Medical Liability Reform

**Summary:** Establishes a 5-year state demonstration program to evaluate alternatives to current medical tort litigation. Also, includes a non-binding Sense of the Senate that health reform presents an opportunity to address issues related to medical malpractice and medical liability insurance, states should be encouraged to develop and test alternative models to the existing civil litigation system, and Congress should consider state demonstration projects to evaluate such alternatives.

**Status update:**
- On September 1, *Health Affairs* published an article stating that “[o]verall annual medical liability system costs, including defensive medicine, are estimated to be $55.6 billion in 2008 dollars, or 2.4 percent of total health care spending,” lower than previous estimates.
- On September 7, 2010, the Florida Medical Association sent a letter to the American Medical Association, expressing frustration that the American Medical Association (AMA) leadership “did not stand up for meaningful tort reform or take appropriate action to ensure passage of a better bill that would have put patients in charge of their medical care, with physicians as their trusted advisors.”

**Next steps:**
- June 11, 2011 – The Department of Health and Human Services (HHS) announces demonstration and planning grants are part of the patient safety and medical liability initiative that President Obama announced during a September 9, 2009, address to a joint session of Congress.
- October 1, 2011 – State demonstration program receives formal authorization
- December 31, 2016 -- the Medicare Payment Advisory Commission (MedPAC) and the Medicaid and CHIP Payment and Access Commission (MACPAC) must each submit to Congress a report that includes findings and recommendations of each body's independent evaluation of the impact of alternatives to current tort litigation on the Medicare and Medicaid/CHIP programs, respectively (and their beneficiaries).

**Additional information:**
- *Health Affairs* article – [http://content.healthaffairs.org/cgi/content/abstract/29/9/1569](http://content.healthaffairs.org/cgi/content/abstract/29/9/1569)
Long summary:

Sec. 10607. State demonstration programs to evaluate alternatives to current medical tort litigation.

Authorizes $50 million for the 5-fiscal year period beginning with FY 2011 for demonstration grants to states (for a period not to exceed 5 years) 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. Applications for demonstration grants will be reviewed by a review panel of 9 to 13 individuals appointed by the Comptroller General of the Government Accountability Office (GAO), with fair representation of: patient advocates; health care providers and health care organizations; attorneys with expertise in representing patients and health care providers; medical malpractice insurers, state officials; and patient safety experts.

Technical assistance. The Secretary is required to provide technical assistance to states applying for or awarded grants, and may provide initial planning grants of up to $500,000 per state for the development of demonstration project applications.

State requirements. States must meet a number of conditions to receive a grant, including providing patients the ability to opt out of or voluntarily withdraw from participating in the alternative at any time. States must establish a scope of jurisdiction for the demonstration (such as Statewide, designated geographic region, a designated area of health care practice, or a designated group of health care providers or health care organizations), but such scope may not be based on a health care payer or patient population.

Annual reports and evaluations. States receiving grants must submit annual reports to the Secretary, and the Secretary must, in turn, submit an annual report to Congress that includes a compendium of state reports and an analysis of the activities funded under the demonstration grants. The Secretary must contract with an appropriate research organization to conduct an overall evaluation of the effectiveness of the grants awarded and annually prepare and submit a report to Congress.

Sec. 6801. Sense of the Senate regarding medical malpractice.

Expresses the sense of the Senate that health reform presents an opportunity to address issues related to medical malpractice and medical liability insurance, states should be encouraged to develop and test alternative models to the existing civil litigation system, and Congress should consider state demonstration projects to evaluate such alternatives.

Legislative Text:

SEC. 10607. STATE DEMONSTRATION PROGRAMS TO EVALUATE ALTERNATIVES TO CURRENT MEDICAL TORT LITIGATION.

"SEC. 399V–4. STATE DEMONSTRATION PROGRAMS TO EVALUATE ALTERNATIVES TO CURRENT MEDICAL TORT LITIGATION.

