

## Patients' Bill of Rights? Or Wrongs?

At the end of its first session, the 106th Congress has produced a list of shortcomings far outdistancing the list of accomplishments. Where, oh, where are the hoped-for legislative solutions to issues such as gun control, campaign finance reform, social security stabilization, Medicare reform including prescription drugs, minimum wage, medical records privacy, and consumer protection, among others?

The Patients' Bill of Rights Act of 1999 debate has held center stage for the past two years but remains contentious and unresolved despite action by both houses of Congress and despite a strong desire by President Clinton to sign legislation. A conservative Republican version passed by the Senate last July and a more liberal version passed by the House in October must be reconciled by a conference committee, members of which have been appointed by the leadership of the two parties in the two legislative chambers.

As the majority party strongly opposed to the House version, the Republicans control the votes in this committee and also control the committee's schedule. It is now a certainty that this committee will not convene until next spring, although no dates have been set. Some Republican leaders prefer a strategy of stalling to rapid resolution of the differences between the two versions. Others fear the political consequences of stalling. What are the tradeoffs of this strategy?

The majority rules. And in the conference committee, all Republican appointees (except Rep. Michael Bilirakis of Florida) are opposed to the House version. They object to federal regulation of private insurance and decry the new cause of action against health plans—especially if brought against employers who sponsor self-insured plans. With the majority votes in hand, the Republicans could forestall any bipartisan compromise that meets the President's expectation for a bill containing a health plan liability provision.

Unfortunately, this strategy may run into the buzz saw of national elections, now just a few months away. If the American electorate's views of managed care are accurately reflected in the most recent surveys, politicians who stand in the way of meaningful consumer protection legislation may find their reelection odds lengthened. And the Republican Party may lose the narrow majority it currently enjoys in both houses of Congress. Only five votes separate

the two parties in the House, whose Republican majority has eroded after the past two elections. Much more may be at stake than just regulation of managed care. The battle over the Patients' Bill of Rights may be won in the short term, but this victory could cost the war for votes and the majority in Congress at the polls in November. If the Democrats regain control of Congress, harsher legislation is likely in the first year of the 107<sup>th</sup> Congress.

Some in the managed care industry are contemplating an alternative strategy. What if we pushed hard for both an early meeting of the conference committee and rapid resolution of differences—including a modified liability provision acceptable to the President? The outcome we get now might be much better than what we could expect later, especially under a Democrat-controlled Congress. Pushing for a compromise might give the health care industry some clout in directing the nature of the compromise. We could "soften the blow" by arguing for a liability provision that would require exhaustion of appeals before bringing a lawsuit; provide admissibility of evidence from appeals panels in any subsequent lawsuit; prohibit punitive damage awards against defendants who have followed the recommendations of an appellate panel; disallow class action lawsuits and vicarious liability; and keep federal jurisdiction over ERISA lawsuits. This strategy holds some promise, but it may entail loss of trust with employers and Republican leaders who have steadfastly opposed any liability provision.

### The Final Question: Does it Really Matter?

As is true with so many complicated legislative issues that drag out over several years, the pace of change in the marketplace and with technology outstrips the deliberate process of creating laws. For example, class action lawsuits already brought against the health care industry would not be outlawed by new legislation. Moreover, many courts have lowered the threshold for bringing lawsuits against health plans. Most health plans now or soon will voluntarily exercise external, independent third-party appeals in disputes over medical necessity determination or experimental care. Some for-profit health plans have seen wisdom in the practice (long pursued by Kaiser Permanente and other not-for-profit health plans) of entrusting to physicians the



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responsibility of making medical decisions. This action alone may restore trust in a medical care system in disrepute among the American people. Most health plans have adopted mandates (found in both versions of the Patients' Bill of Rights) such as for access to specialists, to emergency care, to continuity of care, and to information.

In the final analysis, decisions made in Congress about the endgame of this legislation are likely to be determined not by the virtues of the substance of

bills but by the political calculus of upcoming Congressional and Presidential elections. Will the right decisions be made for the wrong reasons? Will decisions be made at all by a Congress seemingly paralyzed by narrow vote margins? Whatever the outcome of the legislative process, the private marketplace is changing rapidly, and a new law might be outdated before it takes effect. Having taken the lead on so many of these tough issues, Kaiser Permanente will be well prepared to deal with any outcome. ❖

### It's Value, Stupid

"For a variety of reasons, we have focused on the wrong question about education in the clinical setting: we have been asking about 'Costs' when we should be asking about 'Value.'"

*Linda A. Headrick, MD and Mark E. Splaine, MD,  
Institute for Healthcare Improvement 1999  
National Forum on Quality Improvement in Health Care*