RSC Republican Study Committee
Rep. Sue Myrick (R-NC), Chairman
Neil Bradley, Executive Director
230 Cannon House Office Building
Washington, D.C. 20515
ph (202) 226-9717 / fax (202) 226-1633

Legislative Bulletin……..…May 12, 2004

Contents:

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0
Year to Date Prior to Today's Bills: 17

Total Cost of Discretionary Authorizations: $0
Year to Date Prior to Today's Bills: At least $205.26 billion[#], over five years

Total Amount of Revenue Reductions: $3.183 billion over five years
Year to Date Prior to Today's Bills: $43.92 billion over five years

Total Change in Mandatory Spending: -$4.38 billion over five years
Year to Date Prior to Today's Bills: $474 million over five years

Total New State & Local Government Mandates: 1
Year to Date Prior to Today's Bills: 11[#]

Total New Private Sector Mandates: 0
Year to Date Prior to Today's Bills: 11

[#] This figure does not include H.R. 3873, the Child Nutrition Improvement and Integrity Act. A CBO analysis of this bill is not yet completed.

H.R. 4279—To amend the Internal Revenue Code of 1986 to provide for the disposition of unused health benefits in cafeteria plans and flexible spending arrangements (McCrery)

Order of Business: The bill is scheduled for consideration on Wednesday, May 12th, subject to a modified closed rule. The rule allows for an amendment in nature of a substitute, to be offered by Mr. Rangel or his designee. The substitute amendment is described below.

Summary: H.R. 4279 allows up to $500 in unused health benefits in a flexible spending arrangement (FSA) to be carried forward in the FSA to the next year or be transferred to a health savings account (HSA), effective for tax years after December 31, 2003.

An FSA is a reimbursement account under which an employee is reimbursed for medical expenses or other non-taxable employer-provided benefits, and typically is funded through salary reduction. An HSA is a tax-exempt account – created under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 – used to pay for medical expenses of the account holder and that person's spouse and dependents. Employee contributions to an HSA are deductible and employer contributions to an HSA are excluded from income.

Additional Background: The House passed language similar to that of H.R. 4279 on June 26, 2003 by a vote of 237-191 (http://clerk.house.gov/evs/2003/roll328.xml). That bill, H.R. 2596, was ultimately included in the House-passed version of H.R. 1, the Medicare Prescription Drug and Modernization Act of 2003, but was not included as part of the H.R. 1 conference report. Unlike the language of the previous bills, H.R. 4279 does not allow unused FSA benefits to be transferred to a pension plan if the individual cannot contribute to an HSA.

Rangel Amendment in Nature of a Substitute: The substitute would allow up to $500 in unused health benefits in an FSA to be carried forward in the FSA to the next year. It would not allow the funds to be transferred into an HSA. The cost of the FSA provision is offset in the bill by closing what the amendment refers to as "Enron-Related Tax Shelter Provisions." These provisions include a limitation on the transfer or importation of built-in losses, disallowing basis decreases to the stock of a corporate partner, expanded disallowance of the deduction for interest on convertible debt, and preventing corporate expatriation to avoid income tax by requiring the acquiring corporation in a corporate expatriation transaction to be treated as a domestic corporation. The amendment also provides the Secretary of the Treasury the authority to disallow tax benefits for acquisitions that were made primarily to evade U.S. income tax.

Committee Action: The bill was introduced on May 5, 2004, and referred to the Committee on Ways and Means, but the committee did not consider the bill.

Cost to Taxpayers: The Budget Committee provided the following information:

> The Joint Committee on Taxation (JCT) has not provided a revenue estimate for H.R. 4279, although the President's budget for fiscal year 2004 included a similar policy proposal (with the same effective date), in which up to $500 of unused benefits from FSAs could be rolled over to the next plan year or to 401(k) plans, 403(b) plans, 457 plans, SARSEPs, SIMPLE IRAs, or Archer MSAs. The JCT estimated that the President's proposal would reduce revenue by $361 million in fiscal year 2004, and by $3.542 billion over fiscal years 2004-08. HSAs did not exist at the time of the President's proposal, and it is possible that allowing rollovers to HSAs rather than to the other types of accounts would have a negligible effect on revenue.

For purposes of the budget resolution conference report expected to be agreed to for fiscal year 2005, the applicable enforcement periods would be as follows: the bill would reduce revenue by approximately $627 million in fiscal year 2005, and by approximately $4.138 billion over fiscal years 2005-09.

Does the Bill Create New Federal Programs or Rules?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: A committee report citing constitutional authority is not available.

Staff Contact: Lisa Bos, lisa.bos@mail.house.gov, (202) 226-1630

H.R. 4280—To improve patient access to health care services and provide improved medical care by reducing the excessive burden the liability system places on the health care delivery system (Greenwood)

Order of Business: The bill is scheduled for consideration on Wednesday, May 12th, subject to a closed rule.

Summary: H.R. 4280 makes a variety of changes to medical malpractice litigation processes in state and federal court, including capping awards and attorney fees and eliminating joint and several liability. The major provisions of the bill are outlined in further detail below.

The legislation requires that health care lawsuits commence no later than 3 years after the date of injury or 1 year after the claimant discovers the injury (or reasonably should have discovered the injury), whichever occurs first. The only exceptions to the limit are in cases of fraud, intentional concealment, the presence of a foreign body in the injured person, or if the injury occurred to a minor while under the age of 6.