"(a) IN GENERAL.—The Secretary is authorized 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. In awarding such grants, the Secretary shall ensure the diversity of the alternatives so funded.

"(b) DURATION.—The Secretary may award grants under subsection (a) for a period not to exceed 5 years.

"(c) CONDITIONS FOR DEMONSTRATION GRANTS.—

"(1) REQUIREMENTS.—Each State desiring a grant under subsection (a) shall develop an alternative to current tort litigation that—

"(A) allows for the resolution of disputes over injuries allegedly caused by health care providers or health care organizations; and

"(B) promotes a reduction of health care errors by encouraging the collection and analysis of patient safety data related to disputes resolved under subparagraph (A) by organizations that engage in efforts to improve patient safety and the quality of health care.

"(2) ALTERNATIVE TO CURRENT TORT LITIGATION.—Each State desiring a grant under subsection (a) shall demonstrate how the proposed alternative described in paragraph (1)(A)—

"(A) makes the medical liability system more reliable by increasing the availability of prompt and fair resolution of disputes;

"(B) encourages the efficient resolution of disputes;

"(C) encourages the disclosure of health care errors;
‘(1) BY STATE.—Each State receiving a grant under subsection (a) shall submit to the Secretary an annual report evaluating the effectiveness of activities funded with grants awarded under such subsection. Such report shall, at a minimum, include the impact of the quality of care, number and nature of medical errors, medical resources used, length of time for dispute resolution, and the availability and price of liability insurance.

‘(2) REPORTS.— Such report shall, at a minimum, include the impact of the quality of care, number and nature of medical errors, medical resources used, length of time for dispute resolution, and the availability and price of liability insurance.

‘(3) SOURCES OF COMPENSATION.—Each State desiring a grant under subsection (a) shall identify the sources from and methods by which compensation would be paid for claims resolved under the proposed alternative to current tort litigation, which may include public or private funding sources, or a combination of such sources. Funding methods shall to the extent practicable provide financial incentives for activities that improve patient safety.

‘(4) SCOPE.—

‘(A) IN GENERAL.—Each State desiring a grant under subsection (a) shall establish a scope of jurisdiction (such as Statewide, 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. No scope of jurisdiction shall be established under this paragraph that is based on a health care payer or patient population.

‘(B) NOTIFICATION OF PATIENTS.—A State shall demonstrate how patients would be notified that they are receiving health care services that fall within such scope, and the process by which they may opt out of or voluntarily withdraw from participating in the alternative. The decision of the patient whether to participate or continue participating in the alternative process shall be made at any time and shall not be limited in any way.

‘(5) PREFERENCE IN AWARDING DEMONSTRATION GRANTS.— In awarding grants under subsection (a), the Secretary shall give preference to States—

‘(A) that have developed the proposed alternative through substantive consultation with relevant stakeholders, including patient advocates, health care providers and health care organizations, attorneys with expertise in representing patients and health care providers, medical malpractice insurers, and patient safety experts;

‘(B) that make proposals that are likely to enhance patient safety by detecting, analyzing, and helping to reduce medical errors and adverse events; and

‘(C) that make proposals that are likely to improve access to liability insurance.

‘(d) APPLICATION.—

‘(1) IN GENERAL.—Each State desiring a grant under subsection (a) shall submit to the Secretary an application, at such time, in such manner, and containing such information as the Secretary may require.

‘(2) REVIEW PANEL.—

‘(A) IN GENERAL.—In reviewing applications under paragraph (1), the Secretary shall consult with a review panel composed of relevant experts appointed by the Comptroller General.

‘(B) COMPOSITION.—

‘(i) NOMINATIONS.—The Comptroller General shall solicit nominations from the public for individuals to serve on the review panel.

‘(ii) APPOINTMENT.—The Comptroller General shall appoint, at least 9 but not more than 13, highly qualified and knowledgeable individuals to serve on the review panel and shall ensure that the following entities receive fair representation on such panel:

‘(I) Patient advocates.

