 40 percent of the first \$50,000 recov-  
23 ered by the claimant.

24 (B) 33 1/3 percent of the next \$50,000 re-  
25 covered by the claimant.

1 (C) 25 percent of the next \$50,000 recov-  
2 ered by the claimant.

3 (D) 15 percent of any amount by which  
4 the recovery by the claimant exceeds \$600,000.

5 (2) APPLICABILITY.—The limitations prescribed  
6 by paragraph (1) shall apply whether the recovery is  
7 by judgment, settlement, mediation, arbitration, or  
8 any other form of ADR. A court acting in a health  
9 care liability claim or action involving a minor or in-  
10 competent person retains the authority to authorize  
11 or approve a fee that is less than the maximum per-  
12 mitted under paragraph (1).

13 (3) DEFINITIONS.—For purposes of this sub-  
14 section:

15 (A) CONTINGENT FEE.—The term “contin-  
16 gent fee” includes all compensation to any per-  
17 son which is payable only if a recovery is ef-  
18 fected on behalf of one or more claimants.

19 (B) RECOVERY.—The term “recovery”  
20 means the net sum recovered after deducting  
21 any disbursements or costs incurred in connec-  
22 tion with prosecution or settlement of the claim,  
23 including all costs paid or advanced by any per-  
24 son. Costs of health care incurred by the plain-  
25 tiff and the attorney’s office overhead costs or

1 charges for legal services are not deductible dis-  
2 bursements of costs for such purpose.

3 (d) HOURS WORKED.—Counsel of record in a health  
4 care liability action shall maintain accurate and up-to-date  
5 records of hours worked for such action regardless of the  
6 fee arrangement with the attorney’s client.

7 (e) COSTS.—Nothing in this section shall affect the  
8 right of a prevailing party to be awarded costs under ap-  
9 plicable law.

10 (f) EFFECTIVE DATE.—This section shall apply with  
11 respect to a health care liability action which is brought  
12 after the date of the enactment of this Act for a claim  
13 arising from an injury occurring after such date of enact-  
14 ment.

15 **SEC. 5. ALTERNATIVE DISPUTE RESOLUTION.**

16 Any ADR used to resolve a health care liability action  
17 or claim shall contain provisions relating to statute of limi-  
18 tations, noneconomic damages, joint and several liability,  
19 punitive damages, collateral source rule, periodic pay-  
20 ments, and award of attorney’s fees which are identical  
21 to the provisions relating to such matters in this Act.

22 **SEC. 6. DEFINITIONS.**

23 As used in this Act:

1           (1) ACTUAL DAMAGES.—The term “actual dam-  
2           ages” means damages awarded to pay for economic  
3           loss.

4           (2) ADR.—The term “ADR” means an alter-  
5           native dispute resolution system established under  
6           Federal or State law that provides for the resolution  
7           of health care liability claims in a manner other than  
8           through health care liability actions.

9           (3) CLAIMANT.—The term “claimant” means  
10          any person who brings a health care liability action  
11          and any person on whose behalf such an action is  
12          brought. If such action is brought through or on be-  
13          half of an estate, the term includes the claimant’s  
14          decedent. If such action is brought through or on be-  
15          half of a minor or incompetent, the term includes  
16          the claimant’s legal guardian.

17          (4) CLEAR AND CONVINCING EVIDENCE.—The  
18          term “clear and convincing evidence” is that meas-  
19          ure or degree of proof that will produce in the mind  
20          of the trier of fact a firm belief or conviction as to  
21          the truth of the allegations sought to be established.  
22          Such measure or degree of proof is more than that  
23          required under preponderance of the evidence but  
24          less than that required for proof beyond a reason-  
25          able doubt.

1           (5) COLLATERAL SOURCE PAYMENTS.—The  
2 term “collateral source payments” means any  
3 amount paid or reasonably likely to be paid in the  
4 future to or on behalf of a claimant, or any service,  
5 product, or other benefit provided or reasonably like-  
6 ly to be provided in the future to or on behalf of a  
7 claimant, as a result of an injury or wrongful death,  
8 pursuant to—

9           (A) any State or Federal health, sickness,  
10 income-disability, accident or workers’ com-  
11 pensation Act;

12           (B) any health, sickness, income-disability,  
13 or accident insurance that provides health bene-  
14 fits or income-disability coverage;

15           (C) any contract or agreement of any  
16 group, organization, partnership, or corporation  
17 to provide, pay for, or reimburse the cost of  
18 medical, hospital, dental, or income disability  
19 benefits; and

20           (D) any other publicly or privately funded  
21 program.

22           (6) DRUG.—The term “drug” has the meaning  
23 given such term in section 201(g)(1) of the Federal  
24 Food, Drug, and Cosmetic Act (21 U.S.C.  
25 321(g)(1)).

1           (7) ECONOMIC DAMAGES.—The term “economic  
2 damages” means objectively verifiable monetary losses  
3 incurred as a result of the provision of, use of, or  
4 payment for (or failure to provide, use, or pay for)  
5 health care services or medical products such as past  
6 and future medical expenses, loss of past and future  
7 earnings, cost of obtaining domestic services, loss of  
8 employment, loss due to death, burial costs, and loss  
9 of business or employment opportunities.

10           (8) HARM.—The term “harm” means any le-  
11 gally cognizable wrong or injury for which punitive  
12 damages may be imposed.

