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AMENDMENT TO _____

OFFERED BY MR. MATHESON OF UTAH

Base text: HR 3962 as introduced

In section 308(b)(1)—

(1) redesignate subparagraph (E) as subparagraph (F); and

(2) insert after subparagraph (D) the following:

(E) The State is eligible to receive an incentive payment for enacting and implementing medical liability reforms as specified in subsection (g).

In section 308, add at the end the following new subsection:

(g) MEDICAL LIABILITY ALTERNATIVES.—

(1) PURPOSES.—The purposes of this subsection are—

(A) to ensure quality healthcare is readily available by providing an alternative framework to reduce the costs of defensive medicine and allow victims of malpractice to be fairly compensated; and

(B) to do the above without limiting attorneys fees or imposing caps on damages.

(2) INCENTIVE PAYMENTS FOR MEDICAL LIABILITY REFORM.—

(A) IN GENERAL.—Each State is eligible to receive an incentive payment, in an amount determined by the Secretary subject to the availability of appropriations, if the State enacts after the date of the enactment of this subsection, and is implementing, an alternative medical liability law that complies with this subsection.

(B) DETERMINATION BY SECRETARY.—The Secretary shall determine that a State's alternative medical liability law complies with this subsection if the Secretary is satisfied that the State—

(i) has enacted and is currently implementing that law; and

(ii) that law is effective.

(C) CONSIDERATIONS FOR DETERMINATION.—In making a determination of the effectiveness of a law, the Secretary shall consider whether the law—

(i) makes the medical liability system more reliable through prevention of or prompt and fair resolution of disputes;

(ii) encourages the disclosure of health care errors; and

(iii) maintains access to affordable liability insurance.

(D) OPTIONAL CONTENTS OF ALTERNATIVE MEDICAL LIABILITY LAW.—An alternative medical liability law shall contain any one or a combination of the following litigation alternatives:

(i) Certificate of Merit.

(ii) Early offer.

(iii) I'm Sorry Provision.

(iv) Medical Review Panels.

(v) Pilot Programs incentivizing use of evidence-based guidelines combined with liability protections.

(vi) Voluntary Alternative Dispute Resolution

(vii) Other Alternatives Approved by the Secretary.

(E) USE OF INCENTIVE PAYMENTS.—The State shall use an incentive payment received

under this subsection to improve health care in that State.

(3) APPLICATION.—Each State seeking an incentive payment under this subsection shall submit to the Secretary an application, at such time, in such manner, and containing such information as the Secretary may require.

(4) TECHNICAL ASSISTANCE.—The Secretary may provide technical assistance to the States applying for or awarded an incentive payment under this subsection.

(5) REPORTS.—Beginning not later than one year after the date of the enactment of this subsection, the Secretary shall submit to Congress an annual report on the progress States have made in adopting and implementing alternative medical liability laws that comply with this subsection. Such reports shall contain sufficient documentation regarding the effectiveness of such laws to enable an objective comparative analysis of them.

(6) RULEMAKING.—The Secretary may make rules to carry out this subsection.

(7) DEFINITION.—In this subsection—

(A) the term "Secretary" means the Secretary of Health and Human Services; and

(B) the term "State" includes the District of Columbia, Puerto Rico, and each other territory or possession of the United States.

(8) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this subsection such sums as may be necessary, to remain available until expended.

Add at the end of title IX of division B the following:

SEC. 1910. LIABILITY PROTECTIONS.

(a) IN GENERAL.—The protections provided in each of subsections (b) through (o) shall apply in the case of a health care provider with respect to items, services, and treatments for which such provider seeks reimbursement under Medicare under title XVIII of the Social Security Act or under a State plan under title XIX of such Act.

(b) CAP ON NON-ECONOMIC DAMAGES AGAINST HEALTH CARE PRACTITIONERS.—When an individual is injured or dies as the result of health care, a person entitled to non-economic damages may not recover, from the class of liable health care practitioners (regardless of the theory of liability), more than $250,000 such damages.