‘(II) Health care providers and health care organizations.

‘(III) Attorneys with expertise in representing patients and health care providers.

‘(IV) Medical malpractice insurers.

‘(V) State officials.

‘(VI) Patient safety experts.

‘(C) CHAIRPERSON.—The Comptroller General, or an individual within the Government Accountability Office designated by the Comptroller General, shall be the chairperson of the review panel.

‘(D) AVAILABILITY OF INFORMATION.—The Comptroller General shall make available to the review panel such information, personnel, and administrative services and assistance as the review panel may reasonably require to carry out its duties.

‘(E) INFORMATION FROM AGENCIES.—The review panel may request directly from any department or agency of the United States any information that such panel considers necessary to carry out its duties. To the extent consistent with applicable laws and regulations, the head of each department or agency shall furnish the requested information to the review panel.

‘(e) REPORTS.—

‘(1) BY STATE.—Each State receiving a grant under subsection (a) shall submit to the Secretary an annual report evaluating the effectiveness of activities funded with grants awarded under such subsection. Such report shall, at a minimum, include the impact of the activities funded on patient safety and on the availability and price of medical liability insurance.

‘(2) BY SECRETARY.—The Secretary shall submit to Congress an annual compendium of the reports submitted under paragraph (1) and an analysis of the activities funded under subsection (a) that examines any differences that result from such activities in terms of the quality of care, number and nature of medical errors, medical resources used, length of time for dispute resolution, and the availability and price of liability insurance.

‘(f) TECHNICAL ASSISTANCE.—

‘(1) IN GENERAL.—The Secretary shall provide technical assistance to the States applying for or awarded grants under subsection (a).

‘(2) REQUIREMENTS.—Technical assistance under paragraph (1) shall include—

‘(A) guidance on non-economic damages, including the consideration of individual facts and circumstances in determining appropriate payment, guidance on identifying avoidable injuries, and guidance on disclosure to patients of health care errors and adverse events; and

‘(B) the development, in consultation with States, of common definitions, formats, and data collection infrastructure for States receiving grants under this section to use in reporting to facilitate aggregation and analysis of data both within and between States.

‘(3) USE OF COMMON DEFINITIONS, FORMATS, AND DATA COLLECTION INFRASTRUCTURE.—States not receiving grants under this
section may also use the common definitions, formats, and data collection infrastructure developed under paragraph (2)(B).

"(g) EVALUATION.—

"(1) IN GENERAL.—The Secretary, in consultation with the review panel established under subsection (d)(2), shall enter into a contract with an appropriate research organization to conduct an overall evaluation of the effectiveness of grants awarded under subsection (a) and to annually prepare and submit a report to Congress. Such an evaluation shall begin not later than 18 months following the date of implementation of the first program funded by a grant under subsection (a).

"(2) CONTENTS.—The evaluation under paragraph (1) shall include—

"(A) an analysis of the effects of the grants awarded under subsection (a) with regard to the measures described in paragraph (3);

"(B) for each State, an analysis of the extent to which the alternative developed under subsection (c)(1) is effective in meeting the elements described in subsection (c)(2);

"(C) a comparison among the States receiving grants alternatives developed by such States under subsection (c)(1);

"(D) a comparison, considering the measures described in paragraph (3), of States receiving grants approved under subsection (a) and similar States not receiving such grants; and

"(E) a comparison, with regard to the measures described in paragraph (3), of—

"(i) States receiving grants under subsection (a);

"(ii) States that enacted, prior to the date of enactment of the Patient Protection and Affordable Care Act, any cap on non-economic damages; and

"(iii) States that have enacted, prior to the date of enactment of the Patient Protection and Affordable Care Act, a requirement that the complainant obtain an opinion regarding the merit of the claim, although the substance of such opinion may have no bearing on whether the complainant may proceed with a case.

