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Legislative Bulletin……July 27, 2005

Contents:

Summary of the Bills Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: Reduced by $72 million over five years

Effect on Revenue: $141 million decrease over five years

Total Change in Mandatory Spending: $4.14 billion decrease over five years

Total New State & Local Government Mandates: 2

Total New Private Sector Mandates: 1

Number of *Bills* Without Committee Reports: 1

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.R. 5 — Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act (Gingrey)

Order of Business: The bill is tentatively scheduled to be considered on Wednesday, July 27th, most likely subject to a closed rule. The rule will likely allow for a motion to recommit, with or without instructions.

Summary: H.R. 5 would make a variety of changes to medical malpractice litigation processes in state and federal courts, including capping awards and attorneys' fees and eliminating joint liability. The major provisions of the bill are as follows:

- Requires that health care lawsuits commence no later than three years after the date of manifestation of injury or one 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 proven cases of fraud, intentional concealment, the presence of non-therapeutic foreign body in the injured person, or if the injury occurred to a minor while under the age of six.

- Explicitly allows for **unlimited** economic damages ("the full amount of the available economic damages") in health care lawsuits.

- Defines economic damages as "objectively verifiable monetary losses incurred as a result of the provision of, use of, or payment for (or failure to provide, use, or pay for) health care services or medical products, such as past and future medical expenses, loss of past and future earnings, cost of obtaining domestic services, loss of employment, and loss of business or employment opportunities."

- Caps **non**-economic damages (pain and suffering) at $250,000 for any lawsuit— "regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury."

- Defines non-economic damages as "damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature."

- Prohibits juries from being informed of the maximum $250,000 non-economic award, but any amount over $250,000 would have to be reduced either before the judgment is entered or by amendment after it is entered. Any such reduction would have to be made before accounting for any other reduction in damages required by law. If juries provide separate awards for past and future non-economic damages and the combined awards exceed $250,000, the future non-economic damages would have to be reduced first.

- 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.

- Establishes a system under which the court would supervise the payment of damages in civil cases. Under this system, the court could 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 could not exceed:

  --40% of the first $50,000 in damages actually recovered by claimant(s);

--33.3% of the next $50,000 in damages actually recovered by claimant(s);
--25% of the next $500,000 in damages actually recovered by claimant(s); and
--15% of any amount over $600,000 in damages actually recovered by claimant(s).

- Applies these fee limitations regardless of whether the recovery is by judgment, settlement, mediation, arbitration, or any other form of alternative dispute resolution.

- Evidence of collateral source benefits (such as disability or worker's compensation) could be introduced in a lawsuit involving injury or wrongful death to prevent double recoveries.

- Allows punitive damages (if otherwise permitted by state or federal law) to 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 would have to review the evidence and determine that there is a "substantial probability" that the claimant would win punitive damages before a claim could be filed.

- Defines punitive damages as "damages awarded, for the purpose of punishment or deterrence, and not solely for compensatory purposes, against a health care provider, health care organization, or a manufacturer, distributor, or supplier of a medical product. Punitive damages are neither economic nor non-economic damages."

- Prohibits the awarding of punitive damages in a lawsuit where compensatory damages are not awarded.

- Allows any party in a lawsuit to 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, which could not be revealed to the jury, would be set at two times the economic damages or $250,000, whichever is greater.

- Limits the factors to be used when considering punitive damages only to:
  --the severity of harm done;
  --the duration or concealment of the harmful conduct;
  --the profitability of the conduct;
  --the number of products sold or procedures rendered that caused harm;
  --any criminal penalties imposed on the defendant by the alleged conduct; and
  --any civil fines imposed on the defendant by the alleged conduct.

- Prohibits punitive damages from being awarded against the manufacturer or distributor of a medical product (or a supplier of any component or raw material of such medical product), if the product was subject to pre-market approval by the Food

and Drug Administration (FDA), received FDA approval, or is generally recognized by experts as "safe and effective" under conditions established by the FDA.

- Also prohibits a health care provider who prescribes or dispenses a drug or device approved by the FDA from being named in a product liability lawsuit or held liable in a class action lawsuit regarding the product. Makes exceptions in cases of fraud or bribery of FDA officials.

- Provides that, in a lawsuit related to the packaging or labeling of a drug, the manufacturer or product seller of the drug could 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.

- Allows the payment of future damages totaling $50,000 or more to be paid in installments.

- Provides that this bill would not supersede current federal law related to a civil action brought for a vaccine-related injury or death. Otherwise, nothing in this bill could be deemed to affect any defense available in a health care lawsuit or action under any other provision of federal law.

- Provides that this bill would preempt state law to the extent that state law prevents the application of this bill's provisions, but would not preempt laws that provide greater procedural or substantive protections for health care providers and health care organizations from liability. Lesser protections would be preempted.

