

Second-tier: How Health Courts Threaten Civil Justice

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Who is Public Citizen?

Public Citizen delivers credible information based on facts, represents everyday people in the halls of power, and fights relentlessly until we win on the issues that matter most.



What are Health Courts?

- Specialized “courts” – or insurer-dominated panels – that deal only with medical malpractice claims
- Generally mandatory for medmal cases
- Run by a judge with special training (and potential bias) towards medicine
- Experts picked generally by the judge
- “Avoidability” standard rather than negligence
- Schedule of non-economic awards based on severity of injury

What Other Administrative Systems Exist?

International:

- New Zealand, Sweden, Denmark, Finland, Norway, and Iceland

Domestic:

- Virginia Birth-Related Neurological Injury Compensation Program: IN TROUBLE
- Florida Birth-Related Neurological Injury Compensation Association
- Federal Vaccine Injury Compensation Program: IN TROUBLE
- State Worker's Compensation Schemes

Health Courts Based on False Assumptions

Myths Used to Support Health Courts:

- Medical Justice is “random” (vs. PC’s study, *The Great Medical Malpractice Hoax*)
- Lawsuits “cause” for market-based fluctuations in medical malpractice insurance rates
- Lawsuits do not deter bad doctors: Solution is improve doctor discipline
- Fear of lawsuits leads to a decreased quality of medical care— “defensive medicine” vs. fact: secrecy is embedded in culture of medicine

Alleged “Benefits” of Health Courts

The key claims of proponents:

- Cuts administrative costs
- Avoidability standards Increases number compensated (but lowers value for each)
- Could restrain damages (vs. above claim)
- “Trained” judges and medical “experts”
- Increases patient safety
- Decreases defensive medicine

Summary of Major Problems with Health Courts

- They cannot accomplish stated goals, e.g., fairness consistent with due process.
- They are unconstitutional.
- They impose high administrative costs in exchange for little demonstrated value.
- They allow highly biased decision-makers and limit appeals.
- They impose a one-size-fits-all schedule for damages compensation.
- They fail to include real incentives to reduce error.

Cost Transfer to Victims and Taxpayers

- Health courts are a redundant legal system that duplicates costs at taxpayers' expense. PC: Hidden Costs fact sheet.
- As shown in the Virginia model, most plaintiffs retain – and must retain – an attorney: no cost “savings” there.
- In lieu of the parties, financial burden for experts also shouldered by taxpayers.
- Pain and suffering payment schedule highly limited, arbitrary and cruel to many.

Promise to Compensate Victims Is Unrealistic

- The Virginia model is, on paper, “no-fault,” yet it has compensated only 110 children over 20 years – versus original estimates of 40/year.
- Given the small fraction of claims brought today vs. error rates, compensating all victims of avoidable error would EITHER drastically reduce each victim’s share OR bankrupt the system.
- Pre-set injury thresholds and compensation schedules would reduce compensation for many victims who can be more fully compensated now.

Compromised Judges and Biased Medical Experts

- Having judges trained and working closely with panels of insurers or medical “experts” introduces significant anti-plaintiff bias
- Panels will be “you scratch my back” culture
- Experience shows that judges and experts will over-value the viability of fund finances and discount the suffering of victims:
 - Many examples, including: Birth injury VA fund; Vaccine courts; federal mine workers’ fund

Health Courts Will Not Solve Defensive Medicine Myth

- Efforts to measure “defensive medicine” fail
- Culture of secrecy is unrelated to liability
- Linking pay to quality of care would best reduce useless/dubious medical procedures
- No evidence there would be increased reporting of errors, meaning little patient safety benefit
- Would decrease quality: VA shows there is marked decrease in doctor discipline

Health Courts Are Unconstitutional

- The 7th Amendment guarantees: “In suits at common law...the right of trial by jury shall be preserved....”
- Virtually every state constitution guarantees the right to trial by jury
- Health courts can only deprive citizens of trial by jury by providing a reasonable *quid pro quo* – with a true no-fault system
- A constitutional guarantee cannot be extinguished simply for expediency

Health Courts Would Extinguish Subrogation Rights

- Health courts save money by only reimbursing expenses *not* covered by government or private insurers
- Medicare, Medicaid and insurers have a right to reimbursement: subrogation
- To remain viable, health courts would revoke this right – costing insurers, state and federal governments hundreds of millions of dollars
- Key opportunity to recruit state governments and insurers to oppose health courts

New Threat: Binding Arbitration

- Representatives from National Arbitration Forum attended recent Health Cts summit in DC to push “non-legislative” tactics
- Doc-patient contracts also pushed by risk management groups in FL, NJ, elsewhere
- Sadly, few limits from courts on contractual possibilities
- Solution: Federal and state bills to address
- See PC report: The Arbitration Trap

Thank you.

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