(c) CAP ON NON-ECONOMIC DAMAGES AGAINST HEALTH CARE INSTITUTIONS.—When an individual is in-

jured or dies as the result of health care, a person entitled to non-economic damages may not recover—

(1) from any single liable health care institution (regardless of the theory of liability), more than $250,000 such damages; and

(2) from the class of liable health care institutions (regardless of the theory of liability), more than $500,000 such damages.

(d) CAP, IN WRONGFUL DEATH CASES, ON TOTAL DAMAGES AGAINST ANY SINGLE HEALTH CARE PRACTITIONER.—

(1) IN GENERAL.—When an individual dies as the result of health care, a person entitled to damages may not recover, from any single liable health care practitioner (regardless of the theory of liability), more than $1,400,000 in total damages.

(2) TOTAL DAMAGES DEFINED.—In this section, the term "total damages" includes compensatory damages, punitive damages, statutory damages, and any other type of damages.

(3) ADJUSTMENT FOR INFLATION.—For each calendar year after the calendar year of the enactment of this Act, the dollar amount referred to in subsection (a) shall be adjusted to reflect changes in the Consumer Price Index of the Bureau of Labor

Statistics of the Department of Labor. The adjustment shall be based on the relationship between—

(A) the Consumer Price Index data most recently published as of January 1 of the calendar year of the enactment of this Act; and

(B) the Consumer Price Index data most recently published as of January 1 of the calendar year concerned.

(4) APPLICABILITY OF ADJUSTMENT.—The dollar amount that applies to a recovery is the dollar amount for the calendar year during which the amount of the recovery is made final.

(e) LIMITATION OF INSURER LIABILITY WHEN INSURER REJECTS CERTAIN SETTLEMENT OFFERS.—In a civil action, to the extent the civil action seeks damages for the injury or death of an individual as the result of health care, when the insurer of a health care practitioner or health care institution rejects a reasonable settlement offer within policy limits, the insurer is not, by reason of that rejection, liable for damages in an amount that exceeds the liability of the insured.

(f) MANDATORY JURY INSTRUCTION ON CAP ON DAMAGES.—In a civil action tried to a jury, to the extent the civil action seeks damages for the injury or death of an individual as the result of health care, the court shall

instruct the jury that the jury is not to consider whether, or to what extent, a limitation on damages applies.

(g) DETERMINATION OF NEGLIGENCE; MANDATORY JURY INSTRUCTION.—

(1) IN GENERAL.— When an individual is injured or dies as the result of health care, liability for negligence may not be based solely on a bad result.

(2) MANDATORY JURY INSTRUCTION.—In a civil action tried to a jury, to the extent the civil action seeks damages for the injury or death of an individual as the result of health care and alleges liability for negligence, the court shall instruct the jury as provided in paragraph (1).

(h) EXPERT REPORTS REQUIRED TO BE SERVED IN CIVIL ACTIONS.—

(1) SERVICE REQUIRED.—To the extent a pleading filed in a civil action seeks damages against a health care practitioner for the injury or death of an individual as the result of health care, the party filing the pleading shall, not later than 120 days after the date on which the pleading was filed, serve on each party against whom such damages are sought a qualified expert report.

(2) QUALIFIED EXPERT REPORT.—As used in paragraph (1), a qualified expert report is a written report of a qualified health care expert that—

(A) includes a curriculum vitae for that expert; and

(B) sets forth a summary of the expert opinion of that expert as to—

(i) the standard of care applicable to that practitioner;

(ii) how that practitioner failed to meet that standard of care; and

(iii) the causal relationship between that failure and the injury or death of the individual.

(3) MOTION TO ENFORCE.—A party not served as required by paragraph (1) may move the court to enforce that subsection. On such a motion, the court—

(A) shall dismiss, with prejudice, the pleading as it relates to that party; and

(B) shall award to that party the attorney fees reasonably incurred by that party to respond to that pleading.

