

# Jury Still Out on Viability Of Health Courts System

BY ALICIA AULT

Associate Editor, Practice Trends

WASHINGTON — The concept of using administrative law judges instead of civil jury trials to settle malpractice suits has gained some admirers in Congress and generated interest among state legislatures, but it is uncertain whether such a system is the solution to skyrocketing malpractice premiums and jury awards, according to academics, attorneys, and consumer and legislative representatives who met in early November at a meeting sponsored by Common Good and the Harvard School of Public Health, Boston.

Under the “health court” concept, fleshed out earlier this year by Michelle Mello and David Studdert of Harvard, specially trained judges would make compensation decisions according to whether an injury was “avoidable” or “preventable” (*Milbank Quarterly* 2006;3:459-92). The plaintiff would have to show that the injury would not have happened if best practices were followed. Impartial experts would help set compensation, based on scientific evidence and what is known about avoidability of errors. Decisions would be made quickly.

Such a system would likely increase the number of people eligible for compensation but decrease the size of awards, Ms. Mello said.

Unlike the current tort system, a health court system could also help deter medical errors by collecting data that would then be given back to hospitals and practitioners for root-cause analyses, she explained.

In 2005, Sen. Michael Enzi (R-Wyo.) and Sen. Max Baucus (D-Mont.) introduced the Fair and Reliable Medical Justice Act (S. 1337), which would provide money for demonstration projects on alternative methods to address malpractice, including health courts. The Senate Health, Education, Labor, and Pensions Committee held a hearing on the bill in June 2006,

but there has been no further action.

At the symposium, Stephen Northrup, the health policy staff director for that committee, said it is not clear whether the newly Democratic-controlled Congress will consider alternatives such as health courts. Because Democrats are unlikely to approve of caps on damages as a tort reform, he said, it is incumbent on physicians to promote alternatives.

The National Committee for Quality Assurance supports the move toward an administrative court, said NCQA general counsel Sharon Donohue. But there is no evidence that awards will decrease, and with an expanding number of claimants, malpractice premiums might still increase because they are based on the number of claims paid, she said.

Some consumer groups oppose the idea. Linda Kenney, president of the advocacy group Medically Induced Trauma Support Services, said patients should not be required to start the claims process, as is proposed under the health court system. An audience member representing Consumers Union said that her group did not like the idea of taking away a patient’s right to a jury trial.

Dr. Dennis O’Leary, president of the Joint Commission on Accreditation of Healthcare Organizations, also said he saw some basic impediments to using the courts to improve patient safety. Eighty-five percent of errors are due to systems issues; only 15% are competency related, so solutions should focus on systems design, Dr. O’Leary said.

Despite JCAHO’s voluntary reporting requirements of the last 10 years, there are few reports of adverse events—maybe 450-500 a year, he said. Most reports concern errors that are not easy to hide, such as patient suicides—the top category—and surgical misadventures, the No. 2 category, Dr. O’Leary said. Surprisingly, at least eight cases a month of wrong-site surgery are reported, he added. ■

## POLICY & PRACTICE

### Paxil Settlement

The pharmaceutical giant GlaxoSmithKline has agreed to settle a class action lawsuit that alleged that the company inappropriately promoted the antidepressant Paxil to children. The \$63.8 million settlement will include any individuals in the United States who bought Paxil or Paxil CR for their minor children. GlaxoSmithKline agreed to settle the case in order to avoid “protracted litigation” but officials there believe they acted appropriately, company spokeswoman Mary Anne Rhyne said. The settlement agreement is expected to receive final court approval in March 2007.

### Investigating SSRIs and Suicide

Officials at the National Institute of Mental Health, part of the National Institutes of Health, are funding new research to help answer questions about the association between selective serotonin reuptake inhibitors (SSRIs) and suicidality. The projects, which will be conducted at academic medical centers across the country, will draw on data from the Food and Drug Administration, the Department of Veterans Affairs, Medicare, and the National Death Index. In one study being conducted at the University of Florida, researchers will examine whether an “activation syndrome” exists among certain young people that is brought on by SSRIs and can lead to suicidality. “These new, multiyear projects will clarify the connection between SSRI use and suicidality,” Dr. Thomas Insel, director of the National Institute of Mental Health, said in a statement. “They may lead to new tools that will help us screen for those who are most vulnerable.”

### Misusing Rx Pain Relievers

More people are misusing prescription pain relievers for the first time than are trying marijuana, according to a report from the Substance Abuse and Mental Health Services Administration. About 2.7 million individuals aged 12 years and older reported misuse of prescription pain relievers in the past year, compared with 2.1 million who said they started using marijuana in the last year. These figures are based on the combined results of the 2002 and 2004 National Survey on Drug Use and Health. Overall, marijuana users are still outpacing prescription drug abusers. An annual average of about 11.3 million individuals aged 12 years and older reported using prescription pain medications nonmedically in the past year, compared with an average of 25.5 million individuals who had used marijuana in the past year. “While marijuana continues to be the most commonly used illicit drug, the misuse of prescription drugs is clearly a growing national concern that requires action from multiple segments of our society,” Eric Broderick, SAMHSA acting deputy administrator, said in a statement. The report is available online at <http://oas.samhsa.gov/prescription/toc.htm>.

### House Investigates CDC Finances

Members of Congress are looking into alleged financial problems at the Centers for Disease Control and Prevention. In a letter, members of the House Energy and Commerce Committee requested that CDC officials provide an analysis done by Deloitte Consulting L.L.C. detailing “inefficiency and ineffective leadership” in the agency’s finance office. Committee chairman Joe Barton (R-Texas) and chairman of the committee’s subcommittee on oversight and investigations, Rep. Ed Whitfield (R-Ky.), also requested information on how the CDC manages human tissue samples and laboratory equipment. The congressmen also asked to be briefed on the status of CDC’s reorganization, ongoing since June 2003.

### Smoking Rates Level Off

An 8-year decline in adult smoking rates may be flattening, according to the CDC. The agency analyzed self-reported data from the 2005 National Health Interview Survey and found that the nation is falling behind in efforts to reduce cigar and cigarette smoking, use of smokeless tobacco, and adult quit attempts. In 2005, 21% of adults, or 45 million Americans, were smokers; of those, 43% had tried to quit. About 2% were cigar or smokeless tobacco users. All the rates were unchanged from 2004, the authors said in the Oct. 27 Morbidity and Mortality Weekly Report. Smoking rates are highest among people with less education—43% of those with a General Educational Development diploma; the rate is 30% among those living at or below the poverty level. Meanwhile, a Zogby International poll of 1,200 registered voters commissioned by the Drug Policy Alliance found that 45% were in favor of banning cigarettes within 5-10 years.

### Health IT Gaps

The adoption gap in health information technology continues to widen, with physicians in smaller practices being left behind, according to a report from the Center for Studying Health System Change (HSC). Between 2000-2001 and 2004-2005, physicians in all types of practices increased their use of health IT for accessing patient notes, generating preventive care reminders, exchanging clinical data, obtaining treatment guidelines, and writing prescriptions. But practices with two or fewer physicians increased their use of health IT for writing prescriptions by 5%, compared with 28% among practices with more than 50 physicians. The gaps are likely attributable to the greater financial resources of larger practices along with more administrative resources and economies of scale. The data in the report come from the HSC Community Tracking Study Physician survey, a nationally representative telephone survey of physicians involved in direct patient care in the United States. The report is available online at [www.hschange.org/CONTENT/891/](http://www.hschange.org/CONTENT/891/).

—Mary Ellen Schneider

## DATA WATCH

### Average Claims Payments on Medical Malpractice, 2005

