I

112TH CONGRESS
1ST SESSION

H. R. 2363

To establish performance-based quality measures, to establish limitations on recovery in health care lawsuits based on compliance with best practice guidelines, and to provide grants to States for administrative health care tribunals.

IN THE HOUSE OF REPRESENTATIVES

JUNE 24, 2011

Mr. PRICE of Georgia introduced the following bill; which was referred to the Committee on Energy and Commerce

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A BILL

To establish performance-based quality measures, to establish limitations on recovery in health care lawsuits based on compliance with best practice guidelines, and to provide grants to States for administrative health care tribunals.

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 ''Health Care OverUse Reform Today Act (HealthCOURT Act) of 2011''.

SEC. 2. LIMITATION ON RECOVERY IN A HEALTH CARE LAWSUIT BASED ON COMPLIANCE WITH BEST PRACTICE GUIDELINES.

(a) SELECTION AND ISSUANCE OF BEST PRACTICES GUIDELINES.—

(1) IN GENERAL.—The Secretary of Health and Human Services (in this section referred to as the ''Secretary'') shall provide for the selection and issuance of best practice guidelines for treatment of medical conditions (each in this subsection referred to as a ''guideline'') in accordance with paragraphs (2) and (3).

(2) DEVELOPMENT PROCESS.—Not later than 90 days after the date of enactment of this Act, the Secretary shall enter into a contract with a qualified physician consensus-building organization (such as the Physician Consortium for Performance Improvement), in concert and agreement with physician specialty organizations, to develop guidelines. The contract shall require that the organization submit guidelines to the agency not later than 18 months after the date of enactment of this Act.

(3) ISSUANCE.—

(A) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Secretary shall, after notice and opportunity for

public comment, make a rule that provides for the establishment of the guidelines submitted under paragraph (2).

(B) LIMITATION.—The Secretary may not make a rule that includes guidelines other than those submitted under paragraph (2).

(C) DISSEMINATION.—The Secretary shall post such guidelines on the public Internet web page of the Department of Health and Human Services.

(4) MAINTENANCE.—Not later than 4 years after the date of enactment of this Act, and every 2 years thereafter, the Secretary shall review the guidelines and shall, as necessary, enter into contracts similar to the contract described in paragraph (2), and issue guidelines in a manner similar to the issuance of guidelines under paragraph (3).

(b) LIMITATION ON DAMAGES.—

(1) LIMITATION ON NONECONOMIC DAMAGES.—In any health care lawsuit, a court may not award noneconomic damages with respect to treatment that is consistent with a guideline issued under subsection (a).

(2) LIMITATION ON PUNITIVE DAMAGES.—In any health care lawsuit, no punitive damages may be

awarded against a health care provider based on a claim that such treatment caused the claimant harm if—

(A) such treatment was subject to quality review by a qualified physician consensus-building organization and has been found to be safe, effective, and appropriate;

(B) such treatment was approved in a guideline that underwent full review by such organization, public comment, approval by the Secretary, and dissemination as described in subparagraph (a); or

(C) such medical treatment is generally recognized among qualified experts (including medical providers and relevant physician specialty organizations) as safe, effective, and appropriate.

(c) USE.—

(1) INTRODUCTION AS EVIDENCE.—Guidelines established in a rule made under subsection (a) may not be introduced as evidence of negligence or deviation in the standard of care in any health care lawsuit unless they have previously been introduced by the defendant.

(2) NO PRESUMPTION OF NEGLIGENCE.—There shall be no presumption of negligence if a health care provider provides treatment in a manner inconsistent with such guidelines.

(d) CONSTRUCTION.—Nothing in this section shall be construed as preventing a State from—

(1) replacing their current medical malpractice rules with rules that rely, as a defense, upon a health care provider's compliance with a guideline issued under subsection (a); or

(2) applying additional guidelines or safe-harbors that are in addition to, but not in lieu of, the guidelines issued under subsection (a).

SEC. 3. STATE GRANTS TO CREATE ADMINISTRATIVE HEALTH CARE TRIBUNALS.

Part P of title III of the Public Health Service Act (42 U.S.C. 280g et seq.) is amended by adding at the end the following:

"SEC. 399T. STATE GRANTS TO CREATE ADMINISTRATIVE HEALTH CARE TRIBUNALS.

