

Republicans Push for Malpractice Reform

With the House's largely symbolic vote (245-189) on January 19 repealing the *Patient Protection and Affordable Care Act (PPACA)* out of the way and passage unlikely in the Senate, Republicans quickly moved to fulfilling their pledge to replace *PPACA*. Although the health overhaul signed into law last year was the first major legislation to begin addressing the medical malpractice liability system, Republicans believe it does not go far enough. The law provides \$50 million in grants for states to develop alternatives to the current system and to look for ways to reduce medical errors, but it does not place caps on noneconomic damages or prohibit the filing of suits after a certain period, steps supported by the GOP. In starting their push to replace the law, House Republicans introduced, and successfully negotiated through the Judiciary Committee, a medical liability reform bill, H.R. 5, the *Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011*, that includes such caps and time limits for filing suits.

The debate over whether and how to reform medical liability is not new – Republicans long have pushed for reform while Democrats have been skeptical about the effects on premiums and patients' rights – but it took on new earnestness in hearings held by the House Judiciary Committee beginning on January 20. Committee chair Lamar Smith (R-TX) characterized the hearings as laying the groundwork for replacing *PPACA*, and said the Committee would be considering legislation based on medical liability reforms enacted in California in 1975. The *AAEM* endorsed legislation (H.R. 5) ultimately approved by the Committee on a party-line 18-15 vote on February 16 would place a \$250,000 cap on noneconomic damages and limit punitive damages, when allowed, to the greater of \$250,000 or twice the amount of economic damages. The measure also would set a statute of limitations on filing health care lawsuits of one year after a patient discovers – or should have discovered – an injury or three years after the injury, whichever occurs first.

In presenting their position, Republicans said medical liability reform is needed to control malpractice insurance premiums so that doctors are not forced out of practice altogether. They also said that reforms would eliminate the need for doctors to practice defensive medicine. In addition, they view a rewrite of the malpractice law as fitting in nicely with their current GOP economic message. They maintain the rewrite will create jobs by removing the disincentive for people to become doctors or to continue in the practice of medicine, and will cut costs because providers will not have to pay so much for malpractice insurance.

Those testifying at the hearing included The American Medical Association (AMA), which supported the legislation being considered. But Ardis Hoven, chair of AMA's Board of Trustees, also said that other reforms, such as safe harbors, health courts, and processes for alternative dispute resolutions, could complement those reforms. In fact, House Republicans have introduced bills highlighting two other approaches. One measure, H.R. 314, sponsored by Representative William M. Thornberry (R-TX), would help states create specialized health courts featuring a judge with medical expertise or a panel of neutral experts to award damages. The other, H.R. 157, sponsored by Representative Pete Sessions (R-TX), would inoculate physicians from (Cont'd page 3)

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Obama Proposes Overhaul of State Medical Malpractice Laws

While House Republicans are moving ahead with legislation to impose federal caps on jury awards in medical malpractice suits, President Obama is launching his own drive to establish alternative measures to overhaul state medical malpractice laws. His budget for 2012 calls for \$250 million in Justice Department grants to help states rewrite their malpractice laws in line with recommendations issued by his bipartisan debt reduction commission last year. The Justice Department would consult with the Department of Health and Human Services in awarding the grants.

Specific reforms the money could be used for exclude caps on jury awards. The exclusion is troubling to the American Medical Association and GOP lawmakers who have sought such caps for years without success. On the other hand, the reforms also include some measures that are unacceptable to trial lawyers. Health courts, for example, are at the top of the list in the administration's summary of the proposal. In health courts, specially trained judges – not juries – would decide malpractice cases, awarding compensation from a set schedule. Plaintiffs' lawyers say that would undermine the constitutional right to trial by jury, but proponents say it would bring predictability, resulting in lower malpractice insurance rates for doctors. Furthermore, Philip Howard, founder of Common Good, a nonprofit group that advocates for changes in the legal system, pointed out that the money Obama seeks could go far. He estimated that it would cost \$5 million to \$7 million for a mid-size state to set up health courts.

Other malpractice reforms that could be funded under Obama's proposal include:

- Creating a legal defense for doctors, hospitals, and other providers who follow guidelines for best clinical practices and use electronic medical records. Such "safe harbor" laws establish the presumption that by adhering to high standards, doctors are not behaving in a negligent manner.
- Requiring hospitals and doctors to disclose mistakes early, offer an apology and compensation, and also agree to make changes to protect other patients from being harmed in the same way. If the patient's family still wants to go to court, the provider's apology could not be used as evidence of liability. Such programs have been shown to reduce litigation.
- Changing legal rules that result in higher malpractice awards. Instead of holding all the providers involved in a case to be equally liable, a "fair share" rule would allocate malpractice payments in proportion to responsibility for the damages.

Obama first indicated an interest in medical malpractice reforms when, as a senator, he cosponsored a bill to create a program in which doctors disclose mistakes to patients and then try to negotiate a payment. Then, as president in 2009, he authorized \$25 million in grants to explore new ways of settling suits without going to court, and those grants were awarded in 2010. He reiterated his interest in the issue during the marathon debate over the health care law, and included in the law passed \$50 million in demonstration grants to states over five years to develop alternatives to suits. Those grants have not yet been funded by Congress. Republicans consider his record on malpractice as promising more than he delivers, however, so they reacted coolly to this new proposal. In response, administration officials pointed out, that this time his proposal is different, calling for significantly more money with the grants being used to change laws not conduct more studies.

