

107TH CONGRESS  
1ST SESSION

# H. R. 1639

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

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 2001

Mr. TOMMEY (for himself and Mr. SCHAFFER) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and 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. SHORT TITLE.**

4 This Act may be cited as the “Common Sense Med-  
5 ical Malpractice Reform Act of 2001”.

6 **SEC. 2. FEDERAL REFORM OF HEALTH CARE LIABILITY**  
7 **ACTIONS.**

8 (a) **APPLICABILITY.**—This Act shall apply with re-  
9 spect to any health care liability action brought in any

1 State or Federal court and to any health care liability  
2 claim subject to an ADR, except that this Act shall not  
3 apply to an action for damages arising from a vaccine-  
4 related injury or death to the extent that title XXI of the  
5 Public Health Service Act applies to the action.

6 (b) PREEMPTION.—

7 (1) IN GENERAL.—This Act shall amend chap-  
8 ter 171 of title 28, United States Code, (relating to  
9 tort claims procedure) and preempt any State law to  
10 the extent that such State law is inconsistent with  
11 the limitations in this Act.

12 (2) STRONGER STATE LAWS.—This Act shall  
13 not preempt any State law that provides for defenses  
14 or places limitations on a person’s liability in addi-  
15 tion to those contained in this Act or otherwise im-  
16 poses greater restrictions on liability or damages  
17 than those provided in this Act.

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

21 (c) LIMITATIONS.—This Act supersedes chapter 171  
22 of title 28, United States Code (relating to tort claims pro-  
23 cedure) and preempts State law with respect to both pro-  
24 cedural and substantive matters only to the extent that  
25 such chapter or State law differs from any provision of

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

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

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

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

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

19 (4) preempt State choice-of-law rules with re-  
20 spect to claims brought by a foreign nation or a cit-  
21 izen of a foreign nation; or

22 (5) affect the right of any court to transfer  
23 venue or to apply the law of a foreign nation or to  
24 dismiss a claim of a foreign nation or of a citizen

1 of a foreign nation on the ground of inconvenient  
2 forum.

3 (e) AMOUNT IN CONTROVERSY.—In an action to  
4 which this Act applies and which is brought under section  
5 1332 of title 28, United States Code, the amount of non-  
6 economic damages or punitive damages, and attorneys'  
7 fees or costs, shall not be included in determining whether  
8 the matter in controversy exceeds the sum or value of  
9 \$75,000.

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

16 **SEC. 3. STATUTE OF LIMITATIONS.**

17 A health care liability action may not be brought  
18 after the expiration of the 1-year period that begins on  
19 the date on which the alleged injury that is the subject  
20 of the action was discovered or should reasonably have  
21 been discovered, but in no case after the expiration of the  
22 3-year period that begins on the date the alleged injury  
23 occurred.

1 **SEC. 4. CALCULATION AND PAYMENT OF DAMAGES.**

2 (a) TREATMENT OF NONECONOMIC DAMAGES.—In  
3 any health care liability claim or action, the amount of  
4 noneconomic damages shall not exceed \$250,000, regard-  
5 less of the number of parties against whom the action is  
6 brought or the number of claims or actions brought with  
7 respect to the injury.

8 (b) JOINT AND SEVERAL LIABILITY.—In any health  
9 care liability action, a defendant shall be liable only for  
10 the amount of noneconomic damages attributable to such  
11 defendant in direct proportion to such defendant's share  
12 of fault or responsibility for the claimant's actual dam-  
13 ages, as determined by the trier of fact. In all such cases,  
14 the liability of a defendant for noneconomic damages shall  
15 be several and not joint.

16 (c) TREATMENT OF PUNITIVE DAMAGES.—

17 (1) GENERAL RULE.—Punitive damages may,  
18 to the extent permitted by applicable State law, be  
19 awarded in any health care liability action for harm  
20 in any Federal or State court against a defendant if  
21 the claimant establishes by clear and convincing evi-  
22 dence that the harm suffered was the result of  
23 conduct—

24 (A) specifically intended to cause harm, or

25 (B) manifesting a conscious, flagrant indif-  
26 ference to the rights or safety of others.

