



October 2009 Health Courts Update

In recent months, the country has been embroiled in a national debate about healthcare, and Congress is currently working out the contours of comprehensive healthcare reform legislation. Medical malpractice reform, high on the Republican policy agenda during the Bush Administration, has recently emerged as an issue in this year's healthcare debate.

As of September, the bill passed by the House Energy and Commerce Committee is the only one of the major healthcare bills pending before Congress to include medical malpractice reform. That bill includes a provision sponsored by Rep. Bart Gordon (D-TN) offering unspecified financial incentives to states that implement alternative liability schemes in the form of "certificates of merit" or "early offers."¹ While neither of the pending Senate bills includes a medical malpractice reform provision, the Senate Finance Committee has included a statement in the "Sense of the Senate" section of its healthcare reform bill encouraging states to develop and test alternatives to civil litigation for medical errors.²

In his speech to Congress on September 9, 2009, President Obama announced that he wants the Department of Health and Human Services (HHS) to encourage states to experiment with ways to reduce malpractice litigation. Although the president did not offer a detailed proposal, the White House later suggested that state-level experiments could include "certificates of merit" or an "early offer" program similar to that proposed by then-Senators Obama and Clinton in unsuccessful legislation in 2005.³ On September 17, 2009, the White House announced that it has allocated \$25 million in grants to states for a pilot program geared to reducing medical malpractice litigation. The pilot program will provide grants of up to \$3 million each for up to three years for states and health systems to develop patient safety and medical liability programs, as well as one-year planning grants for up to \$300,000.⁴

The attached report was prepared by Alliance for Justice in 2006 to assess a popular proposal floated at the time to create "health courts." The material contained herein has become relevant and applicable to current discussions about medical malpractice policy and potential reform measures now under consideration by Congress and HHS.

¹ America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009), *available at* http://energycommerce.house.gov/Press_111/20090714/aahca.pdf.

² Senate Finance Committee's America's Healthy Future Act of 2009, Title III, Subtitle H, "Sense of the Senate Regarding Medical Malpractice," *available at* <http://finance.senate.gov/sitepages/legislation.htm>.

³ Amy Goodstein, "On Malpractice Reform, Fine Print Is Still Hazy," *Washington Post*, September 11, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/10/AR2009091001865.html>. *See also* S. 1784, The National MEDiC Act, 109th Cong. (2005).

⁴ Patricia Zengerle, "White House sets \$25 Million for Medical Liability Project," *Washington Post*, September 17, 2009, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/17/AR2009091701907.html>.



Health Courts under the Microscope:

Alliance for Justice's Close Look at the Current Proposal to Take Patient Injury Claims out of the Civil Justice System and into an Administrative Bureaucracy

Executive Summary

Purported tort reformers have begun pushing hard for the adoption of “Health Courts.”¹ The health courts concept, which has attracted support in Congress, contemplates that medical injury claims be removed from the civil justice system and placed into an administrative bureaucracy. Before deciding to move toward such an administrative system, Congress must weigh whether the current health courts proposal preserves the underlying values of American law – fairness and justice. This is what Alliance for Justice has done. After careful consideration, we have concluded that the medical claim bureaucracy to be established under the current health courts proposal is, as now designed, an unacceptable substitute for our civil justice system.

- The proposal takes away injured patients’ right to a jury trial without providing an alternative system that offers equal or better protection than our civil justice system. An alternative system that fails to offer victims of medical negligence equal or better protection than they enjoy under the civil justice system is unacceptable.
- Because the proposal is modeled on the workers’ compensation system, it will likely suffer from the same flaws as the workers’ compensation system, which include susceptibility to undue influence by powerful entities, like the insurance industry, whose interests are typically adverse to those of medical malpractice victims.

¹The Health Courts proposal we examined was the one proposed by Common Good and the Progressive Policy Institute in their report, *Health Courts: Fair and Reliable Justice for Injured Patients* (Feb. 2005).

- By compensating victims according to a rigid pay-out schedule, the proposal imposes a de facto non-economic cap on injury claims. This is particularly problematic because it remains unclear whether the schedule will be determined in a fair manner. Proponents of the proposal suggest, for instance, that the schedule should, in part, reflect how health courts in other countries compensate malpractice victims, despite the fact that such other countries have social welfare systems that greatly diminish the need for substantial, additional compensation by health courts.
- The proposal violates the principles of federalism. It contemplates supplanting centuries-old state tort systems with an unproven, federalized administrative system without good reason. There is no persuasive evidence that state court systems handling medical negligence claims are irremediably broken.
- The proposal may be unconstitutional under both federal and state law because, among other things, it would: (a) preempt all constitutional guarantees to trial by jury without providing the constitutionally necessary *quid pro quo* of eliminating the injured parties' burden of proving fault; and (b) impose a uniform schedule of damages, which in reality acts as the kind of damages cap that a number of state courts have found unconstitutional.
- The public is left in the dark about how many aspects of the proposed health courts system would actually operate. Importantly, for example, the proposal does not address whether the health courts system would include many of the procedural safeguards that serve to ensure fairness in the civil justice system, including the injured patient's right to access evidence in the hands of the medical provider and the extent of the injured patient's right to present favorable evidence. Before moving forward with even a pilot program that eliminates the historical right of injured patients to seek redress through the civil justice system, such safeguards must be guaranteed.
- Sensible reforms of existing state tort systems are far superior to the current health courts proposal for ensuring fairness and justice for victims of medical malpractice.

