

Reforming the Medical Liability System

Through sufficient and dedicated financial support for programs that reduce the practice of defensive medicine

The American College of Physicians (ACP) believes that reform of medical liability system is essential. While medical liability premium increases have slowed in recent years, physicians are still seeing high premiums due to the cost of defensive medicine. The current medical liability system encourages physicians to increase the volume or intensity of the health care services they provide to protect themselves against possible lawsuits. A recent study found that defensive medicine increases health care spending by \$55 billion annually, more than half of the annual estimated cost of the Affordable Care Act (ACA, P.L. 111-148).

While the ACA will fund demonstration programs to test various models on the state level, such limited reforms are not expected to be sufficient to substantially reduce the costs of defensive medicine. Section 10607 of the ACA authorizes the Secretary of the Department of Health and Human Services (HHS) to award \$50 million in demonstration grant money to States for the development, implementation, and evaluation of alternatives to current tort litigation, such as certificate of merit programs, which require a finding that a suit has merit before it can proceed to trial, and health courts, which would have cases heard by a panel of medical experts rather than a lay jury. Each state applying for funds has the liberty to develop an alternative system, must allow for the resolution of disputes, and promote a reduction of health care errors by encouraging the collection and analysis of patient safety data related to disputes by organizations that engage in efforts to improve patient safety and the quality of health care. The HHS Secretary is to make these funds available for five years, beginning in FY2011, subject to Congress appropriating the \$50 million that was authorized under the ACA.

Congress should go well beyond the ACA's limited medical liability demonstration projects by enacting proven reforms to reduce the costs of defensive medicine, including enactment of caps on non-economic damages. The United States is the only country in the world that provides unlimited compensation for noneconomic damages, and caps on non-economic damages 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 supports professional liability reform 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.

According to the Congressional Budget Office (CBO), national implementation of a package of proposals similar to the above list would reduce total national premiums for medical liability insurance by about 10% and “would lower costs for health care both directly, by reducing medical malpractice costs—which consist of malpractice insurance premiums and settlements, awards, and legal and administrative costs not covered by insurance—and indirectly, by reducing the use of health care services through changes in the practice patterns of providers.”

Congress should also authorize and fund a national demonstration project of health courts, which would have medical liability cases heard by an expert panel of judges instead of a lay jury. Health courts, also known as “medical courts,” offer a specialized administrative process where judges, experienced in medicine and guided by independent experts, determine contested cases of medical negligence without juries. 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 whatever severity criteria applies; it is not necessary to show that the third party acted in a negligent fashion. The goal of the no-fault concept is to improve upon the injury resolution of liability.