

APRIL 12, 2012

JUDICIARY COMMITTEE PRINT 112-6
PROPOSED RECONCILIATION SUBMISSION TO THE
COMMITTEE ON THE BUDGET

1 **SECTION 1. SHORT TITLE.**

2 This matter may be cited as the “Help Efficient, Ac-
3 cessible, Low-cost, Timely Healthcare (HEALTH) Act of
4 2011”.

5 **SEC. 2. ENCOURAGING SPEEDY RESOLUTION OF CLAIMS.**

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

14 (1) upon proof of fraud;

15 (2) intentional concealment; or

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

19 Actions by a minor shall be commenced within 3 years
20 from the date of the alleged manifestation of injury except

1 that actions by a minor under the full age of 6 years shall
2 be commenced within 3 years of manifestation of injury
3 or prior to the minor's 8th birthday, whichever provides
4 a longer period. Such time limitation shall be tolled for
5 minors for any period during which a parent or guardian
6 and a health care provider or health care organization
7 have committed fraud or collusion in the failure to bring
8 an action on behalf of the injured minor.

9 **SEC. 3. COMPENSATING PATIENT INJURY.**

10 (a) UNLIMITED AMOUNT OF DAMAGES FOR ACTUAL
11 ECONOMIC LOSSES IN HEALTH CARE LAWSUITS.—In any
12 health care lawsuit, nothing in this Act shall limit a claim-
13 ant's recovery of the full amount of the available economic
14 damages, notwithstanding the limitation in subsection (b).

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

21 (c) NO DISCOUNT OF AWARD FOR NONECONOMIC
22 DAMAGES.—For purposes of applying the limitation in
23 subsection (b), future noneconomic damages shall not be
24 discounted to present value. The jury shall not be in-
25 formed about the maximum award for noneconomic dam-

1 ages. An award for noneconomic damages in excess of
2 \$250,000 shall be reduced either before the entry of judg-
3 ment, or by amendment of the judgment after entry of
4 judgment, and such reduction shall be made before ac-
5 counting for any other reduction in damages required by
6 law. If separate awards are rendered for past and future
7 noneconomic damages and the combined awards exceed
8 \$250,000, the future noneconomic damages shall be re-
9 duced first.

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

22 **SEC. 4. MAXIMIZING PATIENT RECOVERY.**

23 (a) COURT SUPERVISION OF SHARE OF DAMAGES
24 ACTUALLY PAID TO CLAIMANTS.—In any health care law-
25 suit, the court shall supervise the arrangements for pay-

1 ment of damages to protect against conflicts of interest
2 that may have the effect of reducing the amount of dam-
3 ages awarded that are actually paid to claimants. In par-
4 ticular, in any health care lawsuit in which the attorney
5 for a party claims a financial stake in the outcome by vir-
6 tue of a contingent fee, the court shall have the power
7 to restrict the payment of a claimant's damage recovery
8 to such attorney, and to redirect such damages to the
9 claimant based upon the interests of justice and principles
10 of equity. In no event shall the total of all contingent fees
11 for representing all claimants in a health care lawsuit ex-
12 ceed the following limits:

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

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

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

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

21 (b) APPLICABILITY.—The limitations in this section
22 shall apply whether the recovery is by judgment, settle-
23 ment, mediation, arbitration, or any other form of alter-
24 native dispute resolution. In a health care lawsuit involv-
25 ing a minor or incompetent person, a court retains the

1 authority to authorize or approve a fee that is less than
2 the maximum permitted under this section. The require-
3 ment for court supervision in the first two sentences of
4 subsection (a) applies only in civil actions.

5 **SEC. 5. PUNITIVE DAMAGES.**

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

1 quest of any party in a health care lawsuit, the trier of
2 fact shall consider in a separate proceeding—

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

5 (2) the amount of punitive damages following a
6 determination of punitive liability.

7 If a separate proceeding is requested, evidence relevant
8 only to the claim for punitive damages, as determined by
9 applicable State law, shall be inadmissible in any pro-
10 ceeding to determine whether compensatory damages are
11 to be awarded.