(4) USE OF EXPERT REPORT.—

(A) IN GENERAL.—Except as otherwise provided in this section, a qualified expert report served under paragraph (1) may not, in that civil action—

(i) be offered by any party as evidence;

(ii) be used by any party in discovery or any other pretrial proceeding; or

(iii) be referred to by any party at trial.

(B) VIOLATIONS.—

(i) BY OTHER PARTY.—If subparagraph (A) is violated by a party other than the party who served the report, the court shall, on motion of any party or on its own motion, take such measures as the court considers appropriate, which may include the imposition of sanctions.

(ii) BY SERVING PARTY.—If subparagraph (A) is violated by the party who served the report, subparagraph (A) shall no longer apply to any party.

(i) EXPERT OPINIONS RELATING TO PHYSICIANS MAY BE PROVIDED ONLY BY ACTIVELY PRACTICING PHYSICIANS.—

(1) IN GENERAL.—A physician-related opinion may be provided only by an actively practicing physician who is determined by the court to be qualified on the basis of training and experience to render that opinion.

(2) CONSIDERATIONS REQUIRED.—In determining whether an actively practicing physician is qualified under paragraph (1), the court shall, except on good cause shown, consider whether that physician is board-certified, or has other substantial training, in an area of medical practice relevant to the health care to which the opinion relates.

(3) DEFINITIONS.—In this section:

(A) The term "actively practicing physician" means an individual who—

(i) is licensed to practice medicine in the United States or, if the individual is a defendant providing a physician-related opinion with respect to the health care provided by that defendant, is a graduate of a medical school accredited by the Liaison Committee on Medical Education or the American Osteopathic Association;

(ii) is practicing medicine when the opinion is rendered, or was practicing med-

icine when the health care was provided; and

(iii) has knowledge of the accepted standards of care for the health care to which the opinion relates.

(B) The term "physician-related opinion" means an expert opinion as to any one or more of the following:

(i) The standard of care applicable to a physician.

(ii) Whether a physician failed to meet such a standard of care.

(iii) Whether there was a causal relationship between such a failure by a physician and the injury or death of an individual.

(C) The term "practicing medicine" includes training residents or students at an accredited school of medicine or osteopathy, and serving as a consulting physician to other physicians who provide direct patient care.

(j) PAYMENT OF FUTURE DAMAGES ON PERIODIC OR ACCRUAL BASIS.—

(1) IN GENERAL.—When future damages are awarded against a health care practitioner to a per-

son for the injury or death of an individual as a result of health care, and the present value of those future damages is $100,000 or more, that health care practitioner may move that the court order payment on a periodic or accrual basis of those damages. On such a motion, the court—

(A) shall order that payment be made on an accrual basis of future damages described in paragraph (2)(A); and

(B) may order that payment be made on a periodic or accrual basis of any other future damages that the court considers appropriate.

(2) FUTURE DAMAGES DEFINED.—In this section, the term "future damages" means—

(A) the future costs of medical, health care, or custodial services;

(B) noneconomic damages, such as pain and suffering or loss of consortium;

(C) loss of future earnings; and

(D) any other damages incurred after the award is made.

(k) UNANIMOUS JURY REQUIRED FOR PUNITIVE OR EXEMPLARY DAMAGES.—When an individual is injured or dies as the result of health care, a jury may not award punitive or exemplary damages against a health care prac-

titioner or health care institution unless the jury is unanimous with regard to both the liability of that party for such damages and the amount of the award of such damages.

(l) PROPORTIONATE LIABILITY.—When an individual is injured or dies as the result of health care and a person is entitled to damages for that injury or death, each person responsible is liable only for a proportionate share of the total damages that directly corresponds to that person's proportionate share of the total responsibility.

(m) DEFENSE-INITIATED SETTLEMENT PROCESS.—

(1) IN GENERAL.—In a civil action, to the extent the civil action seeks damages for the injury or death of an individual as the result of health care, a health care practitioner or health care institution against which such damages are sought may serve one or more qualified settlement offers under this section to a person seeking such damages. If the person seeking such damages does not accept such an offer, that person may thereafter serve one or more qualified settlement offers under this section to the party whose offer was not accepted.

