ISSUE BRIEF:
HEALTH COURTS: AMERICA NEEDS RELIABLE MEDICAL JUSTICE TO LOWER HEALTHCARE COSTS

The cost of healthcare in America is projected to consume roughly 20 percent of GDP by the year 2020. A significant driver of spiraling costs is our nation’s unreliable medical liability system which causes doctors to practice defensive medicine—the ordering of unnecessary tests and procedures to protect themselves from lawsuits—amounting to tens if not hundreds of billions of wasteful spending each year. The current liability system—unpredictable, slow, and expensive—is also bad for injured patients.

Bringing reliability to medical justice is critical for the future of our healthcare system and would be a strong move toward less expensive, higher quality care. Creating special health courts is key to accomplishing these goals.

THE PROBLEM

America’s current medical liability system does a poor a job of distinguishing good care from bad. According to a 2006 study in the New England Journal of Medicine, the system awards damages in 28 percent of cases where there is no error, and leaves 27 percent of cases where there is error unpaid. This unreliability is bad for both doctors and patients alike. For doctors, it causes them to practice defensively, ordering tests and procedures out of legal fear rather than medical necessity. A vast majority of providers have admitted to the practice, including 93 percent of Pennsylvania specialists in a 2005 study in the Journal of the American Medical Association. These expenditures are pure waste, estimated to cost the American healthcare system anywhere from $45 billion to over $200 billion a year.

At the same time, patients injured due to negligence suffer limited access to compensation under the current system. Studies indicate that as few as two percent ever file a claim. And even when they do successfully initiate litigation, patients find that the process is time-consuming (taking an average of three to five years to resolve a claim), inefficient (with nearly 60 percent of an award going to lawyers and court costs), and oftentimes inequitable (with similar cases not receiving similar awards).

Legal fear also compromises patient safety by inhibiting an open exchange among healthcare providers. Doctors and nurses will decline to discuss or confirm critical medical information, fearing that asking even a question as simple as, “Are you sure that’s the right dosage?” will make them vulnerable to lawsuits.

Traditional tort reforms, such as those that aim to cap damages, do not address the unreliability of the current system and do not protect the doctor who is in the right. Reform efforts like
providing safe harbors for following medical guidelines don’t provide for a reliable decision maker—two juries presented with the same set of facts might rule differently.

“Instead of upholding reasonable standards of care, the current system is an ad hoc process in which one jury could find liability where another jury on the same facts finds no liability,” explains Philip K. Howard, Common Good’s founder and chair. “This unreliable system—referred to by one prominent scholar as ‘an engine of inconsistency’—is why distrust of justice by doctors is nearly universal.”

A comprehensive solution is needed if we are to address the totality of problems that underlie the current medical liability system.

**THE HEALTH COURT ALTERNATIVE**

In conjunction with the Harvard School of Public Health, and with support from the Robert Wood Johnson Foundation, Common Good has developed a proposal for specialized health courts that would bring reliability, efficiency, and fairness to medical justice.

Health courts would have full-time, expert judges who would offer written, precedent-setting rulings. These rulings would establish proper standards of care on which both providers and patients can rely. And like administrative courts for tax disputes, workers’ compensation, and vaccine liability, there would be no juries. All decisions could be appealed to a new medical appellate court.

Health courts would also improve upon our current system—where courts must rely on medical advice provided by partisans chosen and paid for by plaintiffs and defendants—by employing independent experts to provide neutral expertise and advice on proper standards of care. To ensure that similar injuries are compensated alike, health courts would utilize a standardized compensation schedule. And finally, health courts would require vigorous reporting of error data so that providers can learn from their mistakes.

**A BIPARTISAN SOLUTION**

Health courts are a bipartisan, practical approach to both improving the medical liability system and reducing the unsustainable cost of healthcare. Both 2012 presidential nominees—President Obama and Governor Romney—embraced the concept, as did the National Commission on Fiscal Responsibility and Reform (commonly known as Simpson-Bowles) and three other debt reduction commissions. Health courts have also been endorsed by doctors’ groups, patient safety advocates, consumer groups, editorial boards, members of Congress, and thought leaders nationwide. Trial lawyers, who profit from the unreliability of the current system, are the main source of opposition to the idea.

Comparable approaches in New Zealand and Scandinavia have markedly improved patient satisfaction and reduced malpractice insurance rates.

The American public is also strongly in favor of health courts. A nationwide poll conducted by
Clarus Research Group revealed that 66 percent of voters support the idea of creating health courts to decide medical claims. Only 25 percent said that those claims should be decided as they are now, and there was virtually no difference between Democrats and Republicans on the issue: 68 percent of Republicans, 67 percent of Democrats, and 61 percent of independents support health courts.

Common Good’s health court proposal best addresses the ills of the current medical liability system. With health courts, injured patients will have easier access to a reliable and efficient adjudication process, and doctors who did nothing wrong will be better protected from spurious claims. Moreover, reliable medical justice will improve patient safety by increasing transparency and, maybe most importantly in these challenging economic times, will curtail the billions of dollars of annual waste lost to defensive medicine.

For more information on addressing the waste and unreliability of our health care system, visit http://www.commongood.org/resources/c/fact-sheets-briefings.

This issue brief was prepared by Common Good, a nonpartisan reform coalition, as part of its Start Over campaign to fill the substance void in this election and beyond. It is intended to provide actionable policy ideas for use by citizens, reform groups, elected officials and candidates for public office. For more information, go to CommonGood.org.