12 (b) DETERMINING AMOUNT OF PUNITIVE DAM-
13 AGES.—

14 (1) FACTORS CONSIDERED.—In determining
15 the amount of punitive damages, if awarded, in a
16 health care lawsuit, the trier of fact shall consider
17 only the following—

18 (A) the severity of the harm caused by the
19 conduct of such party;

20 (B) the duration of the conduct or any
21 concealment of it by such party;

22 (C) the profitability of the conduct to such
23 party;

24 (D) the number of products sold or med-
25 ical procedures rendered for compensation, as

1 the case may be, by such party, of the kind
2 causing the harm complained of by the claim-
3 ant;

4 (E) any criminal penalties imposed on such
5 party, as a result of the conduct complained of
6 by the claimant; and

7 (F) the amount of any civil fines assessed
8 against such party as a result of the conduct
9 complained of by the claimant.

10 (2) MAXIMUM AWARD.—The amount of punitive
11 damages, if awarded, in a health care lawsuit may
12 be as much as \$250,000 or as much as two times
13 the amount of economic damages awarded, which-
14 ever is greater. The jury shall not be informed of
15 this limitation.

16 (c) NO PUNITIVE DAMAGES FOR PRODUCTS THAT
17 COMPLY WITH FDA STANDARDS.—

18 (1) IN GENERAL.—

19 (A) No punitive damages may be awarded
20 against the manufacturer or distributor of a
21 medical product, or a supplier of any compo-
22 nent or raw material of such medical product,
23 based on a claim that such product caused the
24 claimant's harm where—

1 (i)(I) such medical product was sub-
2 ject to premarket approval, clearance, or li-
3 censure by the Food and Drug Administra-
4 tion with respect to the safety of the for-
5 mulation or performance of the aspect of
6 such medical product which caused the
7 claimant's harm or the adequacy of the
8 packaging or labeling of such medical
9 product; and

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

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

1 (B) RULE OF CONSTRUCTION.—Subpara-
2 graph (A) may not be construed as establishing
3 the obligation of the Food and Drug Adminis-
4 tration to demonstrate affirmatively that a
5 manufacturer, distributor, or supplier referred
6 to in such subparagraph meets any of the con-
7 ditions described in such subparagraph.

8 (2) LIABILITY OF HEALTH CARE PROVIDERS.—
9 A health care provider who prescribes, or who dis-
10 penses pursuant to a prescription, a medical product
11 approved, licensed, or cleared by the Food and Drug
12 Administration shall not be named as a party to a
13 product liability lawsuit involving such product and
14 shall not be liable to a claimant in a class action
15 lawsuit against the manufacturer, distributor, or
16 seller of such product. Nothing in this paragraph
17 prevents a court from consolidating cases involving
18 health care providers and cases involving products li-
19 ability claims against the manufacturer, distributor,
20 or product seller of such medical product.

21 (3) PACKAGING.—In a health care lawsuit for
22 harm which is alleged to relate to the adequacy of
23 the packaging or labeling of a drug which is required
24 to have tamper-resistant packaging under regula-
25 tions of the Secretary of Health and Human Serv-

1 ices (including labeling regulations related to such
2 packaging), the manufacturer or product seller of
3 the drug shall not be held liable for punitive dam-
4 ages unless such packaging or labeling is found by
5 the trier of fact by clear and convincing evidence to
6 be substantially out of compliance with such regula-
7 tions.

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

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

20 (B) a person made an illegal payment to
21 an official of the Food and Drug Administra-
22 tion for the purpose of either securing or main-
23 taining approval, clearance, or licensure of such
24 medical product; or

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

6 **SEC. 6. AUTHORIZATION OF PAYMENT OF FUTURE DAM-**
7 **AGES TO CLAIMANTS IN HEALTH CARE LAW-**
8 **SUITS.**

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

19 (b) APPLICABILITY.—This section applies to all ac-
20 tions which have not been first set for trial or retrial be-
21 fore the effective date of this Act.

22 **SEC. 7. DEFINITIONS.**

23 In this Act:

24 (1) ALTERNATIVE DISPUTE RESOLUTION SYS-
25 TEM; ADR.—The term “alternative dispute resolution

1 system” or “ADR” means a system that provides
2 for the resolution of health care lawsuits in a man-
3 ner other than through a civil action brought in a
4 State or Federal court.

5 (2) CLAIMANT.—The term “claimant” means
6 any person who brings a health care lawsuit, includ-
7 ing a person who asserts or claims a right to legal
8 or equitable contribution, indemnity, or subrogation,
9 arising out of a health care liability claim or action,
10 and any person on whose behalf such a claim is as-
11 serted or such an action is brought, whether de-
12 ceased, incompetent, or a minor.