- Also provides that this bill would not preempt any state law (whether effective before, on, or after the date of the enactment of this bill) that specifies a particular monetary amount of compensatory or punitive damages (or the total amount of damages) that may be awarded in a health care lawsuit, regardless of whether such monetary amount is greater or lesser than is provided for under this bill.

- Emphasizes that this bill would not preempt any defense available to a party in a health care lawsuit under any other provision of state or federal law.

- 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 congressional findings that "our current justice system is adversely affecting patient access to health care services" and that health care liability litigation has "a significant effect on the amount, distribution, and use of federal funds."

- The provisions of this bill would apply to any lawsuit filed on or after the date of this bill's enactment, except that any health care lawsuit arising from an injury occurring prior to the date of this bill's enactment would be governed by the applicable statute of limitations provisions in effect at the time the injury occurred.

Additional Background: H.R. 5 is nearly identical to H.R. 4600 in the 107th Congress, which passed on September 26, 2002, by a vote of 217-203 (http://clerk.house.gov/evs/2002/roll421.xml). H.R. 5 this Congress is **identical** to H.R. 5 in the last Congress, which passed on March 13, 2003, by a vote of 229-196-1 (http://clerk.house.gov/evs/2003/roll064.xml).

Committee Action: On July 21, 2005, the bill was referred concurrently to the Judiciary Committee and the Energy & Commerce Committee, neither of which took formal action on the bill this Congress.

Administration Position: Although a Statement of Administration Policy (SAP) is not available for H.R. 5 in this Congress, the SAP for H.R. 5 in the last Congress indicated that "the Administration strongly supports" the bill: http://www.whitehouse.gov/omb/legislative/sap/108-1/hr5sap-h.pdf.

Cost to Taxpayers: Although a cost estimate is not available for H.R. 5 in this Congress, CBO's cost estimate for H.R. 5 in the last Congress indicated that the bill would reduce discretionary spending (authorizations) by $2 million in the first year and by a total of $72 million over five years (because of savings in the Federal Employees Health Benefits Program). Additionally, CBO estimated that H.R. 5 would reduce mandatory spending by $170 million in the first year and by a total of $4.38 billion over five years (because of anticipated reductions in federal spending for Medicare, Medicaid, FEHBP, and other federal health programs). Lastly, CBO estimated that the bill would increase revenues (including Social Security payroll taxes) by $15 million in the first year and by a total of $955 million over five years (because of employers paying less for employee health insurance and making more of their compensation to employees in a taxable form, such as wages).

NOTE: CBO also estimated that state and local governments would receive analogous financial benefits (increased revenues, decreased spending) to those for the federal government. CBO estimated that state and local governments would save about $6 billion over ten years because of lower premiums for health care benefits they provide to their government employees. Additionally, state spending for Medicaid would decrease by $2.5 billion over ten years.

Does the Bill Expand the Size and Scope of the Federal Government?: This bill would apply the federal government's existing authority to regulate the health care and insurance industries (under the interstate commerce provisions of the Constitution) to the health care liability system.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, as follows:

State and local: 1) preempts state laws that prevent the application of this bill's provisions and 2) preempts state laws that provide lesser procedural or substantive protections from liability for health care providers and health care organizations. CBO reported that neither of these intergovernmental mandates would yield additional state spending or a loss of revenue.

Private-Sector: caps the awards that attorneys could receive. CBO estimated that the direct cost of this mandate to affected attorneys would be less than $100 million in the first year and about $340 million per year thereafter. Such costs would exceed the annual threshold specified in the Unfunded Mandates Reform Act (UMRA) ($117 million in 2003, adjusted annually for inflation) in all but the first year the mandate would be effective.

Constitutional Authority: A committee report citing constitutional authority for H.R. 5 in this Congress is not available. Last Congress, the Judiciary Committee, in House Report 108-32, cited constitutional authority in Article I, Section 8, Clause 3 (the congressional power to regulate interstate commerce).

Outside Organizations: H.R. 5 has been supported by a variety of health care and business groups, including the American Medical Association, the American Hospital Association, the National Federation for Independent Businesses, and the U.S. Chamber of Commerce, the last two of which are considering rating H.R. 5 as a "key vote."

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H.R. 3045—Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (DeLay)

Order of Business: The bill is tentatively scheduled to be considered on Wednesday, July 27th, subject to a closed rule. Under Trade Promotion Authority (Public Law 107-210), bills implementing trade agreements are not amendable (either in committee or on the House floor).