1           (2) AMOUNT.—In no event shall the amount of  
2           punitive damages awarded exceed two times the  
3           amount of compensatory damages awarded or  
4           \$250,000, whichever is greater. The jury shall not  
5           be informed of this limitation.

6           (3) APPLICABILITY.—This subsection shall  
7           apply to any health care liability action brought in  
8           any Federal or State court on any theory where pu-  
9           nitive damages are sought. This subsection does not  
10          create a cause of action for punitive damages. This  
11          subsection does not preempt or supersede any State  
12          or Federal law to the extent that such law would  
13          further limit the award of punitive damages.

14          (4) BIFURCATION.—At the request of any  
15          party, the trier of fact shall consider in a separate  
16          proceeding whether punitive damages are to be  
17          awarded and the amount of such award. If a sepa-  
18          rate proceeding is requested, evidence relevant only  
19          to the claim of punitive damages, as determined by  
20          applicable State law, shall be inadmissible in any  
21          proceeding to determine whether actual damages are  
22          to be awarded.

23          (5) DRUGS AND DEVICES—

24                  (A) IN GENERAL.—(i) Punitive damages  
25                  shall not be awarded against a manufacturer or

1 product seller of a drug or medical device which  
2 caused the claimant's harm where—

3 (I) such drug or device was subject to  
4 premarket approval by the Food and Drug  
5 Administration with respect to the safety  
6 of the formulation or performance of the  
7 aspect of such drug or device which caused  
8 the claimant's harm, or the adequacy of  
9 the packaging or labeling of such drug or  
10 device which caused the harm, and such  
11 drug, device, packaging, or labeling was  
12 approved by the Food and Drug Adminis-  
13 tration; or

14 (II) the drug is generally recognized  
15 as safe and effective pursuant to conditions  
16 established by the Food and Drug Admin-  
17 istration and applicable regulations, includ-  
18 ing packaging and labeling regulations.

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

22 (I) intentionally and wrongfully with-  
23 held from or misrepresented to the Food  
24 and Drug Administration information con-  
25 cerning such drug or device required to be

1 submitted under the Federal Food, Drug,  
2 and Cosmetic Act (21 U.S.C. 301 et seq.)  
3 or section 351 of the Public Health Service  
4 Act (42 U.S.C. 262) that is material and  
5 relevant to the harm suffered by the claim-  
6 ant, or

7 (II) made an illegal payment to an of-  
8 ficial or employee of the Food and Drug  
9 Administration for the purpose of securing  
10 or maintaining approval of such drug or  
11 device.

12 (B) PACKAGING.—In a health care liability  
13 action for harm which is alleged to relate to the  
14 adequacy of the packaging or labeling of a drug  
15 which is required to have tamper-resistant  
16 packaging under regulations of the Secretary of  
17 Health and Human Services (including labeling  
18 regulations related to such packaging), the  
19 manufacturer or product seller of the drug shall  
20 not be held liable for punitive damages unless  
21 such packaging or labeling is found by the court  
22 by clear and convincing evidence to be substan-  
23 tially out of compliance with such regulations.

24 (d) PERIODIC PAYMENTS FOR FUTURE LOSSES.—

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

9           (2) FINALITY OF JUDGMENT.—The judgment  
10          of the court awarding periodic payments under this  
11          subsection may not, in the absence of fraud, be re-  
12          opened at any time to contest, amend, or modify the  
13          schedule or amount of the payments.

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

17          (e) TREATMENT OF COLLATERAL SOURCE PAY-  
18          MENTS.—

19               (1) INTRODUCTION INTO EVIDENCE.—In any  
20               health care liability action, any defendant may intro-  
21               duce evidence of collateral source payments. If any  
22               defendant elects to introduce such evidence, the  
23               claimant may introduce evidence of any amount paid  
24               or contributed or reasonably likely to be paid or con-  
25               tributed in the future by or on behalf of the claim-

1 ant to secure the right to such collateral source pay-  
2 ments.