13 (3) COMPENSATORY DAMAGES.—The term
14 “compensatory damages” means objectively
15 verifiable monetary losses incurred as a result of the
16 provision of, use of, or payment for (or failure to
17 provide, use, or pay for) health care services or med-
18 ical products, such as past and future medical ex-
19 penses, loss of past and future earnings, cost of ob-
20 taining domestic services, loss of employment, and
21 loss of business or employment opportunities, dam-
22 ages for physical and emotional pain, suffering, in-
23 convenience, physical impairment, mental anguish,
24 disfigurement, loss of enjoyment of life, loss of soci-
25 ety and companionship, loss of consortium (other

1 than loss of domestic service), hedonic damages, in-
2 jury to reputation, and all other nonpecuniary losses
3 of any kind or nature. The term “compensatory
4 damages” includes economic damages and non-
5 economic damages, as such terms are defined in this
6 section.

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

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

20 (6) HEALTH CARE LAWSUIT.—The term
21 “health care lawsuit” means any health care liability
22 claim concerning the provision of health care goods
23 or services or any medical product affecting inter-
24 state commerce, or any health care liability action
25 concerning the provision of health care goods or

1 services or any medical product affecting interstate
2 commerce, brought in a State or Federal court or
3 pursuant to an alternative dispute resolution system,
4 against a health care provider, a health care organi-
5 zation, or the manufacturer, distributor, supplier,
6 marketer, promoter, or seller of a medical product,
7 regardless of the theory of liability on which the
8 claim is based, or the number of claimants, plain-
9 tiffs, defendants, or other parties, or the number of
10 claims or causes of action, in which the claimant al-
11 leges a health care liability claim. Such term does
12 not include a claim or action which is based on
13 criminal liability; which seeks civil fines or penalties
14 paid to Federal, State, or local government; or which
15 is grounded in antitrust.

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

1 ties, or the number of causes of action, in which the
2 claimant alleges a health care liability claim.

3 (8) HEALTH CARE LIABILITY CLAIM.—The
4 term “health care liability claim” means a demand
5 by any person, whether or not pursuant to ADR,
6 against a health care provider, health care organiza-
7 tion, or the manufacturer, distributor, supplier, mar-
8 keter, promoter, or seller of a medical product, in-
9 cluding, but not limited to, third-party claims, cross-
10 claims, counter-claims, or contribution claims, which
11 are based upon the provision of, use of, or payment
12 for (or the failure to provide, use, or pay for) health
13 care services or medical products, regardless of the
14 theory of liability on which the claim is based, or the
15 number of plaintiffs, defendants, or other parties, or
16 the number of causes of action.

17 (9) HEALTH CARE ORGANIZATION.—The term
18 “health care organization” means any person or en-
19 tity which is obligated to provide or pay for health
20 benefits under any health plan, including any person
21 or entity acting under a contract or arrangement
22 with a health care organization to provide or admin-
23 ister any health benefit.

24 (10) HEALTH CARE PROVIDER.—The term
25 “health care provider” means any person or entity

1 required by State or Federal laws or regulations to
2 be licensed, registered, or certified to provide health
3 care services, and being either so licensed, reg-
4 istered, or certified, or exempted from such require-
5 ment by other statute or regulation.

6 (11) HEALTH CARE GOODS OR SERVICES.—The
7 term “health care goods or services” means any
8 goods or services provided by a health care organiza-
9 tion, provider, or by any individual working under
10 the supervision of a health care provider, that relates
11 to the diagnosis, prevention, or treatment of any
12 human disease or impairment, or the assessment or
13 care of the health of human beings.

14 (12) MALICIOUS INTENT TO INJURE.—The
15 term “malicious intent to injure” means inten-
16 tionally causing or attempting to cause physical in-
17 jury other than providing health care goods or serv-
18 ices.

19 (13) MEDICAL PRODUCT.—The term “medical
20 product” means a drug, device, or biological product
21 intended for humans, and the terms “drug”, “de-
22 vice”, and “biological product” have the meanings
23 given such terms in sections 201(g)(1) and 201(h)
24 of the Federal Food, Drug and Cosmetic Act (21
25 U.S.C. 321(g)(1) and (h)) and section 351(a) of the

1 Public Health Service Act (42 U.S.C. 262(a)), re-
2 spectively, including any component or raw material
3 used therein, but excluding health care services.