Summary by Title: H.R. 3045 would approve and implement the Dominican Republic-Central America Free Trade Agreement (CAFTA), finalized on August 5, 2004, and submitted to Congress on June 23, 2005. The Agreement is between the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. The Agreement would be implemented as soon as the United States and at least two of the other countries respectively pass the Agreement, provided that the involved countries have respectively taken the necessary compliance steps. The Agreement would reduce and eventually eliminate virtually all barriers to trade in goods and services and to investment. Goods originating from CAFTA countries would have preferential tariff treatment in the United States and vice versa. 80% of CAFTA-country tariffs on U.S. manufactured goods and 50% of CAFTA-country tariffs on U.S. agricultural goods would be eliminated immediately upon implementation.

According to the United States Trade Representative (USTR), Central America and the Dominican Republic make up the second-largest U.S. export market in Latin America, behind only Mexico. We export more than $15 billion annually to the region, making it America's tenth-largest export market worldwide. The CAFTA countries comprise a larger U.S. export market than Russia, India, and Indonesia combined.

The USTR also reports that nearly 80% of industrial products and 99% of agricultural products from Central America and the Dominican Republic already enter the U.S. duty-free, mostly because of unilateral preference programs such as the Caribbean Basin Initiative and the Generalized System of Preferences. CAFTA would thus serve to grant such favorable treatment to U.S. goods entering the CAFTA countries.

Highlights of H.R. 3045 are as follows:

Title I—Approval of, and General Provisions Relating to, the Agreement

- Makes U.S. law paramount to any provision in the Agreement that conflicts with U.S. law. States that the Agreement would not modify or limit the authority under any U.S. law.

- A state law that conflicts with any provision in the Agreement could only be declared invalid in an action brought by the United States Government.

- Prevents private legal actions against any provision of the Agreement.

- Provides for 15-day and 60-day layover procedures for certain actions made by presidential proclamation under the Agreement.

- Authorizes "such sums" as may be necessary for the President to establish an office within the Department of Commerce to administer the Agreement.

- Terminates the applicability of this implementing legislation to countries that pull out of the Agreement (including the United States).

Title II—Customs Provisions

- Allows the President to modify any tariffs or tariff-free treatment in the Agreement and to create additional tariffs as necessary (subject to certain limitations).

- Terminates each CAFTA country's status as a beneficiary developing country for trade purposes.

- Allows for additional tariffs on "agricultural safeguard goods" under certain price and trade-volume conditions.

- Defines in detail what an "originating good" is (originating from either the United States or from a country under CAFTA) and what "originating materials," "nonoriginating materials," and "regional value-content" are (including special rules for automotive goods), as they relate to preferential tariff treatment under the Agreement.

- Allows for a *de minimis* exception (up to 10% of value) of materials from other countries in goods eligible for preferential tariff treatment under this Agreement.

- Allows for certain textiles or apparel goods to be considered an "originating good," as long as the total weight of all nonoriginating fibers in such good does not exceed 10% of its total weight.

- Excludes packing materials and shipping containers when determining whether a good is an "originating good."

- Originating goods would be disqualified as so if they undergo further production or any other operation (other than unloading, reloading, or essential preservation operations) outside a CAFTA country.

- Treats "indirect materials" (materials used in the production, testing, inspection, maintenance, operation of the good—but not physically incorporated into the good) as "originating materials" without regard to where they are produced.

- Authorizes the President to add a fabric or yarn to or remove a fabric or yarn from the list of fabrics or yarns to which CAFTA would apply (subject to layover and other requirements).

- Exempts CAFTA-covered products from customs user fees.

- Applies the provisions of CAFTA **retroactively** to January 1, 2004, for textile and apparel goods only (so that importer-exporters could apply for refunds of "overpaid" duties from the Bureau of Customs since that date).

- Shields an importer from penalties for making an incorrect claim that a good qualifies as an "originating good," if the importer, in accordance with regulations issued by the Secretary of the Treasury, "promptly and voluntarily" makes a corrected declaration and pays any duties owed.

- Makes it unlawful for any person to certify falsely, by fraud, gross negligence, or negligence, in a CAFTA certification of origin that a good exported from the United States qualifies as an "originating good," unless the exporter or producer voluntarily and "promptly" provides written notice of the incorrect information to every person to whom the certification was issued.

- Allows the Bureau of Customs and Border Protection to suspend preferential tariff treatment under CAFTA to entries of identical goods from an importer, exporter, or producer who has found to have a pattern of false representations of CAFTA-qualifying goods.

- Requires that all people who issue a certificate of origin under CAFTA keep records and supporting documents for five years and render them for examination and inspection, pursuant to Treasury Department regulations.

- Authorizes the President to take certain actions while a verification of the originating status of a textile or apparel good is taking place. Such actions include suspending preferential tariff treatment to the textile or apparel good for which a claim of origin has been made or, in a case where the request for verification was based on a reasonable suspicion of unlawful activity related to such goods, for textile or apparel goods exported or produced by the person subject to a verification. Other available actions would be the detention of applicable goods or the denial of entry into the U.S. of such goods.