I. Genesis of Health Courts

In the past few years, there has been a growing effort to create an administrative system to handle the claims of injured patients. The most prominent advocate for specialized "health courts" is Common Good, a nonprofit organization established in 2002 to promote restrictive legal reform. That same year, Common Good founder, Philip K. Howard, called for specialized medical courts in a speech before the American Association of Health Plans. He claimed that "America has a defective legal philosophy"

and “an extremely sick medical system.”² The country needs a totally new system for resolving medical injury claims, according to Howard, because “[p]utting more legal leeches on the [medical] system will not make it more healthy.”³ In April 2002, Common Good sponsored a forum calling for a “new system of medical justice.” One of the speakers at the event characterized the American civil justice system as “legal terrorism.”⁴

Common Good’s push for a new administrative system intensified with the February 2005 release of a report it jointly issued with the Progressive Policy Institute.⁵ The report is called “*Health Courts: Fair and Reliable Justice for Injured Patients*.”⁶ On June 29, 2005, soon after the report was released, United States Senators Michael B. Enzi (R-WY) and Max Baucus (D-MT) introduced the “Fair and Reliable Medical Justice Act,” S. 1337,⁷ a legislative proposal to establish health courts based on the Common Good/PPI proposal. The bill authorizes the Secretary of Health & Human Services to award up to ten grants to states “for the development, implementation and evaluation of alternatives to current tort litigation for resolving disputes over alleged injuries caused by a health care provider or health care organization.” On March 2, 2006, the Republican Policy Committee released a report advocating the Common Good/PPI health court proposal as the first step to “[m]eaningful health care reform.”⁸

²Remarks by Philip K. Howard before the American Association of Health Plan, February 27, 2002, available at www.cgood.org.

³*Id.*

⁴Remarks of Alain Enthoven, Common Good Forum: Does America Need a New System of Medical Justice? (April 24, 2002)(Washington, D.C.).

⁵ The Progressive Policy Institute’s self described mission is “to modernize progressive politics and governance for the 21st century. Moving beyond the left-right debates of last century, PPI is a prolific source of the Third Way thinking...” The group’s website is www.ppionline.org. According to the Center for Media & Democracy, the Third Way Foundation, which receives funding for PPI, has received funding from Bank One, Citigroup, Health Insurance Corporation, Morgan Stanley, General Electric and other companies, as well as the Bradley Foundation. (See www.sourcewatch.org).

⁶The report is available at www.ppionline.org.

⁷The Enzi-Baucus bill encourages the development of alternatives to the current civil justice system by providing funding for state demonstration projects. To qualify for funding, participating states must choose to set up one of three programs: an early disclosure program, an administrative determination model and the health courts model. This report focuses on the health courts model because it is the most widely promoted model. Alliance for Justice does not *per se* oppose alternative systems for resolving medical injury claims; we would support a voluntary system that preserves the patient’s right to use the civil justice system, provides fair compensation and improves patient safety. None of the options proposed in the Enzi-Baucus bill meet all of these criteria.

⁸Republican Policy Committee Paper, “Meaningful Health Care Reform Begins with Health Courts” (March 2, 2006).

II. How Health Courts Would Operate⁹

A. *Initial Claim and Review*

Under the health courts proposal, medical injury claims would no longer be handled in civil courts. Those claims would be handled in an administrative system similar to the workers' compensation system. The injured patient would file a claim, which would be investigated by a health court review board. If the injury resulted from a "clear, uncontestable" case of malpractice, the claim would be paid according to a "schedule of benefits."¹⁰ Expedited payment would be made for this class of injuries, which are labeled "avoidable classes of events, or accelerated compensation events (ACEs)." The injuries that would comprise ACEs would be initially established from those already identified by "experts who have proposed and analyzed alternative schemes to our current system."¹¹ An example of an ACE would be giving penicillin to a patient with a known penicillin allergy. Additional injuries would be added to the list of ACEs by health court review boards.¹²

