

Dateline Washington

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Congress examines pay for performance

On July 21, the House Ways and Means Health Subcommittee held a hearing on pay for performance (also known as value-based purchasing for physicians) under Medicare. The hearing explored issues related to a legislative proposal being drafted by subcommittee chair, Rep. Nancy L. Johnson (R-CT), that would phase in Medicare payment incentives for physicians to report, and later to meet, quality performance measures developed under a process incorporating recommendations from medical and surgical specialty societies. Among the witnesses at the hearing was Mark McClellan, MD, PhD, Administrator of the Centers for Medicare & Medicaid Services (CMS), who outlined efforts under way at the agency to engage physicians in working toward changing Medicare policies to support better patient outcomes at lower cost.

Surgical specialty societies jointly submitted for the hearing record a proposed framework for phasing in quality performance measures for surgeons. The proposal can be viewed on the College's Web site at www.facs.org/ahp/views/payforperformance.html.

Patient safety legislation on track

On July 20, the House Energy and Commerce Committee passed the Patient Safety and Quality Improvement Act of 2005, which would permit health care providers to voluntarily report information about medical errors to patient safety organizations (PSOs) that would, in turn, analyze and report on causes and solutions. The legislation, which has been supported strongly by the College, provides protections against using reported safety information in liability lawsuits. It also would allow organizations like the College to apply for PSO status.

Similar legislation was considered in both the House and Senate last year, but it ultimately failed because of irreconcilable views on issues such as the confidentiality of reported information. The legislation, introduced in the House as H.R. 3205, represents a bipartisan and bicameral compromise and ultimately is expected to be passed by both chambers and signed into law by the President.

Wisconsin Supreme Court reviews liability reforms

Because of recent legal decisions, the status of Wisconsin's liability reform statutes related to caps on noneconomic damages has become uncertain. On March 3, the Wisconsin Supreme Court heard oral arguments in the case of *Gregory G. Phelps et al. v. Physicians Insurance Co. of Wisconsin Inc. and Matthew Lindemann, MD*. At issue was an appeal of a recent appellate court ruling that first-year residents are not included under the state's cap because the statute stipulates that only licensed health care providers are covered. As such, this ruling creates a disadvantage because first-year residents are the only group not covered; all medical students and residents beyond the first year of training are protected by the statute. Wisconsin's cap on noneconomic damages was initially enacted at \$350,000 and has an annual inflation adjustment. Currently, the cap is \$445,775.

On June 22, the Court issued its ruling, upholding the appellate court's view that Dr. Lindemann was not a "health care provider" as defined in the noneconomic damage statute. The Supreme Court did, however, remand the case to the Circuit Court for a determination of whether Dr. Lindemann was a "borrowed employee" of St. Joseph's Hospital and therefore entitled to the cap protection as an "employee" of a health care provider under Wisconsin statute.

In a second case, a divided Court declared the \$350,000 cap on noneconomic damages in medical liability lawsuits unconstitutional. In *Matthew Ferdon et al v. Wisconsin Patients Compensation Fund et al*, the jury had awarded Mr. Ferdon and his family \$700,000 in noneconomic damages; the court applied the cap, which reduced the award to just over \$400,000 (based on annual inflation adjustments) and the case was appealed. The justices ruled four to three that the cap violated the equal protection guarantees of the state's constitution because it creates two classes of plaintiffs—those who receive full noneconomic damages if the amount granted by the jury is at the full amount of the cap or less, and those whose granted awards are reduced because of the cap. In other words, because these plaintiffs are not fully compensated for their noneconomic damages as determined by a jury, an unequal situation is created that violates the equal protection guarantees. It is important to note, however, that this current ruling does not negate the Wisconsin Supreme Court's October 2004 ruling that caps are constitutional in cases of wrongful death.

To read the full opinions of both cases, visit <http://www.courts.state.wi.us/sc/opinion/DisplayDocument.html?content=html&seqNo=18674> and <http://www.wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=19014>.

Senate approves trauma and EMSC funding

In July, the Senate Appropriations Committee approved its funding legislation for the Departments of Health and Human Services, Labor, and Education for fiscal year 2006. Included in this bill are \$3.418 million for the Health Services and Resources Administration's Trauma-EMS Program and \$20 million for Emergency Medical Services for Children (EMSC). The companion House bill does not contain funding for trauma, but it did provide \$19 million for EMSC.

In related news, the College, along with 32 other organizations, recently signed a letter in strong support of S. 760, the Wakefield Act. This bill would reauthorize the EMSC program for an additional five years with an annual funding level of \$23 million.