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## PROFESSION

### Health reform has liability insurers looking at tort alternatives

Insurers attending the PIAA's annual meeting received a glimpse into how health courts, early offers and other concepts might work.

By AMY LYNN SORREL, amednews staff. Posted Jun 7, 2010.

Tort reform advocates say the medical liability system is in need of serious repair, and the federal health reform law -- while not perfect -- offers some tools to help get the job started.

That was the message delivered in May to medical liability insurers attending the annual meeting of the Physician Insurers Assn. of America, a trade group for physician-owned medical liability companies.

The health reform law, enacted in March, designated \$50 million in incentive payments to encourage states to test alternatives to damage caps and other more traditional tort reform. The provisions expanded on a separate \$25 million patient safety and liability demonstration program approved by the Obama administration in 2009. The deadline for those grants, overseen by the Dept. of Health and Human Services, was in January. Awards have yet to be announced.

Meanwhile, experts gave insurers a glimpse into four possible alternatives to be tested under the health reform law: health courts, early offers, apology programs and medical review panels. They detailed how the options could alleviate pressures within the current liability system by reducing claims and costs, and by improving efficiency and fairness for physicians and patients.

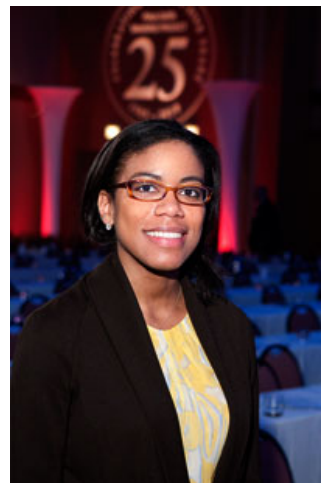
"When looking at what's happening in doctors' offices and hospitals around the country, it's clear that there is still need for further reform," said Ambia Harper, senior counsel for Common Good, a nonprofit legal reform coalition that helped develop the health court model. "Defensive medicine is only one part of the cost problem in health care, but it's a significant part and it's embedded in the way that doctors practice."

With specialized judges, neutral experts and preset timelines and compensation schedules, health courts would create consistent rulings and streamline the legal process, Harper said. The courts also would feed medical error information to patient safety authorities for educational purposes.

The result would be a more predictable system for doctors and insurers, and a more efficient one for patients, Harper said. "The goal is to produce fair and reliable decisions, not to stop lawsuits."

#### Other novel approaches

Early-offer plans would give defendants the option of offering to pay an injured patients' economic damages and attorneys' fees within 180 days of



"Defensive medicine is only one part of the cost problem in health care, but it's a significant part," says Ambia Harper of Common Good, a nonprofit legal reform coalition that helped develop the health court model.

[Photos by Ted Grudzinski / AMA]

a claim being filed. Noneconomic damages would not be available under an early-offer program, and patients who choose the immediate settlement option would forego further recourse in court.

But with as much as 50% of a traditional award often going toward plaintiff attorneys' and administrative fees, patients could still get fair compensation and would be spared "three, four, five years of shin-kicking litigation," said Jeffrey O'Connell, a University of Virginia School of Law professor. He is an insurance law specialist who helped develop model early-offer legislation. Doctors and insurers also would benefit from faster claims resolution and more reasonable awards, he said.

### **75% of Indiana medical liability cases reviewed by a pretrial screening panel end in the physician's favor.**

Early-offer statutes would provide safeguards against inappropriately low settlements, O'Connell explained, and because medical errors rarely involve misconduct, patients would be discouraged from proceeding to court, except in egregious cases. Patients who decline a settlement offer would have to prove a higher standard of gross negligence.

Pretrial screening panels also could help weed out unnecessary litigation, said Scott Hunsberger, claims director for the national medical liability insurer ProAssurance. He handles claims in Indiana, where a 35-year-old tort reform law requires liability cases to be reviewed by a panel of medical and legal experts before going to trial.