If the review board determines that the injury "is clearly not malpractice or is too minor to merit an award," the review board would dismiss the claim. If the case is "not cut and dry," then "the review board would steer the case to the health court for a full trial."¹³

B. *Health Court Trials*

Trials in health courts would be presided over by "specially qualified judges." The judges would be appointed by governors and serve for a set term of years. Judges would have background and training in science or medicine. The parties would be allowed to be represented by attorneys, but there would be no juries. Expert witnesses would be hired by health courts, not the parties.¹⁴

Health courts would find liability "as the result of a mistake that should have been prevented." Proponents call this standard the "avoidability standard," which encompasses "injuries that would not have happened were optimal care given."¹⁵ This is a "broader, more liberal standard of recovery" than negligence, but is not pure "no fault" or strict liability.¹⁶

⁹This section is based on the descriptions in the PPI/Common Good Health Courts Policy Report (hereinafter "Report") and in subsequent forums hosted by Common Good about Health Courts. The first forum was "Health Courts: Exploring the Concept" (May 5, 2005) (Washington, DC); the second was "Administrative Approaches to Compensating for Medical Injuries: National and International Perspectives" (Oct. 31, 2005) (Washington, DC).

¹⁰Report at 3.

¹¹Report at 3.

¹²Report at 11.

¹³Report at 3.

¹⁴Report at 4.

¹⁵Comments of David Studdert, Oct. 31, 2005 forum.

¹⁶Report at 10.

C. *Compensation Resulting from Liability Findings*

As with the ACEs, damage awards resulting from health court findings of liability would be set by a schedule of benefits. The schedule would cover both economic and non-economic damages. Congress is to establish an independent commission of presidential and Congressional appointees to set an initial schedule of benefits. The benefits schedule would be developed “through a consensus process involving research on similar benefit schedules in the United States and abroad,” and would include weighing current awards in the U.S. legal system against typical awards for similar injuries in other countries. This schedule would be adjusted annually at the federal level and thereafter used by the health courts set up in the states.¹⁷

The proposal contemplates that economic damages would be paid in full, “with the exception of a short deductible period.” A patient would have to have suffered “a given duration of lost work time in the vicinity of four to six weeks” or “a certain level of out of pocket medical expenses” to become eligible to file a claim.¹⁸ Non-economic damages would rely “on a tiered system corresponding to the severity of the injury.”¹⁹

III. **Concerns about the Health Courts Proposal**

A. *Because the health court system is modeled on the workers’ compensation system, injured patients will not fare well under it*

According to health courts advocates, the workers’ compensation system provides the model for health courts: “The system would be similar to the one that handles workers’ compensation claims.”²⁰ This is problematic. In a recent examination of workers’ compensation systems across the country, *Consumer Reports* concluded that “the system falls short” for many injured workers.²¹ *Consumer Reports* explained that in the late 1990s, after losing money for several years due to poor investments and rising medical expenses, the insurance industry made a major push for workers’ compensation reform. With the political clout it wields, its campaign succeeded. Twenty-nine states changed workers’ compensation laws in a way that dramatically benefited the insurance industry to the detriment of injured workers. According to *Consumer Reports*:

The result is that ill and injured workers now must fight a series of battles: first, to get medical care; next, to withstand exams by insurance-company doctors who have an incentive to find excuses not to pay; then, to get a fair assessment of any permanent disability; and finally, to win a hearing if there’s a dispute.²²

¹⁷Report at 11.

¹⁸Studdert comments, Oct. 31 forum.

¹⁹Studdert comments, Oct. 31 forum.

²⁰Report at 3.

²¹“Workers’ Comp Falling Down on the Job,” *Consumer Reports*, February 2000, at 28.

²²*Id.* at 30.

A report by the New York State AFL-CIO similarly concluded:

[I]njured and sick workers are often forced into prolonged wrangling with insurance companies in an attempt to get their claims established. The process is so tortured, convoluted and demeaning that many workers do not file for compensation or become so discouraged that they fail to pursue their valid claims.²³

Medical insurers ultimately will be responsible for pay-outs in a health courts system, just as they are responsible for pay-outs in the workers' compensation system. This, of course, creates an incentive for the insurance industry to use its considerable political influence to advocate systemic procedures that have the effect of limiting health courts pay-outs – which is precisely what it did with regard to the workers' compensation system in the 1990s. The incentive for medical insurers to push hard for systemic procedures that have the effect of limiting pay-outs in a health courts system is particularly acute since, according to their proponents, health courts are designed to compensate not only the medical malpractice victims who typically obtain relief from the civil justice system, but the thousands of others who currently do not file claims.²⁴

Given their relatively recent state-by-state success in limiting relief in workers' compensation systems, there is no reason to believe that insurers who are equally or more incentivized to limit relief in an easier-to-target, federalized health courts system will be any less successful. If in the end health courts proponents are correct in asserting that a health courts system will function like the workers' compensation system, injured patients, like injured workers, will face undue difficulty receiving fair compensation. Insurers and hospitals would not be able to wield such political influence over our independent court system.