13           (9) HEALTH BENEFIT PLAN.—The term  
14 “health benefit plan” means—

15           (A) a hospital or medical expense incurred  
16 policy or certificate,

17           (B) a hospital or medical service plan con-  
18 tract,

19           (C) a health maintenance subscriber con-  
20 tract, or

21           (D) a MedicarePlus product (offered under  
22 part C of title XVIII of the Social Security  
23 Act),

24 that provides benefits with respect to health care  
25 services.

1           (10) HEALTH CARE LIABILITY ACTION.—The  
2 term “health care liability action” means a civil ac-  
3 tion brought in a State or Federal court or pursuant  
4 to alternative dispute resolution against a health  
5 care provider, an entity which is obligated to provide  
6 or pay for health benefits under any health benefit  
7 plan (including any person or entity acting under a  
8 contract or arrangement to provide or administer  
9 any health benefit), or the manufacturer, distributor,  
10 supplier, marketer, promoter, or seller of a medical  
11 product, in which the claimant alleges a claim (in-  
12 cluding third party claims, cross claims, counter  
13 claims, or distribution claims) based upon the provi-  
14 sion of (or the failure to provide or pay for) health  
15 care services or the use of a medical product, re-  
16 gardless of the theory of liability on which the claim  
17 is based or the number of plaintiffs, defendants, or  
18 causes of action.

19           (11) HEALTH CARE LIABILITY CLAIM.—The  
20 term “health care liability claim” means a claim in  
21 which the claimant alleges that injury was caused by  
22 the provision of (or the failure to provide) health  
23 care services or medical products.

24           (12) HEALTH CARE PROVIDER.—The term  
25 “health care provider” means any person that is en-

1 gaged in the delivery of health care services in a  
2 State and that is required by the laws or regulations  
3 of the State to be licensed or certified by the State  
4 to engage in the delivery of such services in the  
5 State.

6 (13) HEALTH CARE SERVICE.—The term  
7 “health care service” means any service for which  
8 payment may be made under a health benefit plan  
9 including services related to the delivery or adminis-  
10 tration of such service.

11 (14) MEDICAL PRODUCT.—The term “medical  
12 product” means a drug (as defined in section  
13 201(g)(1)) of the Federal Food, Drug, and Cosmetic  
14 Act (21 U.S.C. 321(g)(1)) or a medical device (as  
15 defined in section 201(h)) of the Federal Food,  
16 Drug, and Cosmetic Act (21 U.S.C. 321(h)), includ-  
17 ing any component or raw material used in a drug  
18 or device but excluding health care services.

19 (15) NONECONOMIC DAMAGES.—The term  
20 “noneconomic damages” means damages paid to an  
21 individual for pain and suffering, inconvenience,  
22 emotional distress, mental anguish, loss of consor-  
23 tium, injury to reputation, humiliation, and other  
24 nonpecuniary losses.

1           (16) PERSON.—The term “person” means any  
2 individual, corporation, company, association, firm,  
3 partnership, society, joint stock company, or any  
4 other entity, including any governmental entity.

5           (17) PREVAILING PARTY.—The term “prevail-  
6 ing party” means a party to a health care liability  
7 action who obtains a final judgment (other than by  
8 settlement) exclusive of interest on all or a portion  
9 of the claims asserted during the litigation.

10          (18) PRODUCT SELLER.—

11           (A) IN GENERAL.—Subject to subpara-  
12 graph (B), the term “product seller” means a  
13 person who, in the course of a business con-  
14 ducted for that purpose—

15               (i) sells, distributes, rents, leases, pre-  
16 pares, blends, packages, labels, or is other-  
17 wise involved in placing, a product in the  
18 stream of commerce, or

19               (ii) installs, repairs, or maintains the  
20 harm-causing aspect of a product.

21           (B) EXCLUSION.—Such term does not in-  
22 clude—

23               (i) a seller or lessor of real property;

24               (ii) a provider of professional services  
25 in any case in which the sale or use of a

1 product is incidental to the transaction and  
2 the essence of the transaction is the fur-  
3 nishing of judgment, skill, or services; or

4 (iii) any person who—

5 (I) acts in only a financial capac-  
6 ity with respect to the sale of a prod-  
7 uct; or

8 (II) leases a product under a  
9 lease arrangement in which the selec-  
10 tion, possession, maintenance, and op-  
11 eration of the product are controlled  
12 by a person other than the lessor.

13 (19) PUNITIVE DAMAGES.—The term “punitive  
14 damages” means damages awarded against any per-  
15 son not to compensate for actual injury suffered, but  
16 to punish or deter such person or others from en-  
17 gaging in similar behavior in the future.

18 (20) STATE.—The term “State” means each of  
19 the several States, the District of Columbia, Puerto  
20 Rico, the Virgin Islands, Guam, American Samoa,  
21 the Northern Mariana Islands, and any other terri-  
22 tory or possession of the United States.

23 **SEC. 7. EFFECTIVE DATE.**

24 This Act will apply to any health care liability action  
25 brought in a Federal or State court and to any health

1 care liability claim subject to an ADR system, that is initi-  
2 ated on or after the date of enactment of this Act, except  
3 that any health care liability claim or action arising from  
4 an injury occurring prior to the date of enactment of this  
5 Act shall be governed by the applicable statute of limita-  
6 tions provisions in effect at the time the injury occurred.

○