''(a) IN GENERAL.—The Secretary may award grants to States for the development, implementation, and evaluation of administrative health care tribunals that comply with this section, for the resolution of disputes concerning injuries allegedly caused by health care providers.

''(b) CONDITIONS FOR DEMONSTRATION GRANTS.—To be eligible to receive a grant under this section, a State shall submit to the Secretary an application at such time, in such manner, and containing such information as may be required by the Secretary. A grant shall be awarded under this section on such terms and conditions as the Secretary determines appropriate.

''(c) REPRESENTATION BY COUNSEL.—A State that receives a grant under this section may not preclude any party to a dispute before an administrative health care tribunal operated under such grant from obtaining legal representation during any review by the expert panel under subsection (d), the administrative health care tribunal under subsection (e), or a State court under subsection (f).

''(d) EXPERT PANEL REVIEW AND EARLY OFFER GUIDELINES.—

''(1) IN GENERAL.—Prior to the submission of any dispute concerning injuries allegedly caused by health care providers to an administrative health care tribunal under this section, such allegations shall first be reviewed by an expert panel.

''(2) COMPOSITION.—

''(A) IN GENERAL.—The members of each expert panel under this subsection shall be ap-

pointed by the head of the State agency responsible for health. Each expert panel shall be composed of no fewer than 3 members and not more than 7 members. At least one-half of such members shall be medical experts (either physicians or health care professionals).

''(B) LICENSURE AND EXPERTISE.—Each physician or health care professional appointed to an expert panel under subparagraph (A) shall—

''(i) be appropriately credentialed or licensed in 1 or more States to deliver health care services; and

''(ii) typically treat the condition, make the diagnosis, or provide the type of treatment that is under review.

''(C) INDEPENDENCE.—

''(i) IN GENERAL.—Subject to clause (ii), each individual appointed to an expert panel under this paragraph shall—

''(I) not have a material familial, financial, or professional relationship with a party involved in the dispute reviewed by the panel; and

''(II) not otherwise have a conflict of interest with such a party.

''(ii) EXCEPTION.—Nothing in clause (i) shall be construed to prohibit an individual who has staff privileges at an institution where the treatment involved in the dispute was provided from serving as a member of an expert panel merely on the basis of such affiliation, if the affiliation is disclosed to the parties and neither party objects.

''(D) PRACTICING HEALTH CARE PROFESSIONAL IN SAME FIELD.—

''(i) IN GENERAL.—In a dispute before an expert panel that involves treatment, or the provision of items or services—

''(I) by a physician, the medical experts on the expert panel shall be practicing physicians (allopathic or osteopathic) of the same or similar specialty as a physician who typically treats the condition, makes the diagnosis, or provides the type of treatment under review; or

"(II) by a health care professional other than a physician, at least two medical experts on the expert panel shall be practicing physicians (allopathic or osteopathic) of the same or similar specialty as the health care professional who typically treats the condition, makes the diagnosis, or provides the type of treatment under review, and, if determined appropriate by the State agency, an additional medical expert shall be a practicing health care professional (other than such a physician) of such a same or similar specialty.

"(ii) PRACTICING DEFINED.—In this paragraph, the term 'practicing' means, with respect to an individual who is a physician or other health care professional, that the individual provides health care services to individual patients on average at least 2 days a week.

"(E) PEDIATRIC EXPERTISE.—In the case of dispute relating to a child, at least 1 medical

expert on the expert panel shall have expertise described in subparagraph (D)(i) in pediatrics.

''(3) DETERMINATION.—After a review under paragraph (1), an expert panel shall make a determination as to the liability of the parties involved and compensation.

''(4) ACCEPTANCE.—If the parties to a dispute before an expert panel under this subsection accept the determination of the expert panel concerning liability and compensation, such compensation shall be paid to the claimant and the claimant shall agree to forgo any further action against the health care providers involved.

''(5) FAILURE TO ACCEPT.—If any party decides not to accept the expert panel's determination, the matter shall be referred to an administrative health care tribunal created pursuant to this section.

''(e) ADMINISTRATIVE HEALTH CARE TRIBUNALS.—

''(1) IN GENERAL.—Upon the failure of any party to accept the determination of an expert panel under subsection (d), the parties shall have the right to request a hearing concerning the liability or compensation involved by an administrative health care tribunal established by the State involved.