B. Compensation to injured patients under the proposal will be pre-set by political appointees, not by judges or juries

Under the proposal, injured patients are denied the right to have a jury of their peers make a common sense determination, based on the evidence, about what is fair compensation for their injuries. Compensation will be determined according to a “schedule of benefits” that “would be developed through a consensus process involving research on similar benefit schedules in the United States and abroad.” Presidential and

²³*Unjust Treatment: 'Independent' Medical Examinations & Workers Compensation in New York State*, A Special Report prepared by the New York State AFL-CIO (1998).

²⁴In 1999, the Institute of Medicine issued a report, *To Err Is Human: Building A Safer Health System*, which examined the rise in injuries and costs associated with preventable medical injuries. The report discovered that as many as 98,000 patients die each year in the United States as a result of medical errors. Numerous other medical studies confirm that there are a large number injuries resulting from medical negligence and that only about one in seven injured patients file claims. Given these numbers, one commentator noted that if every injured patient filed a claim, there would be at least 75 percent more claims than there are now Tom Baker, *THE MEDICAL MALPRACTICE MYTH* (U. of Chicago Press 2005) at 22-44.

congressional appointees would establish the initial schedule of benefits, which would be adjusted annually by the Commission. The proposal would require states that set up demonstration programs use this schedule of benefits.²⁵

Nothing in the proposal spells out who may be appointed to the compensation commission. There is no guarantee that the Commission will be balanced so as to include individuals, like patient and consumer advocates, who understand the hardships that often face medical malpractice victims. Accordingly, there is no assurance that the benefits schedules will provide fair and just compensation for injured patients. Rather, they would impose de facto caps on non-economic damages. Because such damages caps reflect a cookie cutter approach that supplants the well-established system of having juries determine damages awards on an individualized, case-by-case basis, the caps concept has been consistently rejected when considered by Congress in recent years.

Among other things, a damages cap would adversely affect both women and the elderly, according to an empirical study by law professor Lucinda M. Finley.²⁶ Because women and the elderly receive a greater proportion of non-economic damages than men, non-economic damage limits would have a disparate impact on them, Professor Finley found. This is particularly true for elderly women. Non-economic damages limits also have a disparate impact on medical malpractice cases where the victim dies, especially where the victim is a child. Limits on non-economic damages additionally place an effective ceiling on recovery for certain types of injuries experienced by women, including sexual assault and gynecological injuries.

The method that health courts proponents suggest for establishing a benefits schedule also is not promising. They have spent a great deal of time, for example, looking at the administrative patient injury compensation systems in Sweden and Denmark for guidance.²⁷ While it may be useful to take a look at how well those systems have worked, it is not particularly helpful to use the compensation schedules in those systems as an accurate measure of what would be fair for American victims of medical malpractice. That is because the health care systems in Sweden and Denmark are much different, and are part of more comprehensive social safety nets, than in the United States. Sweden has an extremely comprehensive social welfare structure so that even before any compensation is given for an injury claim, the Swedish welfare system would cover about 80 percent of a sick or injured worker's salary. Thus, most of a patient's injury claim is already paid for by the welfare system.²⁸ Likewise, Denmark has public health and extensive welfare systems, so patient injury compensation is considered "on the top" compensation.²⁹

²⁵Report at 11.

²⁶*The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (Summer 2004).

²⁷Mello comments, Oct. 31 forum.

²⁸Comments of Carl Espersson from Sweden's Patient Compensation Fund, Oct. 31 forum.

²⁹Comments of Martin Erichsen from Denmark's Patient Compensation Fund, Oct. 31 forum.

C. *The Health Court proposal may not feature procedural safeguards that have ensured fairness in our civil justice system*

The health court proposal provides a mere skeleton of what a new, administrative health court system would look like. But its proponents have not fleshed out many of its operational procedures. Questions about such procedures must be answered before we seek to replace the current civil justice system. This is true of even state demonstration projects, since they – like any finalized system – would deprive hundreds of injured patients their historical right to seek redress for their injuries through the civil justice system.

One key question is how patients get access to information regarding their claims and injuries. In civil litigation, parties are entitled to discovery from the other side. In the health courts proposal, local health court review boards would validate facts “by reviewing patients’ medical charts and interviewing patients, doctors, and nurses.”³⁰ It is unclear whether a patient also would be entitled to review medical records and interview potential witnesses. It is also unclear how much information the patient will be entitled to obtain before filing a claim and how much information the patient will be provided after a claim is filed.

