



House Reform Bill Would Give Dollar Rewards To States That Pass Tort Reforms

Cheryl Clark, for HealthLeaders Media, August 14, 2009

A little-noticed provision in the House Committee on Energy and Commerce's package on health reform would pave several ways for medical malpractice reform, as long as they do not limit attorney fees or impose caps on damages.

If the provision, contained in four pages of an amendment, ends up in the final version that becomes law, each state would be eligible for a federal incentive payment if it produces an alternative medical liability law that meets the secretary of Health and Human Services' approval.

Clearly, each state may have to pass legislation to make this happen.

To get administration approval, each state's tort reform program would have to:

1. Make the medical liability system more reliable through prevention of prompt and fair resolution of disputes
2. Encourage the disclosure of healthcare errors
3. Maintain access to affordable liability insurance

State programs could also get additional consideration if they provide mechanisms by which cases involving potential malpractice would first receive a "certificate of merit" on whether the damage sustained was significant enough and wrongful enough to go forward.

Another way a state program could get consideration, or extra credit, for qualifying for federal awards would be if it included a system by which health providers recognized errors resulting in harm to patients and made "early offers" of restitution. Presumably, these early offers would not proceed to litigation.

The amendment's intent is to help patients and other would-be plaintiffs receive compensation for avoidable harm caused by medical procedures, hospitals or physicians and shorten that process from the five years or so it takes now. The amendment also intends to keep spurious litigation from going forward.

Also, the amendment seeks 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." Reducing the costs of defensive medicine, or the ordering of unnecessary tests and unnecessary procedures simply as a backup in case one gets sued, are a major part of what is said to be billions in unnecessary health expenses that taxpayers and private insurers pay for today.

However several other parts of the amendment were struck. A previous version of the amendment would have prohibited plaintiffs from using the fact that a physician or hospital expressed the words "I'm sorry" to the wronged patient or patient's survivor as part of the plaintiff's case. That provision was voided.

Another idea to allow programs that offer liability protections for providers who could prove that their care was performed with strict use of evidence based medicine—the definition of which is still under development for many types of specialty care—was also struck.

The amount of the incentive payments would be at the discretion of the secretary of Health and Human Services, and the state would have to stipulate that the funds would be used to improve health care in that state.

J. James Rohack, MD, president of the American Medical Association whose members booed President Obama in June for saying he would not support caps on medical malpractice court judgments, says his organization was "encouraged" by the amendment.

"Medical liability reform . . . is needed to reduce unnecessary costs to the health system. The bill encourages the states to explore alternatives to the costly liability system through reforms that ensure court cases have merit and that allow providers to quickly compensate patients without litigation," he says.

"This is an important step in the right direction toward reforming our broken liability system, and AMA will continue to work for much-needed liability reform," he adds.

The bipartisan amendment was offered by Reps. Bart Gordon of Tennessee, Nathan Deal of Georgia, and Jim Matheson of Utah, and was passed by a voice vote on July 31, the last day of the bill's markup.

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