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Legislative Bulletin……March 21, 2012

Contents:

H.R. 5 – Protecting Access to Health Care Act (PATH Act)

H.R. 5 — Protecting Access to Health Care Act (Gingrey, R-GA)

Order of Business: Consideration of the bill is scheduled to begin on Wednesday, March 21, 2012, under a structured rule (H.Res. 591). The Rule provides six hours of general debate equally divided and controlled by the Chairs and Ranking Members of the Committees on Energy and Commerce, the Judiciary, and Ways and Means. It makes in order six amendments printed in the Rules Committee report (and described within this legislative bulletin).

Summary: H.R. 5 enacts reforms to medical malpractice liability laws (medical tort reform) for health care lawsuits brought in state and federal courts. It also repeals the creation of the Independent Payment Advisory Board, an Obamacare-created, 15 Member appointed board designed to control the rate of growth of Medicare spending without judicial or administrative review. The major provisions of the bill are outlined in greater detail below.

Title I: Health Act

Statute of Limitations for Medical Malpractice Lawsuits—the bill requires that health care lawsuits must commence within three years of the injury or one year after the claimant discovers (or reasonably should have discovered) the injury, whichever comes first, or else the lawsuit is barred. Exceptions to this statute of limitations apply in instances of fraud, intentional concealment, presence of a foreign body that is not therapeutic or for diagnostic purposes, and in cases involving minor children.

Caps on Non-Economic Damages—Non-economic damages in any health care lawsuit are limited to $250,000 per injury regardless of the number of separate legal claims or the number of parties making legal claims. It does not place limits on economic damages (objectively verifiable monetary losses). The bill defines non-economic damages to mean monetary recoveries for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment in 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 Joint and Several Liability—the bill creates a "Fair Share Rule" that requires state and federal courts in health care lawsuits to apportions the amount of monetary damages a defendant is liable for in direct proportion to the defendant's percentage of responsibility. Some state laws currently allow for any one defendant, in a heath care lawsuit with multiple defendants, to be liable for the entire amount of damages without regard to the percentage of liability of the injury (called "joint and several liability"). Some studies maintain that joint and several liability promotes frivolous lawsuits because plaintiffs file lawsuits they might otherwise not file against "deep-pocket" defendant in hopes of procuring a larger out-of-court monetary settlement or potential jury/judge award.

Sliding Scale Limits on Attorney Contingent Fees—the bill establishes limits on the amount of fees attorney's (contingency fees) can be paid based on the monetary damages awarded in civil health care lawsuits according to the following scale:

- 40% of the first $50,000;
- 33 1/3 of the next $50,000;
- 25% of the next $500,000; and
- 15% of any amount over $600,000.

Punitive Damages Guidelines—Punitive damages are defined as monetary 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."

Such punitive damages 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." Claimants cannot seek punitive damages unless the court determines that a "substantial probability" that the claimant could win punitive damages exists.

The bill prohibits punitive damages if compensatory damages are not awarded. The maximum punitive damages awards are prescribed as the greater of two times the economic damages or $250,000, whichever is greater. Specific factors that must be considered in determining the amount include the severity of the harm caused by the conduct of such party, the duration of the conduct, the profitability of the conduct, the number of products sold or procedures rendered that caused harm, the criminal penalties (if any) imposed on such party, and the amount of any civil fines.

Additionally, punitive damages may not be awarded against the manufacturer or distributor of a medical product if the Food and Drug Administration (FDA) approved the product or is generally recognized by experts as safe and effective under established FDA conditions. Health care providers whom proscribe an FDA-approved drug or medical device are immune from product liability lawsuits or class action lawsuits (except for cases of fraud or bribery of an FDA official).

Authorization of Periodic Payments—the bill requires that future monetary damages totaling more than $50,000 against a party with sufficient insurance or other assets be paid out in periodic installments if party in a health care lawsuit makes such a request.

State Flexibility and Protection of States' Rights—the bill preempts states laws to the extent that state law prevents the application of any provisions of the bill except for those that:

- "…impose greater procedural or substantive protections for health care providers and health care organizations from liability, loss, or damages than those provided…" in this bill;
- are not governed by any provision in this bill (including state standards of negligence);
- any state law (whether effective before, on, or after the date of the bill's enactment) 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 what is provided in this bill; or
- any defense available to a party in a health care lawsuit under any other provision of state or federal law.

Title II: Repeal of the Independent Payment Advisory Board

This title incorporates the bill language from H.R. 452, the Medicare Decisions Accountability Act of 2011. It repeals sections 3403 and 10320 of Obamacare which created the Independent Payment Advisory Board (IPAB). Beginning in 2014, IPAB is charged with recommending per capita Medicare spending cuts if Medicare spending exceeds certain economic growth targets determined by the Chief Actuary at the Centers for Medicare and Medicaid Services (CMS). It will consist of 15 Senate-confirmed members with expertise in health finance, actuarial science, health plans, or integrated delivery systems—the majority of its members cannot be health care providers.