As for defensive medicine, the costs are difficult to estimate. Conservative estimates start at around \$50 billion a year, but Obama's debt reduction commission estimated that its recommendations calling for an aggressive effort to rewrite malpractice laws could save government programs \$17 billion through 2020. Obama's FY 2012 budget, however, does not claim any savings from the new proposal.

CMS Releases Proposal on Accountable Care Organizations

On March 31, 2011, the Centers for Medicare & Medicaid Services March 31 released a proposed rule under the health reform law to help doctors, hospitals, and other health care providers better coordinate care for Medicare beneficiaries by establishing accountable care organizations (ACOs). The proposed rule, which will be published in the April 7 Federal Register, calls for a 60-day public comment period. Under the *Patient Protection and Affordable Care Act*, the shared savings program will reward ACOs that lower costs while meeting quality standards. The program must be established by January 1, 2012.

In a conference call with reporters, Health and Human Services Secretary Kathleen Sebelius said that by forming ACOs, providers, and doctors could save up to \$960 million over three years. Under the proposed rule, CMS would implement both a one-sided risk model (sharing savings only for the first two years and sharing savings and losses in the third year) and a two-sided risk model (sharing savings and losses for all three years), allowing the ACO to opt for one or the other model. CMS Administrator Donald Berwick said the choice allows entities to form ACOs that are not yet ready to take on shared risk.

ACOs that participate in the two-sided model would be able to obtain greater savings. However, the rule also proposed to establish a minimum sharing rate. ACOs in the one-sided risk program that have smaller populations (and have more variation in expenditures) would have a larger sharing rate, and ACOs with larger populations (and have less variation in expenditures) have a smaller rate. Under the two-sided approach, CMS proposed a flat 2% minimum sharing rate.

The HHS Office of Inspector General also released a notice on waivers of certain federal fraud and abuse laws for ACOs. In addition, the Federal Trade Commission (FTC) and Department of Justice (DoJ) have released a statement on enforcement of antitrust laws for ACOs. The FTC-DoJ statement can be found at <http://www.ftc.gov/os/fedreg/2011/03/110331acofrn.pdf>.

Two-Year Doc Fix Funded in President's FY 2012 Budget Request

Given that President Obama's FY 2012 budget proposal cancels Medicare reimbursement cuts for physicians for two years and freezes payments during that time, it appears that a permanent solution to the ongoing physician payment issue is off the table at least for the near term. Obama has said, however, that he is committed to permanently fixing the flawed Sustainable Growth Rate (SGR) payment system, and the budget document states: "The Administration is committed to working with the Congress to achieve permanent, fiscally responsible reform and to give physicians incentives to improve quality and efficiency, while providing them with predictable payments for the care they furnish to Medicare beneficiaries." In his budget request, Obama actually proposed a 10-year payment fix, but payment offsets are provided for only the first two years.

According to the Department of Health and Human

Services (HHS), the cost of the two-year fix is about \$62 billion over 10 years, while a 10-year fix would cost \$370 billion. About half of the \$62 billion cost would be offset through "program integrity" provisions targeting fraud, waste, and abuse. The rest would come from a variety of proposals, including recovering erroneous payments made to insurers in the Medicare Advantage program, limiting states' ability to use provider taxes to pay the state share of Medicaid, eliminating graduate medical education payments for children's hospitals, and ensuring that Medicare and Medicaid get the best prices for prescription drugs provided to beneficiaries.

During the Senate Finance Committee's February 15 hearing on Obama's FY 2012 budget blueprint, lawmakers requested that HHS Secretary Kathleen Sebelius work with them to permanently fix Medicare's physician payment system. Committee (Cont'd page 4)

Two-Year Doc Fix Funded in President's FY 2012 Budget Request (Cont'd from page 3)

Chair Max Baucus (D-MT) and ranking member Orrin Hatch (R-UT) specifically asked Sebelius to tackle the issue this year, and she pledged to do so. Hatch also relayed to Sebelius his dismay that a permanent physician payment fix was not included in the health care reform law, and he criticized several of the proposals put forward in the budget proposal to fund the two-year payment fix. The following day Sebelius testified before the House Ways and Means Committee, which also reviewed the health care reform law and budget proposal.

The budget's doc fix proposal comes on the heels of action by Congress late last year to implement a one-year fix for payments to doctors in 2011, which followed several shorter fixes, some as brief as a month. The law, signed by Obama on December 15, 2010, froze physicians' reimbursement for all of 2011, replacing the 25% cut that was scheduled to be implemented on January 1, 2011. If current policy based on the SGR payment system remains in effect, physicians' Medicare reimbursement will be reduced by 29.5% in 2012. With the current focus in Congress on reducing federal spending, many observers doubt that a two-year fix will be enacted this year. More likely, they say, is that Congress will pass another one-year extension leaving action on a permanent fix until after the 2012 election, if then.