4 (14) NONECONOMIC DAMAGES.—The term
5 “noneconomic damages” means damages for phys-
6 ical and emotional pain, suffering, inconvenience,
7 physical impairment, mental anguish, disfigurement,
8 loss of enjoyment of life, loss of society and compan-
9 ionship, loss of consortium (other than loss of do-
10 mestic service), hedonic damages, injury to reputa-
11 tion, and all other nonpecuniary losses of any kind
12 or nature.

13 (15) PUNITIVE DAMAGES.—The term “punitive
14 damages” means damages awarded, for the purpose
15 of punishment or deterrence, and not solely for com-
16 pensatory purposes, against a health care provider,
17 health care organization, or a manufacturer, dis-
18 tributor, or supplier of a medical product. Punitive
19 damages are neither economic nor noneconomic
20 damages.

21 (16) RECOVERY.—The term “recovery” means
22 the net sum recovered after deducting any disburse-
23 ments or costs incurred in connection with prosecu-
24 tion or settlement of the claim, including all costs
25 paid or advanced by any person. Costs of health care

1 incurred by the plaintiff and the attorneys' office
2 overhead costs or charges for legal services are not
3 deductible disbursements or costs for such purpose.

4 (17) STATE.—The term “State” means each of
5 the several States, the District of Columbia, the
6 Commonwealth of Puerto Rico, the Virgin Islands,
7 Guam, American Samoa, the Northern Mariana Is-
8 lands, the Trust Territory of the Pacific Islands, and
9 any other territory or possession of the United
10 States, or any political subdivision thereof.

11 **SEC. 8. EFFECT ON OTHER LAWS.**

12 (a) VACCINE INJURY.—

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

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

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

22 (2) If there is an aspect of a civil action
23 brought for a vaccine-related injury or death to
24 which a Federal rule of law under title XXI of the
25 Public Health Service Act does not apply, then this

1 Act or otherwise applicable law (as determined
2 under this Act) will apply to such aspect of such ac-
3 tion.

4 (b) OTHER FEDERAL LAW.—Except as provided in
5 this section, nothing in this Act shall be deemed to affect
6 any defense available to a defendant in a health care law-
7 suit or action under any other provision of Federal law.

8 **SEC. 9. STATE FLEXIBILITY AND PROTECTION OF STATES'**
9 **RIGHTS.**

10 (a) HEALTH CARE LAWSUITS.—The provisions gov-
11 erning health care lawsuits set forth in this Act preempt,
12 subject to subsections (b) and (c), State law to the extent
13 that State law prevents the application of any provisions
14 of law established by or under this Act. The provisions
15 governing health care lawsuits set forth in this Act super-
16 sede chapter 171 of title 28, United States Code, to the
17 extent that such chapter—

18 (1) provides for a greater amount of damages
19 or contingent fees, a longer period in which a health
20 care lawsuit may be commenced, or a reduced appli-
21 cability or scope of periodic payment of future dam-
22 ages, than provided in this Act; or

23 (2) prohibits the introduction of evidence re-
24 garding collateral source benefits, or mandates or

1 permits subrogation or a lien on collateral source
2 benefits.

3 (b) PROTECTION OF STATES' RIGHTS AND OTHER
4 LAWS.—(1) Any issue that is not governed by any provi-
5 sion of law established by or under this Act (including
6 State standards of negligence) shall be governed by other-
7 wise applicable State or Federal law.

8 (2) This Act shall not preempt or supersede any State
9 or Federal law that imposes greater procedural or sub-
10 stantive protections for health care providers and health
11 care organizations from liability, loss, or damages than
12 those provided by this Act or create a cause of action.

13 (c) STATE FLEXIBILITY.—No provision of this Act
14 shall be construed to preempt—

15 (1) any State law (whether effective before, on,
16 or after the date of the enactment of this Act) that
17 specifies a particular monetary amount of compen-
18 satory or punitive damages (or the total amount of
19 damages) that may be awarded in a health care law-
20 suit, regardless of whether such monetary amount is
21 greater or lesser than is provided for under this Act,
22 notwithstanding section 303(a); or

23 (2) any defense available to a party in a health
24 care lawsuit under any other provision of State or
25 Federal law.

1 **SEC. 10. APPLICABILITY; EFFECTIVE DATE.**

2 This Act shall apply to any health care lawsuit
3 brought in a Federal or State court, or subject to an alter-
4 native dispute resolution system, that is initiated on or
5 after the date of the enactment of this Act, except that
6 any health care lawsuit arising from an injury occurring
7 prior to the date of the enactment of this Act shall be
8 governed by the applicable statute of limitations provisions
9 in effect at the time the injury occurred.