According to House Report 112-412, appointing an "unelected and unaccountable board to cut Medicare spending will harm beneficiary access and force health care providers to limit the number of beneficiaries they will treat." Despite Obamacare's statutory prohibition that IPAB ration health care, the term "ration" is not defined. Also, strong concerns exists that Congress has little ability to override any IPAB-recommended Medicare cuts.

Additional Background: Medical liability tort reform that addresses the cost of frivolous litigation and reducing the practice of "defensive medicine" has been a legislative priority during Republican-led Congresses in the last decade. The House has passed bills very similar to the medical tort reforms included in this bill in 2002 (H.R. 4600), 2003 (H.R. 5), and 2005 (H.R. 5). The Republican Motion to Commit during passage of Speaker Pelosi's health care reform bill in the fall of 2009 (H.R. 3962) included federal medical tort reform. Additionally, both last year's House-passed budget (page 45) and this year's

proposed Republican budget (page 55) include reforms to the medical liability systems. The GOP Pledge to America (page 27) did the same.

Potential Conservative Concerns:

Federalism

Some conservatives have expressed recent federalism concerns in the last year explaining that reforms to medical liability laws are—and have always been—an area reserved for the states. Virginia's Attorney General, Ken Cuccinelli, wrote a Washington Post Op-Ed to this effect. Other conservative bloggers, legal practioners, and Tea Party leaders have argued that relying on the Commerce Clause to enact federal malpractice reforms is contrary to a view of a federal government with limited powers, and akin to some of the arguments supporters of Obamacare use to justify its expansion of federal power.

Supporters of federal medical malpractice reforms highlight that Congress has enacted many federal tort reform statutes that supersede contrary state laws, including federal tort reforms protecting the domestic firearms industry as well as federal vaccine tort liability. Also, President Reagan's Tort Policy Working Group report concluded by expressing, "…tort law appears to be a major cause of the insurance/affordability crisis which the federal government can and should address in a variety of sensible and appropriate ways."[1] Some of this report's specific recommendations are included as provisions in H.R. 5.[2]

Additionally, a 2003 Congressional Research Service report "concludes that enactment of tort reform generally would appear to be within Congress' power to regulate commerce, and would not appear to violate principles of due process or federalism…In concluding that Congress has the authority to enact tort reform 'generally,' we refer to reforms that have been widely implemented at the state level, such as caps on damages and limitations on joint and several liability and on the collateral source rule."[3]

Partial Obamacare Repeal Strategy

A renewed discussion on the strategy to fully repeal Obamacare is surfacing among some conservatives. Last week, 18 leading conservative groups sent a letter to House Leadership expressing their concern about bringing bills to the floor that partially repeal onerous parts of Obamacare. Also, last week Representative Steve King and Senator Jim DeMint penned a Washington Times Op-ed expressing this idea as well.

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[1] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 80 (February 1986)

[2] The report's specific recommendations included eliminate joint and several liability, provide for period payment of future economic damages, schedule [limit] contingency fees of attorneys, and limit non-economic damages to a fair and reasonable amount.

[3] Page 41 of House Report 112-139 citing Henry Cohen, Legislative Attorney, American Law Division, CRS Report to Congress, Federal Tort Reform Legislation: Constitutionality and Summaries of Selected Statutes (February 26, 2003) at 1.

The RSC released a policy brief last December showing which full and partial repeal bills the House has voted on this Congress, as well as House Republicans' committee activity to highlight Obamacare's flaws.

Amendments Ruled in Order: The following six amendments shall each be considered for 10 minutes:

1. **Woodall (R-GA)** – This amendment strikes the findings in Title I, which pertain to the bill's medical malpractice liability reforms.

2. ***Bonamici (D-OR)*** – This amendment delays the effective date of the bill until the Secretary of Health and Human Services (HHS) submits a report to Congress on the potential effect of the bill on reductions upon health insurance premiums.

3. ***Hastings (D-FL)*** – This amendment prevents repeal of the IPAB by striking Title II of the bill.

4. **Dent (R-PA)/Sessions (R-TX)** – This amendment incorporates into the bill the legislative text of H.R. 157, the Health Care Safety Net Enhancement Act of 2011. It seeks to address the shortage of emergency care providers by extending medical liability coverage to on-call and emergency room physicians who provide emergency medical service to patients covered by EMTALA (Emergency Medical Treatment and Labor Act). EMTALA requires most hospitals to provide an examination and treatment when a patient arrives at a emergency room regardless of a patient's ability to pay or health insurance coverage status.

