

Enact Bipartisan Medical Liability “Safe Harbor” Legislation and Initiate National Pilot on Health Courts

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Our nation’s medical liability system is in a state of disrepair and, absent reforms, we will continue to see unnecessary costs to the health care system as a whole, and adverse consequences for patient care. While the U.S. medical liability tort system is intended to deter injuries caused by negligent medical care and provide fair compensation to injured patients, the current system does not adequately address these objectives. Patients often have to wait years before their medical liability claims are considered and the outcomes may vary depending upon the state in which the lawsuit is filed. Physicians also feel threatened by lawsuits and may order more tests and procedures for patients than needed to protect themselves from medical liability claims. The Congressional Budget Office (CBO) estimated in 2011 that the federal government could save \$57 billion over 10 years by reforming our medical liability tort system.

Over the past several years, Congress has been unable to reach a bipartisan agreement to enact legislation to reform our medical liability laws. In the past, the House of Representatives has passed legislation that includes caps on noneconomic damages and other reforms that would lower the cost of defensive medicine but this legislation has not been considered by the Senate. The Affordable Care Act authorized \$50 million in grant funding for states to test innovative medical liability reform and patient safety improvement models beyond traditional tort reform but Congress has not appropriated these funds. The Agency for Health Quality Research (AHRQ) developed a grant program that allowed states to apply for funding test medical liability reforms to lower health costs and improve patient safety. This program concluded in 2013 and we are awaiting a report from AHRQ on the results of this initiative.

It is important that Congress continue to pursue common-sense, innovative alternatives to reform the medical liability system; ones that can gain bipartisan support. A promising bipartisan bill has been introduced this year that provides Congress with a new option to address tort reform. Representatives Andy Barr (R-KY) and Ami Bera (D-CA) have introduced the *Saving Lives, Saving Costs Act* (H.R. 4106) that would provide safe harbor protections from medical liability lawsuits for physicians who document adherence to clinical practice guidelines. This legislation could be a pathway forward and lead to other, equally innovative reforms such as initiating a national pilot on health courts, which would utilize an administrative process and specialized judges, experienced in medicine and guided by independent experts, to determine cases of medical negligence without juries.

What kinds of innovative approaches are needed in addressing today’s failing medical liability system?

Any solution to the broken medical liability system in the U.S. should include a multifaceted approach. Because no single program or law by itself is likely to achieve the goals of improving patient safety, ensuring fair compensation to patients when they are harmed by a medical error or negligence, strengthening rather than undermining the patient-physician relationship, and reducing the economic costs associated with the current system. A multifaceted approach should allow for innovation, pilot-testing, and further research on the most effective reforms.

ACP provides nine approaches in its recent policy paper, “Medical Liability Reform: Innovative Solutions for a New Health Care System,” that should be incorporated into a multifaceted medical liability reform initiative. These include:

- Continued focus on patient safety and prevention of medical errors;
- Passage of a comprehensive tort reform package, including caps on non-economic damages;
- Minimum standards and qualifications for expert witnesses;
- Oversight of medical liability insurers;
- Testing, and if warranted, expansion of communication and disclosure programs;
- Pilot-testing a variety of alternative dispute resolution models;
- Developing effective safe harbor protections that improve quality of care, increase efficiency, and reduce costs;

- Expanded testing of health courts and administrative compensation systems;
- Research into the effect of team-based care on medical liability, as well as testing of enterprise liability and other products that protect and encourage team-based care.

H.R. 4106, the Saving Lives, Saving Cost Act: On February 27, 2014, Representatives Andy Barr (R-KY) and Ami Bera (D-CA) introduced the *Saving Lives, Saving Costs Act*, which provides a bipartisan alternative to reduce costs associated with defensive medicine. The intent of H.R. 4106 is multi-faceted. It offers physicians who document adherence to certain evidence-based clinical-practice guidelines and, when applicable, appropriate use criteria, a safe harbor from medical malpractice litigation; aims to reduce the practice of defensive medicine and resulting health care costs; improves quality of care and patient safety, permits organizations with relevant expertise to participate in the selection of clinical practice guidelines, and permits professionals with relevant expertise to participate and benefit from liability reform.

Equally important is that H.R. 4106 provides a mandatory review of evidence by an independent review panel of three qualified experts in the field of clinical practice, before the costly discovery phase of a medical liability case, if the physician can document adherence to clinical guidelines. The panel will determine if defendant physicians complied with the guidelines, which are to be recognized as the standard of care. The panel should use their medical expertise to determine when departing from recommendations in the guidelines is appropriate for individual patients. The findings, opinions, and conclusions of the review panel shall be admissible as evidence in any and all subsequent proceedings before the court, including for purposes motions for summary judgment at trial. If the panel made a finding that there was an applicable practice guideline that the physician adhered to, the court shall issue summary judgment in favor of the physician unless the claimant is able to show otherwise by clear and convincing evidence.

This legislation is consistent with ACP principles that encourage the use of evidence-based guidelines, and ACP believes it will improve quality of care and patient safety since these practices are consistent with trusted quality measures approved by physician specialties. Clinical guidelines will also have the potential to lower costs associated with defensive medicine since these principles do not support the use of unnecessary tests or procedures.

Authorize a National Pilot on Health Courts: 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.

- Health courts are designed to facilitate speedy decisions, promote consistency and reliability of verdicts, discourage the filing of unnecessary claims, and justly compensate patients, while improving the physician – patient relationship. Quality information gathered from health court claims can be used to track common problems and design responses to 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.

ACP has prepared a detailed section-by-section framework for legislation (available upon request) 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.

What are ACP members asking Congress to do?

- ✓ Cosponsor H.R. 4106, the *Saving Lives, Saving Cost Act* in the House; introduce a companion bill in the Senate.
- ✓ Introduce legislation, based on ACP’s framework, to authorize and fund a national pilot on health courts.