

A Bill or Not a Bill?

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Hamlet's soliloquy is playing out on the stage of the US Congress this year as once again policymakers determine whether and how to further regulate managed care. Despite high levels of members' overall satisfaction with their health plans, the American public has heard managed care horror stories, reinforced by verdicts of angry juries and dialogue of Hollywood scriptwriters. In some quarters, political popularity seems assured by passage of Federal mandates on health plans.

Given this scenario, what political environment faces the first session of the 106th Congress in this postimpeachment era, and what are the chances of passage of new Federal patient protections?

An outcome of the impeachment proceedings is the realization that bipartisanship is needed to pass controversial legislation. Republican majorities are slim in both houses of Congress, and the Republican Party finds itself widely split over fiscal and social issues. (For example, some Republican members of Congress seem embarrassed over the outcome of impeachment, and ideological fault lines are appearing over the prospect of next year's presidential campaign.) Some commentators have suggested that Congressional Republicans will therefore be forced to negotiate with Democrats, making passage of a bill more likely. Indeed, some Republicans support comprehensive patient protection. Bill sponsor Rep. Greg Ganske (R-IA) says of this support, "the water is building behind the dam," making passage inevitable.

On the other hand, the Republican Party generally takes its cues from American business, whose leaders are already paying a steep price for health care and would prefer not to tamper with the status quo. They are happy with five years of stable insurance premiums, reasonable employee satisfaction, and good performance by health plans. They fear that even higher health care prices will follow burdensome mandates and that proposals to expand liability for self-insured businesses could threaten the very existence of these businesses. New Speaker of the House Dennis Hastert (R-IL) has repeatedly rejected the notion of liability being included in any bill that emerges from the House.

For their part, despite their solidarity on the impeachment vote, Congressional Democrats are not likely to hold together on such a controversial piece of legislation that carries great emotional overtones

and strong political implications. The "Blue Dog" Democrats, about 25 mostly Southern social conservatives, are particularly independent on the liability issue and are contemplating introduction of their own bill in the near future. Sometimes they side with the majority party; on this issue, however, they seem to want their own approach. George Stephanopoulos (who, despite his recent tell-all book, insists he still has friends and influence in the White House) has publicly stated his belief that the President will veto any bill that lacks a liability provision. Such is the persisting influence of trial attorneys and consumer interest groups, now reinforced by the strength of organized medicine.

A Need for New Alternatives

There seems to be a stalemate on the liability issue. And if the liability issue is removed from the equation, what remains? Consensus appears to be growing in favor of establishing health plan accountability through independent, third-party review of health plan decisions to deny coverage. But does this require legislation? In fact, many health plans have indicated their intention to initiate such review programs voluntarily by year-end. Underlying this stated intention is an interest to give patients every benefit of the doubt, although cynics might look for self-serving financial motives such as avoiding giant-sized lawsuits (like those recently filed in California and Kentucky).

One major question for our political leaders to ponder is whether a comprehensive approach is feasible or whether they should try a piecemeal approach. Seven comprehensive bills are pending, and others are rumored to be at various stages of being drafted. In addition, single-issue bills abound. Experience acquired during this decade, from the Clinton Health Security Act in 1993 to last year's assortment of legislative bills, indicates that the comprehensive approach "invites death by a thousand nibbles." In such an environment, the perfect becomes the enemy of the good. Special-interest groups may favor all but one or two provisions of a comprehensive bill. The extensive compromise needed to garner solid backing for such a bill often strips it of substance, and support eventually fades away.

What is the alternative to comprehensive reform? Some have suggested that single-issue, less-complex



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bills may be more acceptable. One example is the Access to Emergency Care Act (HR 904), sponsored by Rep. Ben Cardin (D-MD). This proposal has been pending in Congress for three years and is beginning to seem as familiar as an old slipper. Similarly, other single-issue bills (eg, bills denouncing gag clauses, bills espousing genetic nondiscrimination, and bills providing access to specialists and advocating various other pieces of the consumer protection agenda) may be easier to pass.

The Key Issue: Medical Necessity

The one area of growing concern for all parties—and the central issue in the debate—is the definition of “medical necessity.” Who decides what services to offer patients? Should this authority be reserved to the treating physician constrained only by “generally accepted principles of medical practice,” as the AMA and some consumer organizations would insist? Or do health plans have a sustainable argument when they claim that a physician cannot always be independently aware of the best and most efficient treatment option in every case and that health plans therefore have an obligation to their members to conserve resources by overseeing medical decisions, limiting variations in practice, introducing evidence-based guidelines, and fostering involvement of informed patients in the medical

decision-making process. Some would argue that including a definition of “medical necessity” in Federal law will freeze in time a dynamic concept that should remain flexible; that doing so will invite fraud; and that adherence to such a fixed definition will lead to “defensive” utilization management and cause health care costs to spiral upward. Sen. Bill Frist, MD (R-TN) maintains that a better approach is to establish a process of internal and external appeals that allows the definition of “medical necessity” to flow through several layers of experts, each of whom uses all available scientific evidence to arrive at a binding conclusion.

A Prediction

Given all these factors, what should we see by the end of 1999? As a result of the lengthy impeachment process, time on the legislative calendar has rapidly grown short, adding great pressure to address budgetary and appropriations issues in a timely fashion. If any managed care reform is passed by Congress this year, look for modest comprehensive bills that include an appeals process but exclude liability provisions and a definition of “medical necessity.” Alternatively, consideration of single-issue bills may be moved to the end of the legislative session if the comprehensive bills appear to be unmanageable.

We hope Hamlet gets off the stage alive. ❖

*“Who decides
what services to
offer patients? ...
the treating
physician ...
or health plans?”*

Newness into the World

“How does newness come into the world? How is it born?
Of what fusions, translations, conjoinings is it made?
How does it survive, extreme and dangerous as it is?
What compromises, what deals, what betrayals of its secret
nature must it make to stave off the wrecking crew, the
exterminating angel, the guillotine?

*Salman Rushdie,
The Satanic Verses*