''(2) REQUIREMENTS.—In establishing an administrative health care tribunal under this section, a State shall—

''(A) ensure that such tribunals are presided over by special judges with health care expertise;

''(B) provide authority to such judges to make binding rulings, rendered in written decisions, on standards of care, causation, compensation, and related issues with reliance on independent expert witnesses commissioned by the tribunal;

''(C) establish gross negligence as the legal standard for the tribunal;

''(D) allow the admission into evidence of the recommendation made by the expert panel under subsection (d); and

''(E) provide for an appeals process to allow for review of decisions by State courts.

''(f) REVIEW BY STATE COURT AFTER EXHAUSTION OF ADMINISTRATIVE REMEDIES.—

''(1) RIGHT TO FILE.—If any party to a dispute before a health care tribunal under subsection (e) is not satisfied with the determinations of the tribunal,

the party shall have the right to file their claim in a State court of competent jurisdiction.

''(2) FORFEIT OF AWARDS.—Any party filing an action in a State court in accordance with paragraph (1) shall forfeit any compensation award made under subsection (e).

''(3) ADMISSIBILITY.—The determinations of the expert panel and the administrative health care tribunal pursuant to subsections (d) and (e) with respect to a State court proceeding under paragraph (1) shall be admissible into evidence in any such State court proceeding.

''(g) DEFINITION.—In this section, the term 'health care provider' means any person or entity required by State or Federal laws or regulations to be licensed, registered, or certified to provide health care services, and being either so licensed, registered, or certified, or exempted from such requirement by other statute or regulation.

''(h) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for any fiscal year such sums as may be necessary for purposes of making grants to States under this section.''.

SEC. 4. DEFINITIONS.

In this Act:

(1) HEALTH CARE LAWSUIT.—The term ''health care lawsuit'' means any health care liability claim concerning the provision of health care goods or services brought in a Federal court or in a State court or pursuant to an alternative dispute resolution system, if such claim concerns items or services with respect to which payment is made under title XVIII, title XIX, or title XXI of the Social Security Act or for which the claimant receives a Federal tax benefit, against a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product, regardless of the theory of liability on which the claim is based, or the number of claimants, plaintiffs, defendants, or other parties, or the number of claims or causes of action, in which the claimant alleges a health care liability claim. Such term does not include a claim or action which is based on criminal liability; which seeks civil fines or penalties paid to Federal government; or which is grounded in antitrust.

(2) NONECONOMIC DAMAGES.—The term ''noneconomic damages'' means damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, dis-

figurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other non-pecuniary losses.

(3) PUNITIVE DAMAGES.—The term ''punitive damages'' means damages awarded, for the purpose of punishment or deterrence, and not solely for compensatory purposes, against a health care provider. Punitive damages are neither economic nor non-economic damages.

(4) MEDICAL TREATMENT.—The term ''medical treatment'' means the provision of any goods or services by a health care provider or by any individual working under the supervision of a health care provider, that relates to the diagnosis, prevention, or treatment of any human disease or impairment, or the assessment or care of the health of human beings.

(5) HEALTH CARE PROVIDER.—The term ''health care provider'' means any person or entity required by State or Federal laws or regulations to be licensed, registered, or certified to provide health care services, and being either so licensed, registered, or certified, or exempted from such requirement by other statute or regulation.

(6) FEDERAL TAX BENEFIT.—A claimant shall be treated as receiving a Federal tax benefit with respect to payment for items or services if—

(A) such payment is compensation by insurance—

(i) which constitutes medical care, and

(ii) with respect to the payment of premiums for which the claimant, or the employer of the claimant, was allowed an exclusion from gross income, a deduction, or a credit for Federal income tax purposes,

(B) a deduction was allowed with respect to such payment for Federal income tax purposes, or

(C) such payment was from an Archer MSA (as defined in section 220(d) of the Internal Revenue Code of 1986), a health savings account (as defined in section 223(d) of such Code), a flexible spending arrangement (as defined in section 106(c)(2) of such Code), or a health reimbursement arrangement which is treated as employer-provided coverage under an

accident or health plan for purposes of section 106 of such Code.

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