Moreover, the proposal fails to set forth the kind and quantity of evidence that will be allowed in support or defense of a claim. It is clear that the system would use expert witnesses paid for by the court. But beyond that, the details are murky. Patients and providers “could *possibly* submit written expert testimony of their own in addition to court-appointed expert opinion.”³¹ Other types of evidence that would be admissible are not established. Nor is there any indication of the standards that would be used to determine admissibility.

Given the potential unfairness of the proposed system, as well as questions about whether the system will feature adequate procedural safeguards, it is especially troubling that the proposal does not appear to contain an opt-out provision for patients. In other words, the proposal does not indicate that patients will have the option of declining to participate in the health courts system and choosing instead to pursue their remedies in the civil justice system. The proposal’s proponents have recommended that *health care providers* have the option of opting in.³² But they do not advocate a similar provision for patients, suggesting only that patients be notified about the mandatory nature of the system so that they can give “meaningful informed consent.”³³ Even if the proposal did not require patients to opt in, opting in might nevertheless “be a mandatory part of health care agreements that HMO’s, insurers, hospitals and health care providers” require patients to sign before treatment.³⁴

³⁰Report at 10.

³¹Report at 10.

³²Comments of Michelle Mello, Oct. 31, 2005 forum.

³³*Id.*

³⁴American Bar Association Report, accompanying ABA Resolution, dated Feb. 13, 2006, opposing “the creation of health care tribunals.”

D. *The proposal may well be unconstitutional*

Although the U.S. Constitution provides “the right of trial by jury,”³⁵ proponents of the current health courts proposal claim that their alternative system, which clearly takes away the right to a jury, is constitutional.³⁶ They argue that because the Supreme Court has upheld the constitutionality of other administrative systems, such as workers’ compensation, the health courts proposal is likewise constitutionally sound.

The American Bar Association, however, has pointed out that because the current health courts proposal features a fault standard, unlike the no-fault standard used in the workers’ compensation system, there is no comparable trade off that passes constitutional muster.³⁷ The Supreme Court held that workers’ compensation systems are constitutional because employees are given “a certain and speedy remedy *without the difficulty and expense of establishing negligence.*”³⁸ The liability standard to be used under the health court proposal is allegedly less than negligence, but unlike the workers’ compensation system, it is not “no fault.” Whether the liability standard to be established in health courts is low enough to be constitutional is doubtful.

The schedule of benefits from which compensation awards are made may also be unconstitutional if determined to be a de facto cap on non-economic damages. At least thirteen states have found damages caps to be unconstitutional for a variety of reasons.³⁹ For example, in *Ferdon v. Wisconsin Patients Compensation Fund*,⁴⁰ the Supreme Court of Wisconsin found that a cap on non-economic medical malpractice damages violated the equal protection guarantees of the Wisconsin constitution. The court noted:

No one disputes that the cap does not apply equally to all medical malpractice victims. Indeed, the burden of the cap falls entirely on the most seriously injured victims of medical malpractice. Those who suffer the most severe injuries will not be fully compensated for their non-economic damages, while those who suffer relatively minor injuries with lower non-economic damages will be fully compensated. The greater the injury, the smaller the fraction of non-economic damages the victim will receive.⁴¹

Amy Widman of the Center for Justice and Democracy has recently written a detailed treatment of the constitutionality of the health courts proposal. It is forthcoming in the Pace Law Review and can be accessed at www.centerjd.org/press/opinions/HealthCourtsUnconstitutional.pdf.

³⁵U.S. CONST. amend. VII.

³⁶Report at 3.

³⁷ American Bar Association Resolution Opposing the Creation of Health Care Tribunals and accompanying report (Feb. 13, 2006).

³⁸ *New York Central R.R. v. White*, 243 U.S. 183, 247 (1917).

³⁹See Center for Justice & Democracy statement, “Tort Reforms” are Unconstitutional (listing at least 13 states that have declared damages caps unconstitutional) (available at www.centerjd.org).

⁴⁰701 N.W.2d 440 (Wis. 2005).

⁴¹*Ferdon*, 701 N.W.2d at 465.

