

Authorize and Fund a National Pilot of No-Fault Health Courts

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Health care costs in this country continue to rise and numerous studies show that a substantial contributing factor in that rise has been through costs associated with the practice of “defensive medicine.” While the U.S. medical liability tort system is supposedly intended to deter injuries caused by negligent medical care, and provide compensation to those who experience such injuries, the current system does not deter physician negligence, provide timely compensation to injured patients, or resolve disputes fairly in favor of injured parties. In order to protect themselves from being inappropriately sued, some physicians may feel compelled to order more tests and procedures than are needed, refuse to take certain high-risk patients, decline to provide certain higher-risk services, decide not to practice in geographic areas that are associated with a greater incidence of malpractice suits, or even leave specialties that are more prone to being sued. The practice of “defensive medicine” results in the delivery of health care that has minimal medical benefit and is a major driver of rising health care costs. The Congressional Budget Office (CBO) estimates that as much as \$62 billion could be saved each year by reforming the medical liability tort system; other studies estimate the costs are even higher.

Very little progress has been made in Congress to advance any significant, comprehensive medical liability reforms. Attempts at reform have been made, such as state demonstration grants for alternatives to current tort litigation, as enacted under the Affordable Care Act, but those grants (to date) have not been funded by Congress. The House of Representatives, to its credit, has on several occasions passed legislation that included caps on non-economic damages and other reforms that have been proven to reduce the costs of defensive medicine, but the Senate has not acted on those measures. 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.

With Democrats and Republicans seemingly at odds over how best to reform the medical liability system, ACP believes that members from both sides of the aisle can work in a bipartisan fashion, and have in the past, on the concept of health courts. As an alternative to traditional medical malpractice reforms, 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. An effective approach to making progress on medical liability reform in this Congress must be one that can muster bipartisan support in both chambers.

What can health courts achieve in helping to resolve medical liability claims?

ACP believes that Congress should consider alternative approaches to addressing the costs of our broken medical liability system that *fundamentally change the way that claims are considered and adjudicated rather than just capping the damages that can be awarded under the existing tort system*. Health courts offer a highly promising alternative to the existing tort system for adjudicating medical liability claims. Health courts would offer patients access to a specialized “no fault” administrative process where judges, experienced in medicine and guided by independent experts, determine contested cases of medical negligence without the unpredictability and unfairness of jury trials.

- Under today’s judicial system, judges and juries decide medical malpractice cases with little or no medical training. The majority of medical liability cases involve very complicated issues of fact, and these untrained individuals must subjectively decide whether a particular physician deviated from the appropriate standard of care. Therefore, it is not at all surprising that juries often decide similar cases resulting in very different outcomes. Circumstances in one particular case may lead to no compensation for the plaintiff, while similar circumstances can result in a multi-million dollar verdict in another. It is this kind of uncertainty that is a substantial contributor to instability in the insurance market.
- A national pilot of health courts would allow for evaluation of an alternative resolution process for medical malpractice claims. Health 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 medical 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. Decisions made by health courts would serve as precedent to other courts and act as guidance to the physician community in overall efforts to improve patient quality and patient safety.

Health courts have received widespread and bipartisan support from Congress, interest groups, and physician membership organizations. President Obama included funding for pilot projects for health courts in his Fiscal Year 2012 budget and former Massachusetts Governor Mitt Romney supports funding for states to adopt the health court model. Legislation that would authorize the use of health courts was proposed in 2004 by Former Senate Majority Leader Bill Frist (R-TN). The following year, Senators Max Baucus (D-MT) and Mike Enzi (R-WY) as well as Jim Cooper (D-TN) and Mac Thornberry (R-GA) introduced legislation that would provide states with grants to administer health courts. The American Medical Association, the American College of Obstetricians and Gynecologists, and the Common Good have also endorsed the use of health courts. The bipartisan National Commission on Fiscal Responsibility and Reform (Simpson-Bowles) recommended that “specialized ‘health courts’ for medical malpractice lawsuits” should be among the policies to be pursued as part of “an aggressive set of reforms to the tort system.”

ACP has prepared a detailed section-by-section framework for legislation to authorize and fund a national pilot of health courts, which we hope will be considered as the basis for the introduction of a bipartisan health courts pilot bill in the 113th Congress. The section-by-section summary of this framework can be found in the document entitled, *Medical Injury Compensation Act of 2013: Section-by-Section Summary*.

What are ACP members asking Congress to do?

- ✓ Introduce legislation, based on ACP’s framework, which would authorize and fund a national pilot of health courts.

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