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Op-Ed: Heeding Vaccine Court's Failures

Shortcomings of the compensation program do not bode well for other alternative tribunals.

Nora Freeman Engstrom, The National Law Journal

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The tort system is frequently criticized — for the unpredictability of its judgments, the stinginess (or, some say, profligacy) of its awards, and the slow pace, exorbitant cost and adversarial nature of its operation. In tort's place, many suggest, we ought to create alternative compensation mechanisms — which is to say, programs that would provide payment to injured individuals outside the traditional court system. The idea is that, within these alternative mechanisms, compensation would be more quickly, more easily, more consistently and more simply delivered, without long delays or adversarial process.

Recently, this idea has been taking hold in the realm of medical injury. Fed up with the medical malpractice status quo, many advocate moving medical-malpractice cases outside the traditional court system into freestanding, dedicated tribunals. More than just a passing fancy, legislation to establish these "health courts" has been introduced in more than a half-dozen states, while bills to charter pilot projects have been introduced in both houses of Congress. If health courts' many influential supporters are to be believed, these specialized courts are poised to revolutionize medical-malpractice litigation: They would offer faster compensation to far more people, while quelling adversarialism and restoring faith in the reliability of legal decision-making.

But would they? Do alternative compensation mechanisms really operate as effectively as proponents now predict? The best place to look for answers to that question is the Vaccine Injury Compensation Program.

Created by Congress in 1986 as the problem of vaccine injury hit crisis proportions, the program is a no-fault compensation system housed within the U.S. Court of Claims and funded by a 75-cent tax on each vaccine dose administered. Since its effective date, the Vaccine Injury Compensation Program has adjudicated more than 14,000 petitions for vaccine injury. As such, it offers a rich empirical template to assess whether the advantages thought to accompany alternative compensation mechanisms actually accompany these mechanisms once the rubber hits the road.

DISCOURAGING RESULTS

I have studied nearly three decades of previously untapped material concerning the Vaccine Injury Compensation Program's operation, and the results are discouraging. Echoing current claims about health courts, back when the program was created, expectations for its operation were sky high. Congress expressed confidence that the program would resolve claims "quickly, easily and with certainty and generosity," while contemporary commentators predicted that it would offer prompt justice to vaccine-injured children, while guaranteeing equal compensation to similarly situated individuals. So certain was Congress that adjudications would be straightforward that it established a mandatory, statutory 240-day deadline for all vaccine-injury adjudication decisions. Yet, it's putting it charitably to say that the Vaccine Injury Compensation Program has failed to live up to these high hopes.

Despite predictions at enactment that it would "guarantee" equal treatment to similarly situated claimants, a lack of consistency has bedeviled the program. Even though Congress established that each petition would take, at most, 240 days to adjudicate, in reality, the average program adjudication takes more than five years. This is substantially longer than similar claims resolved by court judgment or trial verdict within the traditional tort system.

And although claims within the system are supposed to be amicably resolved, in reality their resolution is frequently antagonistic. In the words of a medical expert who has long participated in the program: "What should be a quiet, civil, deliberative discussion of facts and medicine too frequently degenerates into a contentious, vituperative, decibel-escalating exchange."

The bottom line is that the Vaccine Injury Compensation Program was supposed to offer "simple justice" to vaccine-injured children. But it has largely failed to do so.

For two reasons, these findings should give us pause. First, problems that plague the Vaccine Injury Compensation Program should trouble us if we care about the plight of vaccine-injured children and whether the safety net Congress created to protect those who suffer from vaccine injury is working as intended. This concern is especially urgent now.

Vaccination rates in the United States are lower than they should be, with fewer of our children vaccinated for the measles than children in Uzbekistan, for example. And with the recent California measles outbreak, the effects of this comparatively low vaccine rate seem to be coming home to roost.

At the time the Vaccine Injury Compensation Program was enacted, many thought a smoothly functioning, reliable compensation system would help to convince Americans to become (in the words of the day) "soldiers in the battlefield in the war against disease." If we want to convince more American parents to vaccinate their children, improving the Vaccine Injury Compensation Program could help.

Second, these findings shed light on how well other alternative compensation mechanisms, including health courts, might work. There have been many proposals to create alternative compensation schemes in the past and many more will follow. But the Vaccine Injury Compensation Program, with high hopes at its enactment yet disappointing performance over the past three decades, stands as a cautionary tale for all of them.

Nora Freeman Engstrom, a professor at Stanford Law School, is the author of "A Dose of Reality for Specialized Courts: Lessons from the VICP," in Volume 163 of the *Pennsylvania Law Review*.

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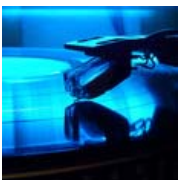
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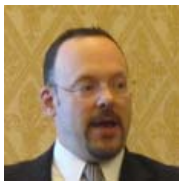
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