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YOU CAN'T ALWAYS GET WHAT YOU WANT

This week the House will consider H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act. The title does not tell you much except that Congress is obsessed with acronyms. It is a medical malpractice litigation reform bill. The plan is to use the "savings" from medical malpractice litigation reform to offset the repeal of a part of the current health care reform law (the Patient Protection and Affordable Health Care Act (PPACA)). Oddly enough, the part of PPACA that opponents of PPACA want to repeal, the Independent Payment Advisory Board (IPAB) is actually one part of PPACA designed to cut spending, hence the need for a substitute for the savings. While the House will pass H.R. 5, the Senate is not likely to consider it on its own or as part of a package. The Senate is trial lawyer-friendly.

Some of the highlights of H.R. 5 (sorry for the legalese, did not want to lose any more in the translation):

*In any health care lawsuit, the amount of noneconomic damages, if available, may be as much as \$250,000, 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.

*Future noneconomic damages shall not be discounted to present value.

*The jury shall not be informed about the maximum award for noneconomic damages.

*An award for noneconomic damages in excess of \$250,000 shall be reduced either before the entry of judgment, or by amendment of the judgment after entry of judgment, and such reduction shall be made before accounting for any other reduction in damages required by law.

*If separate awards are rendered for past and future noneconomic damages and the combined awards exceed \$250,000, the future noneconomic damages shall be reduced first.

*Each party shall be liable for that party's several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility. Whenever a judgment of liability is rendered as to any party, a separate judgment shall be rendered against

each such party for the amount allocated to such party. The trier of fact shall determine the proportion of responsibility of each party for the claimant's harm.

*The amount of punitive damages, if awarded, in a health care lawsuit may be as much as \$250,000 or as much as two times the amount of economic damages awarded, whichever is greater. The jury shall not be informed of this limitation. In determining the amount of punitive damages, if awarded, in a health care lawsuit, the trier of fact shall consider only the following -

(A) the severity of the harm caused by the conduct of such party;

(B) the duration of the conduct or any concealment of it by such party;

(C) the profitability of the conduct to such party;

(D) the number of products sold or medical procedures rendered for compensation, as the case may be, by such party, of the kind causing the harm complained of by the claimant;

(E) any criminal penalties imposed on such party, as a result of the conduct complained of by the claimant; and

(F) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.

As I indicated, the bill is being considered as the offset for the repeal of the IPAB created by PPACA. The job of the IPAB is to

“reduce the per capita rate of growth in Medicare spending.” The IPAB will be composed of 15 members appointed by the President with the advice and consent of the Senate. IPAB is a souped-up version of an existing entity known as MedPAC (Medicare Payment Advisory Commission). MedPAC can only make recommendations about Medicare. MedPAC will still exist just to confuse things.

Under the IPAB system, the Chief Actuary of the government’s Center for Medicare and Medicaid Services must determine whether there has been “per capita rate of growth in Medicare spending.” If the Chief Actuary does find there has been growth and it exceeds targets established in accordance with PPACA, the IPAB is supposed to come up with recommendations for cuts, and they go into effect unless Congress specifically rejects them. If IPAB does not come up with recommendations, then the Secretary of Health and Human Services must come up with them, and they go into effect unless Congress rejects them.

I know you are thinking, besides that there are a lot of acronyms in this story, “there is opposition to limiting the growth of Medicare?”

The reasoning goes this way according to the Committee on Ways and Means, “*While few Americans are aware that this ObamaCare rationing board even exists, it embodies the very thing Americans feared most about the law – unaccountable Washington bureaucrats meeting behind closed doors to make unilateral decisions that should be made by patients and their doctors.*” *Rather than*

endangering Medicare beneficiaries, we should empower them. Rather than make decisions behind closed doors, we ought to have those discussions in public with patients and providers in our hearing rooms and walking the halls of Congress, and we ought to consider the ideas of those affected.”

Representative Paul Ryan (R-WI) and Senator Ron Wyden (D-OR) have suggested an alternative that would introduce a “‘premium support’ system that would empower seniors to choose either a traditional Medicare plan or a Medicare-approved private plan. Low-income seniors who qualify for Medicaid would continue to have Medicaid pay for their out-of-pocket expenses, while other low-income seniors who do not qualify for Medicaid would receive fully funded savings accounts to help offset any increased out-of-pocket costs. Wealthier seniors who need help least would see their assistance reduced.”

Some Democrats, who are concerned about the impact on Medicare beneficiaries, support repeal of IPAB. Some health care provider groups support repeal. Some business groups that are concerned that if Medicare is cut, it will result in cost shifting to employers, also support repeal.

As with most health care reform issues, hard to separate the pros and cons from the politics on the IPAB repeal.

Sure would like the medical malpractice litigation reform!

ACCESS TO CAPITAL

The Senate will work on the package of access to capital proposals embodied in H.R. 3606.

Senate Majority Leader Harry Reid (D-NV) switched gears last week. Initially, he said he would introduce his own proposal. Then he decided to just bring up the House version. This in turn triggered opposition from within his own party.

There are some amendments that will be considered by the Senate this week. If the Senate should reject them all, H.R. 3606 would go on to the President. If the Senate adopts any of them, it is back to the House.