Order Code RS22193
July 14, 2005

Grants to States to Develop Alternatives to Medical Malpractice Litigation: Legal Analysis of S. 1337, 109th Congress

name redacted
Legislative Attorney
American Law Division

Summary

S. 1337, 109th Congress, would authorize the Secretary of Health and Human Services "to award demonstration grants to States for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations." States desiring grants would be permitted to choose from among three models of alternatives to the tort system: the "early disclosure and compensation model," the "administrative determination of compensation model," or the "special health care court model."

S. 1337, 109th Congress, the "Fair and Reliable Medical Justice Act," would not, like most tort reform bills, preempt state tort law. Rather, it would add a new section 3990 to the Public Health Service Act that would authorize the Secretary of Health and Human Services "to award demonstration grants to States for the development, implementation, and evaluation of alternatives to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations." The Secretary would be authorized to award up to 10 grants, with each not to exceed a period of five years.

S. 1337 would apply to "health care services," and, unlike S. 354 and H.R. 534, which are pending bills that would preempt state tort law, would apparently not apply to medical products litigation.

Each state "desiring" a demonstration grant would be required to develop an alternative to tort litigation for resolving medical malpractice disputes, and promote a reduction of health care errors by allowing for patient safety data related to disputes resolved by such alternative "to be collected and analyzed by organizations that engage in voluntary efforts to improve patient safety and the quality of health care delivery."[1]

[1] The bill's use of "desiring," quoted here and below, rather than "receiving" or "accepting," (continued...)

Each state desiring a demonstration grant would also have to demonstrate how its proposed alternative "(A) makes the medical liability system more reliable through prompt and fair resolution of disputes; (B) encourages the early disclosure of health care errors; (C) enhances patient safety; and (D) maintains access to liability insurance." Each state would also be required to "identify the sources from and methods by which compensation would be paid for claims."

Each state desiring a demonstration grant would be permitted to "establish a scope of jurisdiction (such as a designated geographic region, a designated area of health care practice, or a designated group of health care providers or health care organizations) for the proposed alternative to current tort litigation that is sufficient to evaluate the effects of the alternative." A state that proposes a scope of jurisdiction would have to "demonstrate how patients would be notified that they are receiving health care services that fall within such scope."

In awarding demonstration grants, the Secretary would be required to give preference to states "that have developed the proposed alternative through substantive consultation with relevant stakeholders," and states whose "law at the time of the application would not prohibit the adoption of an alternative to current tort litigation."[2] The fact that the Secretary would be required to give preference to states that had already developed a proposed alternative might seem inconsistent with the fact that the demonstration grants, as noted in the first paragraph of this report, would be for the "development, implementation, and evaluation of alternatives." However, subsection (i) of the new section 3990 that the bill would enact would authorize the Secretary "to provide planning grants to ... States for the development of demonstration project applications." In providing planning grants, the Secretary would be required to give preference to states whose laws would not prohibit the adoption of an alternative to current tort litigation, but would not be required to give preference to states that had already developed a proposed alternative. It appears, therefore, that a state may apply for a planning grant to develop a proposed alternative, but would have to develop a proposed alternative in order to apply for a demonstration grant.

Three Models

As noted, each state desiring a demonstration grant would be required to develop an alternative to current tort litigation. The alternative to current tort litigation would have to be one of three models: the "early disclosure and compensation model," the "administrative determination of compensation model," or the "special health care court model."

Early disclosure and compensation model. In this model, the state would provide immunity from tort liability to any "health care provider or health care

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[1] (...continued)
suggests that a state would be required to develop a plan even before it received or accepted a demonstration grant. This seems to be the case, as discussed in the third paragraph on page 2 of this report.

[2] A state that desired a grant could change its laws that prohibited the adoption of an alternative, although some states might have to amend their constitutions in order to do so.

organization" (hereinafter "provider") that offers in good faith to pay compensation to a patient injured by the health care provider or health care organization. The state would set a time within which the provider would have to make an offer of compensation, and such offer would have to include periodic payments for the patient's net economic loss, reduced by any payments the patient received from health, accident, or disability income insurance, or any wage or salary continuation plan.[3] A provider's offer would also have to include payment for the non-economic damages (e.g., pain and suffering), based on a defined payment schedule that the state would develop. Finally, a provider's offer would have to include reasonable attorney's fees. If a provider fails to make a timely good faith offer of the types of compensation noted above, then the state could not abridge the patient's right to seek redress through the tort system. If a provider makes a timely offer, then the state must permit him "to join in the payment" other potentially liable providers.[4]

Administrative determination of compensation model. In this model, the state would designate an administrative entity ("Board"), "set up classes of avoidable injuries ... that will be used by the Board to determine compensation," and bar negligence lawsuits for the designated classes of avoidable injuries. The state would decide whether to make participation by the health care provider, health care organization, and patient in this model voluntary, and, if it did decide to make it voluntary, it would outline a procedure for the parties to decide, prior to the provision of health care services, whether to participate.[5]

Under this model, the Board would "resolve health care liability claims for certain classes of avoidable injuries as determined by the State and determine compensation for such claims."[6] Compensation would be based on the same factors as it would be based on under the early disclosure and compensation model: net economic losses reduced by the specified collateral source payments, non-economic damages, and reasonable attorney's fees.