E. The proposal violates federalism principles without just cause

Though the current legislative proposal envisions voluntary participation by the states, the health court proposal expressly contemplates making participation by the states mandatory at some point.⁴² “[I]n states that choose to forgo federal start-up funds and avoid creating health courts of their own,” Common Good asserts, the federal government “may need to preempt state medical malpractice laws and establish federal health courts.”⁴³ Although states that set up health courts may retain a degree of discretion in designing some of the courts’ operational details, including where to house the court bureaucracy, the courts would be federalized in every significant way. Start up funds would come from a federal tax on medical malpractice premiums.⁴⁴ More fundamentally, the federal government will set the standards for nearly every aspect of the claims resolution process. Unelected federal officials will establish uniform federal guidelines on the qualifications for judges, the criteria for selecting experts for health court trials, the standards of liability and the schedule of limits on non-economic damages.⁴⁵ Federal health court judges, in turn, will “develop a body of written rulings” to provide consistent guidance on standards of care.⁴⁶ The system would include “a supporting system of federal health courts to arbitrate when health court decisions in different states are contradictory.”⁴⁷

This kind of mandatory nationwide system raises serious federalism concerns. Like nearly all common law tort claims, claims of medical negligence have been traditionally adjudicated by the states under legal doctrines that have developed over decades, even centuries. The principles of federalism authorize the replacement of such traditional state systems *only* when there is a clearly identified national need for such a replacement. As discussed at length below, no one yet has demonstrated a compelling need to override the multitude of well-developed, long-standing state laws governing medical negligence claims.

F. The proposal may sweep a large number of health care providers into the jurisdiction of health courts and out of reach of state courts

Another question is whether the jurisdiction of the health courts will extend beyond patient injury claims against doctors and nurses. Most of the medical malpractice bills introduced in Congress extend the definition of health care claims to claims relating to HMOs, drug companies, nursing homes, medical device manufacturers and the insurance industry.⁴⁸ Those bills give drug companies and medical device-makers

⁴²Fair and Reliable Medical Justice Act, S. 1337 (109th Congress).

⁴³Report at 14.

⁴⁴Report at 5.

⁴⁵Report at 14.

⁴⁶Report at 9.

⁴⁷Report at 9.

⁴⁸See the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 5, which defines health claims as those against a health care provider, a health care organization, or the manufacturer, distributor, supplier, marketer, promoter, or seller of a medical product.

special protection through provisions that provide a shield against liability for drugs and products that have FDA approval. Some proponents of the current proposal have recommended that health courts be limited “to the ordinary types of claims that doctors and hospitals face,” but the legislation allowing for health courts contains no such limitation.⁴⁹

IV. Health Courts Proponents Have Not Justified Supplanting the Civil Justice System

Proponents of the current health courts proposal envision replacing localized civil justice systems with a federalized administrative system for the resolution of medical injury claims. The idea runs counter to the traditions, values and history of American law. It would supplant an area of the common law that has a long pedigree and that, under our federal system, has always been governed by the states. And it would do so without relieving injured parties of the burden of proving fault. Contrast this with the workers’ compensation system, which, despite its current imperfections, *created* remedies that the common law effectively did not provide (rather than replacing common law remedies) and justified overriding the civil justice system by adopting a true “no fault” standard of liability.⁵⁰

Proponents of the current health courts proposal justify departing from American legal traditions by arguing that the civil justice system is effectively broken. They claim that most medical malpractice claims lack merit, that insurance companies are settling frivolous claims, and that the current system impedes patient safety initiatives. None of these claims withstand scrutiny. Despite their efforts, health courts proponents simply have not justified their project.

The civil justice system is not perfect. But the problems are not what proponents of the current health courts proposal say they are. The problems can be resolved, and the civil justice system improved, by common sense reforms that many states are beginning to explore. These reforms are far superior to the current health courts proposal for improving patient safety and ensuring justice for the victims of medical malpractice without financially burdening doctors.

⁴⁹Mello comments, Oct. 31 forum.

⁵⁰ Amy Widman, “Why Health Courts Are Unconstitutional,” at 10 – 12, at www.centerjd.org/press/opinions/HealthCourtsUnconstitutional.pdf

A. *Health Courts proponents are not shooting straight about the problems they say exist in the civil justice system*

(1) Most medical negligence cases filed under the current civil justice system have merit

Many studies show that most malpractice claims are justified.⁵¹ “In fact, the research shows that most malpractice claims are reasonable in light of what plaintiffs and their lawyers can find out at the time.”⁵²

Despite these studies, proponents of the current health courts proposal argue that most medical malpractice claims and settlements are frivolous. They say that “for every valid [medical negligence] claim, four unfounded claims are filed.”⁵³ Health courts proponents base this figure on the Harvard Medical Practice Study, which examined medical injuries from a sampling of 31,000 hospital records from New York in 1984. Using the rate of injuries determined from their study, researchers extrapolated that there were 27,000 negligent medical injuries in hospitalizations in New York that year. Of the hospitalizations they actually studied, only 47 medical malpractice cases were filed, of which only eight were identified as involving a “negligent medical management injury.”⁵⁴ Using that figure, advocates of tort reform argue that 80 percent of medical malpractice claims are without merit.

