

## House Passes Liability Overhaul Again, but Diagnosis Shaky for Senate

By Kate Schuler, CQ Staff

The House passed medical liability overhaul legislation for the ninth time on Thursday, sending the measure to its almost certain demise in the Senate.

The House passed the measure ([HR 5](#)) 230-194 on Thursday.

Sponsored by Republican Phil Gingrey of Georgia, the measure would cap non-economic damages, such as those for pain and suffering, at \$250,000, and limit punitive damages to two times the economic damages or \$250,000, whichever was greater.

It also would limit the amount a plaintiff's attorney could charge in "contingent fees" — a predetermined percentage of damages awarded to the plaintiff.

Gingrey's bill is identical to legislation that twice passed the House during the 108th Congress, but liability caps have failed to gain a foothold in the Senate.

The rule for House debate did not allow amendments, frustrating lawmakers who were particularly chagrined about a provision that would provide an extra measure of protection for drug and medical-device makers.

"This Congress is the gift that keeps on giving" to pharmaceutical companies, said Democrat Rahm Emanuel of Illinois. "At some point the pharmaceutical industry has to be held accountable."

The provision would impose the same \$250,000 cap on non-economic damages against drug and medical-device companies, but the drug and device makers would also be shielded from most punitive damages for suits involving products approved by the Food and Drug Administration (FDA).

Recent problems with some FDA-approved drugs, however, have made lawmakers particularly sensitive on the topic. Democrats have said the provision could protect companies such as Merck, which is in the middle of a much-publicized lawsuit over heart-attack risks associated with the arthritis drug Vioxx.

But Gingrey noted that the bill would not protect companies from all penalties and called the debate "a distraction from the real problem" of rising malpractice insurance premiums.

The issue of damage-award caps in cases against doctors and other providers also drew the ire of Democrats, as it had in past debates.

Republicans, backed by the American Medical Association, have argued that high damage awards are driving up health care costs by leading doctors to practice “defensive medicine” — ordering unnecessary tests and procedures to avoid vulnerability in a potential malpractice suit.

They also say malpractice premiums are increasing to the point that doctors are being forced out of the practice of medicine, limiting access to care, especially in specialties such as obstetrics.

“This is a special-interest bill for the American consumer of health care, our patients,” said Gingrey, “not the insurance industry or drug companies.”

Democrats, with the support of the Association of Trial Lawyers of America, have countered that capping non-economic awards harms patients and unfairly penalizes women and children, whose earning potential would be calculated at a lower rate when figuring economic damages. They say that increased malpractice premiums result from insurance companies’ efforts to recoup investment losses, not because of litigation.

“It’s about profits for insurance companies,” said Democratic Rep. Marion Berry of Arkansas. “It has nothing to do with health care.”

Rep. John Conyers Jr., D-Mich., motioned to recommit the bill to committee, with instructions to replace the bill’s language with provisions to limit frivolous lawsuits, require mediation in malpractice cases and mandate insurance companies to lower premiums; the motion failed, 193-234.

President Bush strongly supports the legislation.

In the Senate — where Finance Committee Chairman Charles E. Grassley, R-Iowa, has been pursuing investigations into the problems with Vioxx and other drugs — Republican John Ensign of Nevada introduced his malpractice bill ([S 354](#)) this year without the shield for drug and device makers.

Sens. Michael B. Enzi, R-Wyo., and Max Baucus, D-Mont., have introduced a bill ([S 1337](#)) that would authorize grants for states to develop ways of resolving malpractice cases outside the tort system.