The President's budget includes a renewed commitment to permanently fix the broken Medicare physician payment system, which the AMA strongly supports. It also contains funding to delay the devastating cuts scheduled to occur January 1, 2012 for another two years, which is important for providing stability in the Medicare system while a permanent solution is enacted.

– AMA Statement, February 14, 2011

Others appear to be pleased with the two-year proposal and anticipate its enactment. Physician groups said that, while a permanent fix is needed, a two-year solution will provide welcome relief from the roller coaster of short-term payment patches. In a statement issued on February 14, the American Medical Association (AMA) cited the need for permanent reform, but also noted that a two-year fix would provide payment stability.

Other groups indicating support for the two-year proposal were the American Academy of Family Physicians, AARP, and the American Hospital Association, although the latter group also said it was "deeply disappointed" the budget proposal reduces Medicaid spending. "While we fully support eliminating future reductions to physicians, the answer to the physician payment issue is not cutting one provider to reimburse another," the association said.

Recently, prompted by the prediction of Medicare officials that the scheduled cut to physician payments would amount to 29.5% if allowed to occur on January 1, 2012, AMA and 130 other state and medical specialty societies, including AAEM, sent letters to House and Senate leaders calling yet again for a permanent solution to the Medicare physician payment formula and asking that Congress start working now on a bipartisan and bicameral solution. In AMA's letter, president Cecil Wilson said the new estimate of a 29.5% cut "should serve as a wake up call to Congress that physicians who serve Medicare and TRICARE patients are facing a debilitating cut." This is the year, he said, that Congress must make a solution for the cuts "one of its highest priorities."

From the States . . .

North Carolina Bill Capping Noneconomic Damages Clears Senate

Legislation limiting noneconomic damages in medical malpractice lawsuits to \$500,000 has cleared the **North Carolina** Senate by a 36-13 vote. A floor amendment raised that cap annually based on an inflation formula.

Republican backers of the bill argued that it would stabilize health care and premium costs while attracting more doctors to practice in the state.

Republicans have sought medical malpractice changes – particularly a cap on awards – for years but were

turned back by Democrats when they controlled the majority. After the vote, Senator Tom Apodaca, (R-Henderson), one of the bill's primary sponsors, said, "This has been a long road many of us have walked, and I know it's not the end. It's the start."

Arguing against the bill, the state's trial lawyers group said a cap on noneconomic damages would not only not result in lower malpractice insurance premiums or overall health care expenses, it would harm children and retirees who would not be compensated for lost wages because they have no wages. **North Carolina** currently has no cap on compensatory damages; its cap on punitive damages equals the greater of \$250,000 or three times the amount of compensatory damages.

Senator Dan Clodfelter (D-Mecklenburg) asserted that the cap is unconstitutional because the right for a wronged person to seek damages to their property and well being from a jury is sacred.

The bill also would make it harder for a patient to win in court against an ED physician. Senator Pete Brunstetter (R-Forsyth) defended that circumstance, pointing out that, unlike other doctors, ED physicians can be fined \$50,000 by the federal government for failing to treat the patient.

Six Democrats – two of them physicians – joined all Republicans voting to approve the bill. The measure now heads to the House, which has a special committee looking at medical liability and other tort reform.

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litigation stemming from care provided as emergency services by extending medical liability protection provided by the federal government. Both ideas received bipartisan support in the past, but neither bill currently has Democratic cosponsors.

To counter AMA's support for the legislation under consideration, Democrats said there is little proof that Republican proposals would lower insurance premiums, and that capping noneconomic damages would arbitrarily limit recourse for patients who are seriously injured. In testimony bolstering that position, Joanne Doroshow, president and executive director of the Center for Justice & Democracy, told the Committee that measures such as caps on noneconomic damages "force patients who are injured by medical negligence or the families of those killed to accept inadequate compensation. Meanwhile the insurance industry gets to pocket money that should be available to the sick and injured."

After beginning the Committee's markup of H.R. 5 on February 9, Smith postponed further consideration for a week after fellow Republicans agreed with Democrats' concerns that the **HEALTH** Act did not adequately respect states' rights. The constitutions of Arizona, Arkansas, Kentucky, Pennsylvania, and Wyoming ban damage caps, but H.R. 5 would enact caps in those states too. When Smith resumed the markup on February 16, the Committee voted to approve H.R. 5, after considering nearly 20 Democratic amendments, only one of which was approved. Among those amendments not approved was one offered by Representative Hank Johnson (D-GA) that specified that the bill would not preempt any applicable state constitutional provisions. Smith explained the rejection, saying that GOP panel members were working to craft an amendment that "will empower states and improve states' rights." He said the amendment would probably be introduced when the bill reaches the House floor.

At present, The House Committee on Energy and Commerce has been granted an extension for further consideration of H.R. 5 ending not later than May 13, 2011. A date for floor consideration has not been set but with a Republican majority in the House, passage of H.R. 5 is expected. Past House efforts died in the Senate, which also could be the fate of H.R. 5 with a Democratic majority in the Senate.