



Federal Funding to Study Medical Malpractice Litigation Alternatives: HHS Distributes \$25 Million in Grants, another \$50 Million Possibly to Come

Eliminating defensive medicine could save more than \$200 billion in healthcare costs annually, according to estimates by the AMA and others, yet meaningful tort reform is absent on the federal level. The most commonly advocated fix, caps on damages, remains a political nonstarter lacking support from the Democrats and aggressively opposed by the powerful plaintiff's bar / trial lawyer lobby. However, on the heels of the Health Reform Act, the federal government continues to invest dollars in efforts to study and combat medical malpractice.¹ These grants would seem to be an effort to find legal changes to the medical liability system that can win political support.

Recently, Department of Health and Human Services (HHS) announced \$25 million in funding for an initiative to study patient safety and medical liability.² The Patient Protection and Affordable Health Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively, the "Health Reform Act") included another \$50 million in grants for states that want to explore alternatives to traditional tort reform proposals. While the funding for these initiatives is small when evaluated in light of the scale of healthcare expenditures generally, it nevertheless can be seen as a potentially encouraging sign of the administrations' interest in medical liability reform.

In his joint address to Congress in September 2009, President Obama revealed his plans for the Department of Health and Human Services (HHS) to address the issue of medical malpractice costs, separate and apart from the Healthcare Reform Bill. This came in response to Republican criticisms that the Bill did not include sufficient tort reform provisions. Several weeks later the Secretary of Health and Human Services announced the Department's "Patient Safety and Medical Liability Initiative" which would apportion \$25 million in grant money to worthy projects designed to reduce the costs and dangers associated with medical malpractice. This effort was born of increasing concern that the fear of lawsuits discourages hospitals from sharing information about mistakes that could help prevent recurrences of those problems.

This initiative has four stated goals:

- Put patient safety first to reduce preventable injuries;
- Foster better communication between physicians and patients;
- Ensure that patients are compensated in a fair and timely manner for medical injuries; and
- Reduce liability premiums.

¹ Academic health center scientists, physicians and research centers received approximately 128 grants totaling nearly \$35 million in federal stimulus money in 2009 after the stimulus bill (American Recovery and Reinvestment Act) was approved in February 2009. Studies estimate that this will result in total economic impact of more than \$105 million.

² See Adamy, Janet, [U.S. to Begin Handing out Grants to Reduce Medical Malpractice Suits](#), Wall Street Journal, June 11, 2010.



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On June 11, 2010, HHS revealed the twenty recipients of \$23 million dollars in grants. The beneficiaries are local government agencies, universities, hospitals and court systems. These awards fall into two categories: three-year “demonstration” grants of \$3 million and under, and one-year “planning grants” of \$300,000 or less. To date, this represents the largest government investment in the issue of medical liability. HHS reserved \$2 million for a final evaluation contract.

Demonstration Grants. The Department awarded seven demonstration grants to support the implementation and evaluation of evidence-based patient safety and medical liability projects. These projects are as follows:

- The University of Illinois will study the impact on safety and litigation of improved communication with patients, transparency, disclosure of adverse events, and early compensation offers. This project is underway at the University hospital but is set to extend to other Chicago-area hospitals.
- Fairview Health Services in Minnesota will seek to improve perinatal safety by implementing and evaluating the use of best practices in its 16 hospitals.
- The University of Texas Health Center will formulate a program of disclosure and compensation, with an emphasis on patient and family input.
- Ascension Health System of St. Louis will also focus on perinatal patient care, seeking to establish evidence-based standards and decrease variation in obstetrics practice.
- The University of Washington will launch a statewide initiative of communication training for healthcare workers and improvement in adverse events analysis, disclosure and compensation, with a goal of increased collaboration between insurers and hospitals.

- The New York State Unified Court System will expand and enhance its Judge-Directed Negotiation Program in the hopes that early disclosure and settlement by hospitals will reduce the costs of malpractice.
- The Massachusetts State Department of Public Health will analyze the factors that contribute to medical errors by primary care physician practices, and seek to make primary care practices more patient- and family-centered.

Planning Grants. A smaller set of one-year grants will go to 13 states and healthcare systems. Among other things, they will go toward developing evidence-based guidelines to curb lawsuits, reducing patient suicides and developing a legislative proposal that will define a legal standard of care for healthcare providers. HHS awarded thirteen planning grants, which give states and health systems the opportunity to create detailed plans for patient safety and tort reform. Some of the proposals include safe harbor provisions for physicians who follow state-endorsed evidence-based care guidelines; promoting shared decision making; early disclosure and offer models; and the promotion of transparency and enhanced communication between providers and patients.

More Money to Come. Although this \$25 million has already been apportioned, the new federal Healthcare Reform Act contains a provision for an additional \$50 million in grant money for states to explore alternatives to traditional tort-reform proposals. Of note, the funds will still have to be apportioned by Congress, and by the terms of the program, test projects cannot limit the rights of plaintiffs and defendants to pursue claims through traditional means.

The AMA, in their publication American Medical News suggested in June that proposals to be studied could include “health courts,” where judges who specialize in medical-



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liability cases would decide cases with the assistance of neutral experts, preset timelines, and standardized compensation schedules.³ Another alternative that might be funded as a test project involves early offers of settlement whereby a defendant could opt to pay economic damages and attorney fees within 180 days of a claim, avoiding lengthy litigation. Apology programs, while not a new development, continue to be a favored topic of study with the thought that clear communication and apologies may work to decrease litigation arising from medical errors. Medical review panels, charged with screening cases for merit before trial with the idea that their conclusions can be used by either part as evidence in court have also been

around for years, but fallen out of popular use. Winners for this second round of grants have yet to be announced.

If you have questions or would like more information about how the federal funding for malpractice litigation reform might impact your organization, or medical malpractice litigation in general, please contact Sean Byrne or Timothy Litzenburg at (866) 967-9604 or by email at sbyrne@hdjn.com or tlitzenburg@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C., is available on the firm's website at: www.hdjn.com.

³ Sorrel, Amy Lynn, amednews.com, *Health reform has liability insurers looking at tort alternatives*, posted June 7, 2010.

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