Roughly 75% of cases end in a favorable panel determination for doctors, and 95% of those cases never make it to court, Hunsberger said. The process costs roughly \$12,000 to resolve a case administratively, compared with \$50,000 to \$100,000 to go to trial. And it promotes fairness by giving both sides an expert opinion to use as evidence in cases that do go to court, he added.

But the problem with the liability system is more than just a legal one. "It's a relationship one," said Douglas B. Wojcieszak. In the past he lobbied on both sides of the damage caps issue before founding the Sorry Works! Coalition, which advocates for medical error disclosure and apology programs. He said litigation often stems from communication barriers between doctors and patients that typically arise after an adverse event.

But discussing such incidents with patients and empathizing with them -- which does not mean admitting liability -- changes the conversation "from anger to what's fair ... and you only change the discussion when you inject honesty and accountability," Wojcieszak said. "It won't stop every lawsuit. But we know it stops a lot of lawsuits."

### **Stumbling blocks**

Some PIAA annual meeting participants expressed concerns, however, about shortfalls in the health reform law that could undermine states' ability to test such alternatives.

"This bill says you can try all kinds of pilot programs but they must not in any way change the rights of any claimant, and they must not in any way diminish attorneys' fees. So let's have pilot programs that are not pilot programs," O'Connell said.

### **As much as 50% of a medical liability award goes toward attorneys' and administrative fees.**

Harper pointed to the lack of a legal carve-out preventing plaintiffs who pursue a case through a pilot from later going to court. "The best environment for piloting alternatives would be a situation where the alternative remedy is the only remedy ... so you can really get a good test and a good comparison."

The provisions also remain subject to subsequent appropriations by Congress, so it is unclear when the \$50 million in promised funding will come through and when the projects can get under way, said Mike Stinson, PIAA director of government relations.

Insurers still favor noneconomic damage caps as a proven method of curbing liability costs and pressures, he said.

Alternative reforms "are intended to complement caps where they are in place and to be at least a degree of reform where caps cannot be achieved," Stinson said. "The one thing we don't want to do is inadvertently replace the existing caps or make them less effective" when implementing new reforms.

The American Medical Association, while still favoring traditional tort reforms such as damage caps, also supports broad testing of alternatives. The AMA is working with federal lawmakers to ensure funding for the new pilots and is partnering with state medical societies that are considering participation in the various demonstrations.

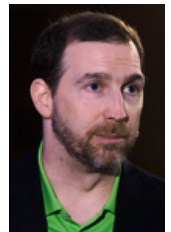
Meanwhile, some experts criticized caps as a limited approach.

Traditional tort reform fails to tackle defensive medicine "because caps work simply on top of the current system without changing the underlying incentives," Harper said. Nor do caps help distinguish between good and bad care.

Caps also do not address abuses that can occur on both sides of a lawsuit, O'Connell said. "There are some frivolous claims, but also some frivolous defenses against needy claimants."

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**Mike Stinson,**  
PIAA director of  
government  
relations

### **ADDITIONAL INFORMATION:**

#### **Rethinking liability claims**

The federal health reform law encourages states to test alternative methods of handling medical liability claims. Four ideas experts are exploring:

#### **Health courts**

- Cases are decided by specialized judges.

- Neutral experts are appointed by the courts.
- Timelines and compensation schedules are preset.

#### Early offers

- Settlement offers are made within 180 days of claim filing.
- Payments are limited to plaintiff's medical expenses and attorneys' fees.
- Gross negligence must be proven to win in court.

#### Disclosure and apology programs

- Medical errors are disclosed to patient.
- Apology is issued for bad outcomes without admitting fault.
- Informed consent and communication processes are expanded.

#### Pretrial review panels

- Case merits are screened prior to trial by a panel of medical and legal experts.
- Panel conclusions can be used by either party as evidence in court.

Source: Physician Insurers Assn. of America

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