

## **Finding Common Ground in Congress on Medical Liability Reform Leadership Day on Capitol Hill**

**May 21-22, 2013**

Background

### **Where Things Stand**

For the past decade, Congress has been unable to muster the political will to pass substantive tort reform legislation. Despite numerous years of legislation having been introduced to address the growing practice of defensive medicine, mainly through attempts to cap non-economic damages in medical malpractice cases, Republicans and Democrats remain sharply divided on the issue. The Democratic Senate majority and the Administration are sympathetic to the need for medical liability reform but tend not to favor an approach that imposes caps on damages as they believe doing so would severely hamper a person's right to have their day in court. Republicans do support such an approach but cannot succeed in enacting such legislation without at least some Democratic votes. Thus, a stalemate continues in Congress on how best to address the broken medical liability system.

ACP continues to work with members on both sides of the aisle to find common ground on medical liability reform. One area where we believe there is bipartisan support is on the concept of health courts. We saw encouraging results from Congress at last year's Leadership Day when we proposed a legislative framework to fund a national pilot on health courts. However, 2012 having been an election year meant that we faced practical challenges in having our legislative framework progress from the concept stage to that of introduced legislation. We continue to see high potential for advancing this concept of health courts in Congress and, with the elections now completed and a new 113<sup>th</sup> Congress awaiting us, we see an opportunity to break the gridlock and are again urging Congress to introduce legislation to fund a pilot on health courts.

In 2013, ACP has identified numerous members of Congress with interest in health courts and potentially in introducing legislation on the issue. These members include: Reps. Chabot (R-OH), Cooper (R-TN), D. Ross (R-FL), Polis (D-CO), Fitzpatrick (R-PA), Price (R-GA), and Senator Enzi (R-WY). Discussions with these member offices are continuing. We are also seeking to combine efforts with other organizations on the national level that have interest in advancing health courts and those discussions are on-going. These groups include: The National Coalition on Health Care, the American College of Surgeons, the American Congress of Obstetricians and Gynecologists, and the Common Good. In addition, the Agency for Healthcare Research and Quality (AHRQ) is funding numerous [on-going projects](#) on medical liability reform, such as patient safety initiatives and alternative dispute resolution demonstrations, all of which will conclude in 2013.

### **Background**

ACP remains concerned about the rising cost of health care and the inability of Congress to address medical liability reform. While the U.S. medical liability system is designed to compensate and deter injuries caused by medical care, the current system does not provide timely compensation to injured patients or resolve disputes in a fair and timely manner. Medical liability premium increases have slowed in recent years, but physicians are still seeing high premiums. The current medical liability system encourages physicians to increase the volume or intensity of health care services they provide to protect themselves against possible lawsuits. The Congressional Budget Office (CBO) estimates that as much as \$62 billion could be saved each year by reforming the medical liability tort system. ACP has [long-standing policy](#) supporting meaningful medical liability reforms.

### **AUTHORIZE AND FUND A NATIONAL PILOT OF NO-FAULT HEALTH COURTS**

ACP has developed a framework for legislation that authorizes a national pilot on health courts and is actively seeking a member of Congress in both chambers to introduce it. A section-by-section summary of the framework will be available in future briefing materials.

This dispute resolution process would provide a new system to resolve medical malpractice claims. Health courts (also known as health care tribunals or medical courts) utilize an administrative process and specialized judges, experienced in medicine and guided by independent experts, to determine cases of medical negligence without juries. Health courts

would provide fair compensation for injuries caused by medical care, reduce costly and time-consuming litigation, reduce malpractice liability costs, provide guidance on standards of care, reduce the practice of defensive medicine, and improve patient safety. The health court model is predicated on a “no fault” system, meaning compensation programs that do not rely on negligence determinations. The central premise behind no-fault is that patients need not prove negligence to access compensation. Instead, patients must only prove that they have suffered an injury, that it was caused by medical care, and that it meets the severity criteria. The goal of the no-fault concept is to improve upon the injury resolution of liability.

Health courts have received widespread and bipartisan support from Congress, interest groups, and physician organizations. President Obama included funding for pilot projects for health courts in his Fiscal Year 2012 budget and former Governor Mitt Romney supports funding for states to adopt the health court model to resolve medical malpractice lawsuits. Former Senate Majority Leader Bill Frist proposed health court legislation in 2004, and the following year Senators Max Baucus (D-MT) and Mike Enzi introduced legislation that would provide grants to states to administer health courts. Representatives Jim Cooper (D-TN) and Mac Thornberry (R-GA) introduced similar legislation in the House.

The National Commission on Fiscal Responsibility and Reform noted that the current tort system in the United States leads to an increase in health care costs, not only because of direct costs – higher malpractice insurance premiums – but because of indirect costs in the form of over-utilization of diagnostic and related services (sometimes referred to as “defensive medicine”). The Commission recommended numerous policies aimed at addressing this problem, one of which is the creation of specialized “health courts.”

In recent years, the literature recognizing the potential of health courts has grown. The [Common Good](#), the [Robert Wood Johnson Foundation](#), the [Commonwealth Fund](#), the [Journal of Health Politics, Policy and Law](#), to name just a few, have all examined the concept of health courts as an alternative to traditional reforms. And, a recent [blog](#) in *Health Affairs* by Philip Howard, shows the growing bipartisan support for health courts.

## LIMIT DAMAGES IN MEDICAL MALPRACTICE LAWSUITS

ACP acknowledges that the likelihood of Congress enacting caps on non-economic damages is remote, as explained above. However, consistent with College policy, we continue to believe in caps on non-economic damages as a viable approach to help reduce the costs of medical liability insurance. Such caps would in no way limit the amount of money that an injured plaintiff could receive to cover his or her hospital costs, doctor bills, other medical expenses, lost wages, or future damages.

The College also supports medical liability reforms that:

- ✓ Limits awards for noneconomic damages at \$250,000
- ✓ Eliminates punitive damages
- ✓ Eliminates the collateral source rule (eliminates double compensation to plaintiffs for certain items);
- ✓ Allows for periodic payment of future damages and structured settlements; and
- ✓ Provides for attorney fee regulation in personal injury and medical malpractice cases

In 2012, the House passed H.R. 5, the *Protecting Access to Health Care Act*, comprehensive tort reform legislation offered by Rep. Phil Gingrey (R-GA) that included caps on non-economic damages and other reforms that have been proven to reduce the costs of defensive medicine. While ACP supported the medical liability provisions in that legislation, the College did not take a position on House passage of H.R. 5 on last year because a provision was added to the bill repealing the Independent Payment Advisory Board, which created a conflict with ACP policy. To read more on ACP’s position on the IPAB, please see [here](#).

Also in 2012, the House passed H.R. 5652, the *Sequester Replacement Reconciliation Act of 2012*, which included legislative language providing for caps on non-economic damages and other reforms. However, it also contained many cuts in other programs (such as repeal of the “maintenance of effort” requirements on states for Medicaid and the

Children's Health Insurance Program (CHIP) and elimination of the Prevention and Public Health Fund) that ACP did not support.

For more information on ACP's positions on medical liability reform, please visit the Advocacy section of ACP Online, [http://www.acponline.org/advocacy/where we stand/medical liability reform.html](http://www.acponline.org/advocacy/where_we_stand/medical_liability_reform.html)