A close look at the Harvard study, however, does not support the conclusion that most medical malpractice claims have no merit, because the study “was not designed to make judgments about the validity of a small number of medical malpractice claims.”⁵⁵ At the outset, the study used a very conservative process to classify an injury as resulting from negligence and “only examined hospital records, not the full range of evidence available in a medical negligence case.”⁵⁶ This conservative approach “was well suited to the task of providing a solid, lower bound estimate of those injuries, an estimate that would be trusted by medical providers.”⁵⁷ But it was not well suited to determining whether medical malpractice cases were frivolous or not. Researchers disagreed five times more than they agreed on the question of whether an injury was the result of negligence.⁵⁸

⁵¹Baker, *supra* n. 24 at 83.

⁵²*Id.* at 83-87 (discussing the research that “clearly rejects the claim that most medical malpractice lawsuits are frivolous”).

⁵³Report at 1.

⁵⁴Tom Baker, “Reconsidering the Harvard Medical Practice Study Conclusions about the Validity of Medical Malpractice Claims, (June 6, 2005) at 5 (available at <http://ssrn.com/abstract+724781>).

⁵⁵*Id.*

⁵⁶*Id.* at 12.

⁵⁷*Id.* at 8.

⁵⁸*Id.* at 11.

The researchers themselves acknowledged:

Our study was not designed to evaluate the merits of individual claims... . [W]ithout access to the full [liability] insurance records, we cannot assess the prospects of individual cases. ...Our reviewers sometimes disagreed about causation and negligence; when only one found negligence, the case did not qualify as an adverse event due to negligence (except in the rare case when there was only a single reviewer). In a lawsuit a single expert opinion might be sufficient to support a finding of negligence; under our protocol it would not. ...Thus our findings are not directly comparable to the results of civil litigation.⁵⁹

(2) Insurance companies are not settling frivolous claims

Studies of insurance records also show that insurance companies are not settling frivolous claims. One insurance scholar, who has extensively studied medical malpractice claims, noted the attempt by some to downplay what insurance records clearly demonstrate. Referring, for instance, to the statement by doctors who studied 8,000 insurance claims that “further efforts to clarify the frequency of unjustified payments are needed, but our data suggest that such payments are uncommon,” the scholar translated:

“Further efforts to clarify” is academese for “we know that you are not going to like this, so we do not want to stick our necks out too far.” And “our data suggests that such payments are uncommon” is academese for “almost everyone who got paid really was injured by medical malpractice.”⁶⁰

Studies of jury performance also show that jury verdicts closely correspond to prior case assessments by insurance company experts.⁶¹ Thus, the claims of health courts proponents that juries are unable to accurately determine whether an injury was the result of negligent care and how much it was worth is simply not true.

(3) The civil justice system does not impede patient safety initiatives

Proponents of the current health courts proposal claim that the civil justice system “deters improvements in the quality of medical care” because health care providers will not disclose errors out of fear of liability.⁶² But scholars who have studied medical malpractice have searched extensively for data supporting that often-repeated claim and

⁵⁹*Id.* at 13 (citing Localio, A. Russell, Susan L. Weaver, J. Richard Landis, Ann G. Lawthers, Troyen A. Brennan, Liesi Hebert, Tonya Sharp, “Identifying Adverse Events Caused by Medical Care: Degree of Physician Agreement in a Retrospective Chart Review,” *Ann Intern Med* 125:457-64 (1996).

⁶⁰Baker, *supra* n. 24 at 77.

⁶¹Struve, Catherine T., *Expertise in Medical Malpractice Litigation: Special Court, Screening Panels, and Other Options*, Pew Project on Medical Liability (2003), at 37-40.

⁶²Report at 7.

have found none. “No statistical study shows an inverse correlation between malpractice exposure and the frequency of error reporting.”⁶³ A leading advocate for error reporting and patient safety noted, “Fear of litigation may ... be overblown. No link between [error] reporting and litigation has ever been demonstrated.”⁶⁴

Another leading medical malpractice insurance scholar also tried to confirm “the conventional wisdom” that medical malpractice lawsuits prevent doctors from acknowledging mistakes and concluded, “People often refer to articles that support the conventional wisdom, but when you actually read those articles, what you find is a naked assertion or, at best, testimony. What you do not find is research or empirical evidence.”⁶⁵

B. There are common sense reforms that would improve the civil justice system without undermining individual rights and protections

The current health courts proposal is not an adequate substitute for the civil justice system. But there are several common sense reform proposals that would make the current system work better for everyone. Such proposals should be explored and encouraged. For example, as proponents of the health courts proposal admit, medical experts have already been able to identify large classes of injuries where liability is clear. The health courts proponents call these ACEs (avoidable classes of events, or accelerated compensation events). Claims involving such injuries could be quickly and efficiently handled in a system that would operate much like a small claims court. In addition, scholars have developed worthy proposals to improve the courts’ use of expert witnesses and to provide juries with more guidance to better equip their decision making.⁶⁶