The bill sets a cap on noneconomic damages (pain and suffering) of $250,000 for any lawsuit. A jury is not to be informed of the maximum award, but any amount over $250,000 must be reduced either before the judgment is entered or by amendment after it is entered. No limit is set on actual economic damages. Evidence of collateral source benefits (such as disability or worker's compensation) may also be introduced in a lawsuit to prevent double recoveries.

The bill also establishes a "fair share" rule, under which each party in a lawsuit is liable only for that party's share of damages based on the degree of responsibility. Currently, a defendant is liable for the entire sum of the damages even when only partially at fault. Under the bill, the "trier of fact" (a judge in a bench trial or a jury in a jury trial) would determine the proportion of responsibility for each party involved in the claim.

H.R. 4280 establishes a system under which the court shall supervise the payment of damages. Under this system, the court may limit contingent fee payments (where an attorney receives a percentage of the damages) to the claimant's attorney and redirect the payment to the claimant "based upon the interests of justice and principles of equity." Contingent fees may not exceed:

- 40 percent of the first $50,000 in damages
- 33 1/3 percent of the next $50,000 in damages
- 25 percent of the next $500,000 in damages
- 15 percent of any amount over $600,000.

Under the bill, punitive damages (if otherwise permitted by state or federal law) may be awarded against any person in a health care lawsuit if "it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer." When initially filing a lawsuit, individuals could not make a claim for punitive damages. Rather, the court must review the evidence and determine that there is a "substantial probability" that the claimant would win punitive damages before a claim can be filed.

No punitive damages can be awarded in a suit where compensatory damages are not awarded. Any party in a lawsuit can request that a separate proceeding be used to determine whether punitive damages are to be awarded and the amount of such damages. The maximum award is set at two times the economic damages or $250,000, whichever is greater. Factors to be used when considering punitive damages may only include:

- severity of harm;
- duration of the conduct;
- profitability of the conduct;
- number of products sold or procedures rendered that caused harm;
- any criminal penalties imposed; and
- the amount of any civil fines.

In addition, no punitive damages may be awarded against the manufacturer or distributor of a medical product if the product was approved by the Food and Drug Administration (FDA) or is generally recognized by experts as safe and effective under conditions established by the FDA. Similarly, a health care provider who provides a drug or device approved by the FDA cannot be named in a product liability lawsuit or held liable in a class action lawsuit. An exception is made in cases of fraud or bribery of FDA officials. In a lawsuit related to the packaging or labeling of a drug, the manufacturer or product seller of the drug "shall not be held liable for punitive damages unless such packaging or labeling is found by the trier of fact by clear and convincing evidence to be substantially out of compliance" with FDA regulations.

The bill also allows the payment of future damages totaling $50,000 or more to be paid in periodic payments and allows evidence of collateral source benefits (such as disability payments, workers' compensation, or medical benefits) to be introduced in any lawsuit.

H.R. 4280 includes language that the bill preempts state law if state law prevents the application of its provisions, but does not preempt or supersede laws that provide greater protections for health care providers and health care organizations from liability. The bill also does not preempt any state statutory limit on the amount of compensatory or punitive damages that may be awarded in a health care lawsuit.

The bill also includes a sense of Congress that "a health insurer should be liable for damages for harm caused when it makes a decision as to what care is medically necessary and appropriate" and findings that "our current justice system is adversely affecting patient access to health care services" and health care liability litigation has "a significant effect on the amount, distribution, and use of federal funds."

The provisions of the bill would apply to any lawsuit filed on or after the date of enactment.

Additional Background: The House passed legislation nearly identical to H.R. 4280 on March 13, 2003 by a vote of 229-196 (http://clerk.house.gov/evs/2003/roll064.xml). That bill, H.R. 5, has not been acted on by the Senate.

Committee Action: H.R. 4280 was introduced on May 5, 2004, and referred to the Committees on the Judiciary and Energy and Commerce. Neither committee considered the bill.

Administration Position: While an official statement on H.R. 4280 is not available, the Administration did support H.R. 5 - http://www.whitehouse.gov/omb/legislative/sap/108-1/hr5sap-h.pdf.

Cost to Taxpayers: While a cost estimate of H.R. 4280 is not available, the Congressional Budget Office previously estimated that enacting H.R. 5 would reduce federal spending for Medicare, Medicaid, FEHBP, and other federal health programs, **reducing direct spending $14.9 billion** over the 2004-2013 period ($4.38 billion over five years). CBO also estimated the bill would result in employers paying less for health insurance (and making more of their compensation to employees in a taxable form, such as wages), **increasing revenues $3 billion** over the 2004-2013 period ($955 million over five years). Discretionary spending also would be reduced under FEHBP, for savings of $230 million over the 2004-2013 period ($72 million over five years).

Note: CBO also estimated **state savings on Medicaid of $2.5 billion** over the 2004-2013 period.

Does the Bill Create New Federal Programs or Rules?: Yes. The bill creates new federal rules for health care liability lawsuits in state and federal court. It does not create any new programs.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: The bill would create one state-government mandate by preempting state laws that would prevent the application of any provisions H.R. 4280.

Constitutional Authority: A committee report citing constitutional authority is not available.

Staff Contact: Lisa Bos, lisa.bos@mail.house.gov, (202) 226-1630