The state would also "provide for an appeals procedure to allow for review of decisions." In establishing the appeals process, the state could "choose whether to allow for de novo review, review with deference, or some opportunity for parties to reject determinations by the Board and elect to file a civil action after such rejection."

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[3] The bill does not state whether earned sick leave would constitute a wage or salary continuation plan.

[4] The bill does not dictate how providers would apportion the total liability among themselves.

[5] As the bill does not address the question, a state presumably could decide that, for the administrative determination of compensation model to apply in a particular case, both the provider and the patient would have to agree that it would or, if one of them agreed to it, then it would become mandatory for the other.

[6] The bill does not define "avoidable injuries" or indicate how general or specific the state must be in establishing classes of avoidable injuries.

Finally, under this model the state would "establish procedures to coordinate settlement payments with other sources of payment," and would establish time frames to ensure that claims are handled in a more timely fashion than they are by the tort system.[7]

Special health care court model. In this model, the state would establish a special court to adjudicate medical malpractice claims. The judges on the court would have to have health care expertise in addition to meeting state standards for judges, and would have to preside over the court voluntarily. The judges would have the authority to make "binding rulings" that would be subject to an appeals process.

The fact that rulings would be made by judges would mean that under this model the parties would have no right to a jury trial. The Seventh Amendment guarantees a right to trial by jury "In Suits at common law, where the value in controversy shall exceed twenty dollars." Medical malpractice suits are suits at common law, so the Seventh Amendment applies to them. The Seventh Amendment, however, does not apply in state courts, and special health care courts would be state courts.

One might argue, moreover, that suits brought under the special health care court model would not be "Suits at common law," but would be an alternative to traditional tort suits. This, however, might be the case in some states but not in others, because the bill does not state what substantive law the special health court judges would apply. If a state does not enact a special law for the special health court, but applies the same law that it applies in tort suits, then claims heard in the special health court would likely be considered "Suits at common law." But this point seems moot, given that the Seventh Amendment does not apply in state courts.

An argument that the Seventh Amendment would apply to suits in special health courts might be that special health courts would be established as a consequence of federal law, and Congress may not attach unconstitutional conditions to the receipt of federal funds.[8] This argument seems unpersuasive, however, because the condition that Congress would attach under the special health care court model — denial of the right to a jury trial — would not be unconstitutional because special health care courts would be state courts.

Under current law, medical malpractice claims may be brought in federal court under "diversity" jurisdiction, which means that they may be brought in federal court if they are between citizens of different states and the matter in controversy exceeds $75,000.[9] In a diversity suit, the federal court applies the relevant state law.[10] S. 1337 would not change this, which means that, under S. 1337, some medical malpractice claims could still be brought in federal court, and would be decided by a jury unless the federal court applied

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[7] The elimination of the right to a jury trial under this model would not violate the U.S. Constitution, because the Seventh Amendment does not apply in state courts, and applies only in suits at common law, not in administrative proceedings. The next section of this report examines this matter in greater depth.

[8] South Dakota v. Dole, 483 U.S. 203, 208 (1987).

[9] 28 U.S.C. § 1332.

[10] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

the law of a state that had abolished common law torts suits in favor of some other system of recovery.

Awarding of Demonstration Grants

S. 1337 contains other provisions that we will mention briefly. Subsection (e) of the new section 3990 provides for the establishment of a review panel to evaluate states' applications for demonstration grants. The Comptroller General would appoint the panel, which would consist of from 11 to 15 people who, among them, represent patient advocates, health care providers and health care organizations, attorneys with expertise in representing patients and health care providers, insurers, and state officials. The bill provides: "In reviewing applications ... , the Secretary shall consult with a review panel." This suggests that the Secretary, and not the review panel, would make the decision whether to accept or reject a state's application for a demonstration grant. The bill does not state this explicitly, however.

Subsection (f) provides that states that receive demonstration grants shall submit to the Secretary reports, as the Secretary requires, evaluating the effectiveness of activities funded under a demonstration grant.

Subsection (g) provides that the Secretary shall provide technical assistance to the states that are awarded demonstration grants. Technical assistance shall include "the development of a defined payment schedule for non-economic damages ... , the development of classes of avoidable injuries, and guidance on early disclosure to patients of adverse effects; and ... the development, in consultation with States, of common definitions, formats, and data collection infrastructure."

Subsection (h) provides that the Secretary, in consultation with the review panel, shall enter into a contract with a research organization to evaluate the effectiveness of demonstration grants that are awarded and to annually prepare and submit a report to the appropriate committees of Congress.

Subsection (i) concerns planning grants, which were discussed in the third paragraph on page 2 of this report; subsection (j) contains definitions of terms used in the bill; and subsection (k) would authorize to be appropriated such sums as may be necessary to carry out the program.