5. **Gosar (R-AZ)** – This amendment repeals the McCarran-Ferguson Act of 1945 limited exemption to federal antitrust laws with respect to the *business of health insurance* that has been law for over 60 years. It keeps in place the McCarran-Ferguson Act's limited anti-trust exemptions for other insurance products including life insurance, property and casualty insurance (including medical liability, automobile, and workers compensation), and any "excepted benefits" as defined under section 9832 (c) of the Internal Revenue Code. McCarran-Ferguson allows insurers, through state oversight of advisory organizations, to share loss cost data to predict future losses and to develop common policy forms as long as the activity is:

    - "the business of insurance" (defined by courts to mean activities such as underwriting, spreading of risk, the relationship between companies and their policyholders, and is limited to entities within the industry, not an insurance company activity or business of insurers);
    - Such "business of insurance" is regulated at the state level; and
    - Such activity does not comprise "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

    Four bills in the 111th Congress were introduced which sought to eliminate McCarran-Ferguson limited exemptions (sec. 262 of H.R. 3962, H.R. 3596, S.

1681, and H.R. 4626). H.R. 4626 passed the House by a vote of 406-19. At that time, groups such as the Competitive Enterprise Institute, America's Health Insurance Plans, National Association of Health Insurers, National Association of Health Underwriters, U.S. Chamber of Commerce, and the National Conference of Insurance Legislators opposed the bill. At the time of this legislative bulletin, these (nor other groups) groups have not currently weighed in on this amendment.

6. **Stearns (R-FL)/*Matheson (D-UT)*** – The amendment grants limited civil liability protection under federal or state law to health professionals for any harm caused by an act or omission while volunteering at federally declared disaster sites.

Outside Groups Supporting Medical Liability Reforms in the bill: American Hospital Association, American Medical Association, Business Roundtable, Docs 4 Patient Care, Federation of American Hospitals, U.S. Chamber of Commerce, and numerous other state and national medical societies listed here (Courtesy of the Majority Whip's Office).

Outside Groups Opposing Medical Liability Reforms in the bill: The National Conference of State Legislatures and the American Association for Justice (also known as the Association of Trial Lawyers of America).

Outside Groups Supporting IPAB Repeal: 60 Plus Association, American Hospital Association, American Medical Association, Americans for Prosperity, Americans for Tax Reform, Biotechnology Industry Organization, Center for Freedom and Prosperity, Coalition for Affordable Health Coverage, Concerned Women for America, Docs 4 Patient Care, Doctor Patient Medical Association, Easter Seals, Freedom Works, Galen Institute, International Franchise Association, Let Freedom Ring, National Taxpayers Union, PhRMA, Taxpayers Express, Tea Party Nation, Tea Party Union, U.S. Chamber of Commerce, and many more organizations listed here (Courtesy of the Majority Whip's Office).

Committee Action: The Rules committee print of H.R. 5 combines the legislative texts of H.R. 452, the Medicare Decisions Accountability Act of 2011, and the originally-introduced H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare Act of 2011. The Judiciary Committee reported out H.R. 5 on March 11, 2011, and the Energy and Commerce Committee reported out H.R. 5 on May 23, 2011. Similarly, the Ways and Means Committee and Energy and Commerce Committee reported out H.R. 452 on March 13, 2012 and March 16, 2012.

Administration Position: The Obama Administration released a Statement of Administration Policy (SAP) opposing this bill.

Cost to Taxpayers: The Congressional Budget Office (CBO) released a cost estimate for H.R. 5 on March 19, 2012. The estimate explains that the bill would reduce deficits by $45.5 billion over the 2013-2022 through a combination of $7.3 billion in revenue increases and $38.2 billion in spending decreases.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes. The bill creates new federal rules and standards for health care liability lawsuits brought in state and federal courts.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: The CBO estimate explains that the bill contains an intergovernmental mandate "because it would preempt state laws that provide less protection for health care providers and organizations from liability, loss, or damages (other than caps on awards for damages)." The costs for complying would fall well below the threshold establish in the Unfunded Mandates Reform Act for intergovernmental mandates ($73 million in 2012, adjusted annually for inflation).

It also contains "several mandates on the private sector, including caps on damages and attorneys' fees, the statute of limitations, and the fair share rule. The costs of these mandates "exceed the UMRA threshold ($146 million in 2012, adjusted for inflation) in four of the first five years in which the mandate were effective."

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: Both House Reports for the originally introduced bills explain that the bills do **not** contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of House Rule XXI.

Constitutional Authority: The Constitutional Authority Statements accompanying both the originally introduced bills upon introduction state:

For Medical Malpractice Reforms in H.R. 5:

"Congress has the power to enact this legislation pursuant to the following: The constitutional authority on which this legislation is based is found in Article I, Section 8, Clause 3 of the Constitution, as health care-related lawsuits are activities that affect interstate commerce."

For IPAB repeal in H.R. 452:

"Congress has the power to enact this legislation pursuant to the following: The repeal of this provision is consistent with the powers that are reserved to the States and the people as expressed in Amendment X to the United States Constitution."

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