(2) QUALIFIED SETTLEMENT OFFER.—A qualified settlement offer under this section is an offer,

in writing, to settle the matter as between the offeror and the offeree, which—

(A) specifies that it is made under this section;

(B) states the terms of settlement; and

(C) states the deadline within which the offer must be accepted.

(3) EFFECT OF OFFER.—If the offeree of a qualified settlement offer does not accept that offer, and thereafter receives a judgment at trial that, as between the offeror and the offeree, is significantly less favorable than the terms of settlement in that offer, that offeree is responsible for those litigation costs reasonably incurred, after the deadline stated in the offer, by the offeror to respond to the claims of the offeree.

(4) LITIGATION COSTS DEFINED.—In this subsection, the term "litigation costs" include court costs, filing fees, expert witness fees, attorney fees, and any other costs directly related to carrying out the litigation.

(5) SIGNIFICANTLY LESS FAVORABLE DEFINED.—In this subsection, a judgment is significantly less favorable than the terms of settlement if—

(A) in the case of an offeree seeking damages, the offeree's award at trial is less than 80 percent of the value of the terms of settlement; and

(B) in the case of an offeree against whom damages are sought, the offeror's award at trial is more than 120 percent of the value of the terms of settlement.

(n) STATUTE OF LIMITATIONS; STATUTE OF REPOSE.—

(1) STATUTE OF LIMITATIONS.—When an individual is injured or dies as the result of health care, the statute of limitations shall be as follows:

(A) INDIVIDUALS OF AGE 12 AND OVER.—If the individual has attained the age of 12 years, the claim must be brought either—

(i) within 2 years after the negligence occurred; or

(ii) within 2 years after the health care on which the claim is based is completed.

(B) INDIVIDUALS UNDER AGE 12.—If the individual has not attained the age of 12 years, the claim must be brought before the individual attains the age of 14 years.

(2) STATUTE OF REPOSE.—When an individual is injured or dies as the result of health care, the statute of repose shall be as follows: The claim must be brought within 10 years after the act or omission on which the claim is based is completed.

(3) TOLLING.—

(A) STATUTE OF LIMITATIONS.—The statute of limitations required by paragraph (1) may be tolled if applicable law so provides, except that it may not be tolled on the basis of minority.

(B) STATUTE OF REPOSE.—The statute of repose required by paragraph (2) may not be tolled for any reason.

(o) LIMITATION ON LIABILITY FOR GOOD SAMARITANS PROVIDING EMERGENCY HEALTH CARE.—

(1) WILLFUL OR WANTON NEGLIGENCE REQUIRED.—A health care practitioner or health care institution that provides emergency health care on a Good Samaritan basis is not liable for damages caused by that care except for willful or wanton negligence or more culpable misconduct.

(2) GOOD SAMARITAN BASIS.—For purposes of this section, care is provided on a Good Samaritan basis if it is not provided for or in expectation of re-

muneration. Being entitled to remuneration is relevant to, but is not determinative of, whether it is provided for or in expectation of remuneration.

(p) DEFINITIONS.—In this section:

(1) HEALTH CARE INSTITUTION.—The term "health care institution" includes institutions such as—

(A) an ambulatory surgical center;

(B) an assisted living facility;

(C) an emergency medical services provider;

(D) a home health agency;

(E) a hospice;

(F) a hospital;

(G) a hospital system;

(H) an intermediate care facility for the mentally retarded;

(I) a nursing home; and

(J) an end stage renal disease facility.

(2) HEALTH CARE PRACTITIONER.—The term "health care practitioner" includes a physician and a physician entity.

(3) PHYSICIAN ENTITY.—The term "physician entity" includes—

(A) a partnership or limited liability partnership created by a group of physicians;

(B) a company created by physicians; and

(C) a nonprofit health corporation whose board is composed of physicians.

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