Title III—Relief from Imports

- Authorizes the filing (with the U.S. International Trade Commission) by an entity, including a trade association, firm, certified or recognized union, or group of representative workers, of a petition requesting adjustment to the obligations of the United States under the Agreement (and asking for provisional relief). The Commission would then have to investigate whether "a substantial cause of serious injury or threat thereof to [a] domestic industry" is occurring as a result of CAFTA (subject to certain exceptions).

- If the Commission finds injury or threat of injury, it would then have to recommend the amount of import relief necessary to correct or prevent harm. Further, the Commission would have to facilitate the efforts of the domestic industry to make a "positive adjustment to import competition."

- The President would not *have* to provide the suggested import relief, if doing so would have greater economic and social costs than benefits.

- Import relief could entail increasing duties or suspending their reductions and would have to occur progressively in intervals if the relief is to last more than one year.

- Import relief could not last more than four years.

- No import relief could be provided for a good that has been given duty-free treatment under the Agreement, and no import relief could be provided ten years after CAFTA enters into force (subject to exception).

- Prohibits the President from releasing information that is submitted in an import relief proceeding and that the President considers to be confidential business information, unless the party submitting the confidential business information had notice at the time of submission that such information would be released, or such party subsequently consents to the release of the information. To the extent a party submits such confidential business information to the President, the party would have to submit a

non-confidential version of the information in which the confidential business information is summarized or, if necessary, deleted.

- Enacts similar, yet more stringent, provisions for import relief for the textile and apparel industries.

- Requires that, if the U.S. International Trade Commission finds that import relief is merited because of goods coming from one country, it also analyze the effects of those same goods coming from other CAFTA countries.

Title IV—Miscellaneous

- Removes the CAFTA countries as eligible beneficiary countries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2702).

- Requires reports every two years (over a 16-year period) on the progress being made in CAFTA countries on the labor provisions in the Agreement and in previous labor-related meetings in the region.

- Directs the Secretary of Labor to "periodically" meet with the labor ministers of the CAFTA countries to discuss, among other things, the operation of CAFTA's labor provisions.

Additional Background: To read a summary of CAFTA, visit this webpage:
http://waysandmeans.house.gov/media/pdf/trade/cafta/summary.pdf

To read the actual text of CAFTA, visit this webpage:
http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html

For other supporting documents, visit these webpages:
http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file235_7178.pdf
http://waysandmeans.house.gov/Links.asp?section=1733
http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/Section_Index.html

Committee Action: On June 23, 2005, the bill was referred to the Ways & Means Committee, which reported the bill to the full House without amendment (as required by Trade Promotion Authority).

Possible Conservative Concerns: Some conservatives have expressed concerns that CAFTA would diminish the sovereignty of the United States subjecting U.S. trade decisions and certain domestic matters (such as labor and environmental laws and regulations) to the jurisdiction of international tribunals established under the auspices of the United Nations or World Bank. To read the Administration's responses to such concerns, visit this webpage:

http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file121_7786.pdf

Some conservatives have expressed immigration-related concerns. To read the Administration's response go to:
http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file425_7839.pdf

Administration Position: Since the Administration negotiated CAFTA, it is strongly supporting this congressional implementing legislation.

Cost to Taxpayers: CBO reports that implementing CAFTA would reduce revenues by $3 million in FY2006 and a total of $1.096 billion over the FY2006-2010 period. Additionally, the bill would increase mandatory spending by $27.0 million in FY2006 and a total of $245.0 million over the FY2006-2010 period.

Does the Bill Expand the Size and Scope of the Federal Government?: No. This legislation would implement CAFTA, which would lower and eliminate tariffs (and other barriers to trade) among the involved countries, thereby reducing government involvement in the free market.

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

Constitutional Authority: The Ways & Means Committee, in House Report 109-182, cites constitutional authority in Article I, Section 8, Clause 1 (the congressional power to lay and collect taxes, duties, imposts and excises).

Outside Organizations: Below are some examples of the variety of organizations that have expressed a public position on CAFTA:

Supporting:

American Apparel and Footwear Association
American Conservative Union
American Farm Bureau Federation
Americans for Tax Reform
Business Roundtable
Business Software Alliance
CATO
Citizens Against Government Waste
Club for Growth
Family Research Council
FreedomWorks
Heritage Foundation
National Association of Manufacturers

National Cattleman's Beef Association
National Council of Textile Organizations
National Retail Federation
National Taxpayers Union
Retail Industry Leaders Association

Opposing:

AFL-CIO
Alliance for Responsible Trade
American Dental Association
American Manufacturing Trade Action Coalition
American Sugar Alliance
Eagle Forum
Earthjustice
International Association of Machinists
The Liberty Committee
National Family Farm Coalition
National Textile Association
National Wildlife Federation
Sierra Club
United Steelworkers
U.S. Business and Industry Council

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