"(3) MEASURES.—The evaluations under paragraph (2) shall analyze and make comparisons on the basis of—

"(A) the nature and number of disputes over injuries allegedly caused by health care providers or health care organizations;

"(B) the nature and number of claims in which tort litigation was pursued despite the existence of an alternative under subsection (a);

"(C) the disposition of disputes and claims, including the length of time and estimated costs to all parties;

"(D) the medical liability environment;

"(E) health care quality;

"(F) patient safety in terms of detecting, analyzing, and helping to reduce medical errors and adverse events;

"(G) patient and health care provider and organization satisfaction with the alternative under subsection (a) and with the medical liability environment; and

"(H) impact on utilization of medical services, appropriately adjusted for risk.

"(4) FUNDING.—The Secretary shall reserve 5 percent of the amount appropriated in each fiscal year under subsection (k) to carry out this subsection.

"(h) MEDPAC AND MACPAC REPORTS.—

"(1) MEDPAC.—The Medicare Payment Advisory Commission shall conduct an independent review of the alternatives to current tort litigation that are implemented under grants under subsection (a) to determine the impact of such alternatives on the Medicare program under title XVIII of the Social Security Act, and its beneficiaries.

"(2) MACPAC.—The Medicaid and CHIP Payment and Access Commission shall conduct an independent review of the alternatives to current tort litigation that are implemented under grants under subsection (a) to determine the impact of such alternatives on the Medicaid or CHIP programs under titles XIX and XXI of the Social Security Act, and their beneficiaries.

"(3) REPORTS.—Not later than December 31, 2016, the Medicare Payment Advisory Commission and the Medicaid and CHIP Payment and Access Commission shall each submit to Congress a report that includes the findings and recommendations of each respective Commission based on independent reviews conducted under paragraphs (1) and (2), including an analysis of the impact of the alternatives reviewed on the efficiency and effectiveness of the respective programs.

"(i) OPTION TO PROVIDE FOR INITIAL PLANNING GRANTS.—Of the funds appropriated pursuant to subsection (k), the Secretary may use a portion not to exceed $500,000 per State to provide planning grants to such States for the development of demonstration project applications meeting the criteria described in subsection (c). In selecting States to receive such planning grants, the Secretary shall give preference to those States in which State law at the time of the application would not prohibit the adoption of an alternative to current tort litigation.

"(j) DEFINITIONS.—In this section:

"(1) HEALTH CARE SERVICES.—The term ‘health care services’ means any services provided by a health care provider, or by any individual working under the supervision of a health care provider, that relate to—

"(A) the diagnosis, prevention, or treatment of any human disease or impairment; or

"(B) the assessment of the health of human beings.

"(2) HEALTH CARE ORGANIZATION.—The term ‘health care organization’ means any individual or entity which is obligated to provide, pay for, or administer health benefits under any health plan.

"(3) HEALTH CARE PROVIDER.—The term ‘health care provider’ means any individual or entity—

"(A) licensed, registered, or certified under Federal or State laws or regulations to provide health care services; or

"(B) required to be so licensed, registered, or certified but that is exempted by other statute or regulation.

"(k) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for initial planning grants for fiscal year 2011.

"(l) CURRENT STATE EFFORTS TO ESTABLISH ALTERNATIVE TO TORT LITIGATION.—Nothing in this section shall be construed to limit any prior, current, or future efforts of any State to establish any alternative to tort litigation.

"(m) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as limiting states’ authority over or responsibility for their state justice systems.

SEC. 6801. SENSE OF THE SENATE REGARDING MEDICAL MALPRACTICE.

It is the sense of the Senate that—

(1) health care reform presents an opportunity to address issues related to medical malpractice and medical liability insurance;
(2) States should be encouraged to develop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, increasing the availability of prompt and fair resolution of disputes, and improving access to liability insurance, while preserving an individual's right to seek redress in court; and
(3) Congress should consider establishing a State demonstration program to evaluate alternatives to the existing civil litigation system with respect to the resolution of medical malpractice claims.