The Rush Mediation Program is an example of a legal reform that has worked well. It has reduced defense costs and provided a more predictable procedure for settlement while also preserving injured patients’ right to a jury trial. The Rush-Presbyterian-St. Luke’s Medical Center in Chicago, Illinois established the program in 1995. Since then, it has resolved more than 80% of filed claims. The program, which is voluntary, uses a mediator who has no interest in or power to determine the outcome of the mediation. The parties agree that the proceedings will be confidential. In 2003, the program adopted an apology component to help build trust between the parties, but any apology or expression of remorse by health care providers given during mediation cannot be used in any subsequent legal proceedings.

Around the country, reformers are implementing programs that address the real crisis of avoidable medical errors. These programs are premised on the notion that improving patient safety will diminish the amount of litigation associated with medical

⁶³David A. Hyman and Charles Silver, “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?,” 90 CORNELL L. REV. 893 (2005) at 914.

⁶⁴*Id.* (citing Lucian L. Leape, “Reporting of Adverse Events,” 347 N. ENG. J. MED. 1633, 1635 (2002)).

⁶⁵Baker, *supra* n. 24 at 96.

⁶⁶Struve, Catherine T., *Expertise in Medical Malpractice Litigation: Special Court, Screening Panels, and Other Options*, Pew Project on Medical Liability (2003) at 83-90.

errors. One such program is Sorry Works. Under Sorry Works, medical providers and professionals who acknowledge their medical errors are offered liability protections and an opportunity to negotiate fair compensation for injured patients. This system encourages health care providers to come forward and acknowledge their mistakes, improves patient safety in the long run and reduces patients' incentives to litigate; at the same time, because participation is voluntary, it preserves the historical right of injured patients to take their claims to court. Twenty states have already enacted legislation adopting some version of the Sorry Works model and 19 other states are considering similar proposals.⁶⁷ Senators Hillary Clinton (D-NY) and Barack Obama (D-IL) have introduced federal legislation that would enable states to implement the program.⁶⁸

The Anesthesiologists Patient Safety Model represents another successful reform effort. It has both improved patient safety and reduced medical malpractice rates for doctors. In 1970, anesthesiologists were the subject of almost eight percent of all medical malpractice claims.⁶⁹ In the mid-1980s, recognizing their disproportionate exposure to legal liability resulting from patient injuries, anesthesiologists embarked upon a series of reforms aimed at determining the causes of anesthesia-related harms and implementing standardized practice reforms to address the problems that they identified. By focusing on patient safety, anesthesiologists have dramatically reduced: (a) the number of anesthesia-related injuries and deaths; (b) the number of claims against them, which now account for less than four percent of all medical malpractice claims⁷⁰; and, significantly (c) their own malpractice insurance premiums, which are now some of the lowest in medicine.⁷¹

⁶⁷Reni Gertner, *The Art of Apologizing Takes Hold in the Legal World*, MASSACHUSETTS LAWYERS WEEKLY, Dec. 19, 2005.

⁶⁸National Medical Error Disclosure and Compensation Act, S. 1784, 109th Cong. (2005).

⁶⁹*Beyond Stopgap: Medical System Reforms*, MEDIAL ECONOMICS, Jan. 7, 2005.

⁷⁰*Id.*

⁷¹Joseph T. Hallinan, *Once Seen as Risky, One Group of Doctors Changes its Ways*, WALL ST. J., June 21, 2005.

V. Conclusion

The current health courts proposal would cast aside our vaunted court system, which has heard and developed law concerning medical malpractice cases since the early 19th century. This system, though imperfect, has given injured patients an objective process to defend their rights and hold powerful interests accountable. In order to justify such a radical departure from American legal traditions, the proponents of the current health courts proposal must demonstrate that the system they envision would protect injured patients the same as, or better than, the existing civil justice system. They have not carried their burden. The current proposal: (a) contemplates a system that would be susceptible to political influence by powerful entities whose interests run counter to those of injured patients; (b) leaves open too many questions about how health courts would operate and, importantly, fails to provide that health courts will feature the same procedural safeguards that ensure fairness in the civil justice system; (c) violates the principles of federalism by substituting an untested, nationalized system for our traditional, state-based common law system without offering persuasive evidence that the traditional system is irremediably broken; and (d) is probably unconstitutional. For these reasons, Congress should reject the current proposal. Unless and until the proposal's shortcomings are fixed, common sense reforms that build upon and strengthen the civil justice system should be pursued instead.