3 (2) NO SUBROGATION.—No provider of collat-  
4 eral source payments shall recover any amount  
5 against the claimant or receive any lien or credit  
6 against the claimant’s recovery or be equitably or le-  
7 gally subrogated the right of the claimant in a  
8 health care liability action.

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

12 **SEC. 5. LIMITATIONS ON CONTINGENT FEES.**

13 (a) IN GENERAL.—The total of all contingent fees  
14 for representing all claimants in a health care liability  
15 claim or action shall not exceed the following limits:

16 (1) 40 percent of the first \$50,000 recovered by  
17 the claimant.

18 (2)  $33\frac{1}{3}$  percent of the next \$50,000 recovered  
19 by the claimant.

20 (3) 25 percent of the next \$50,000 recovered by  
21 the claimant.

22 (4) 15 percent of any amount by which the re-  
23 covery by the claimant exceeds \$600,000.

24 (b) APPLICABILITY.—The limitations shall apply  
25 whether the recovery is by judgment, settlement, medi-

1 ation, arbitration, or any other form of ADR. A court act-  
2 ing in a health care liability claim or action involving a  
3 minor or incompetent person retains the authority to au-  
4 thorize or approve a fee that is less than the maximum  
5 permitted under this section.

6 (c) DEFINITIONS.—For purposes of this subsection:

7 (1) CONTINGENT FEE.—The term “contingent  
8 fee” includes all compensation to any person which  
9 is payable only if a recovery is effected on behalf of  
10 one or more claimants.

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

19 **SEC. 6. ALTERNATIVE DISPUTE RESOLUTION.**

20 Any ADR used to resolve a health care liability action  
21 or claim shall contain provisions relating to statute of limi-  
22 tations, noneconomic damages, joint and several liability,  
23 punitive damages, collateral source rule, periodic pay-  
24 ments, and limitations on contingent fees which are iden-  
25 tical to the provisions relating to such matters in this Act.

1 **SEC. 7. DEFINITIONS.**

2 As used in this Act:

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

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

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

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

1 less than that required for proof beyond a reason-  
2 able doubt.

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

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

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

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

22 (D) any other publicly or privately funded  
23 program.

24 (6) DRUG.—The term “drug” has the meaning  
25 given such term in section 201(g)(1) of the Federal

1 Food, Drug, and Cosmetic Act (21 U.S.C.  
2 321(g)(1)).

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

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

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

17 (A) a hospital or medical expense incurred  
18 policy or certificate,

19 (B) a hospital or medical service plan con-  
20 tract,

21 (C) a health maintenance subscriber con-  
22 tract, or

23 (D) a MedicarePlus product (offered under  
24 part C of title XVIII of the Social Security

1 Act), that provides benefits with respect to  
2 health care services.

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

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

1           (12) HEALTH CARE PROVIDER.—The term  
2           “health care provider” means any person that is en-  
3           gaged in the delivery of health care services in a  
4           State and that is required by the laws or regulations  
5           of the State to be licensed or certified by the State  
6           to engage in the delivery of such services in the  
7           State.

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

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

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

1 tium, injury to reputation, humiliation, and other  
2 nonpecuniary losses.

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

7 (17) PRODUCT SELLER.—

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

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

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

18 (B) EXCLUSION.—Such term does not  
19 include—

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

21 (ii) a provider of professional services  
22 in any case in which the sale or use of a  
23 product is incidental to the transaction and  
24 the essence of the transaction is the fur-  
25 nishing of judgment, skill, or services; or

1 (iii) any person who—

2 (I) acts in only a financial capac-  
3 ity with respect to the sale of a prod-  
4 uct; or

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

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

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

20 **SEC. 8. EFFECTIVE DATE.**

21 This Act will apply to any health care liability action  
22 brought in a Federal or State court and to any health  
23 care liability claim subject to an ADR system, that is initi-  
24 ated on or after the date of enactment of this Act, except  
25 that any health care liability claim or action arising from

1 an injury occurring prior to the date of enactment of this  
2 Act shall be governed by the applicable statute of limita-  
3 tions provisions in effect at the time the injury occurred.

○