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WHY THE TEXAS HMO LIABILITY LAW IS NOT A PROVEN MODEL FOR CONGRESS

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House and Senate conferees are meeting to reconcile the differences between the legislation they passed to establish a "patients' bill of rights" (H.R. 2990 and S. 1344). Among other things, the conferees are weighing the merits of allowing expanded litigation against employment-based health insurance plans.

During debate in the House last October on H.R. 2723, the Norwood–Dingell bill on patients' rights that became H.R. 2990, proponents cited the experience with a law in Texas that expanded liability for health plans. They pointed out that only a handful of lawsuits have been filed since that law took effect in 1997. This, they claimed, was "proof" that a federal law exposing insurers and managed care entities to greater liability would not result in a flood of litigation, with such corresponding effects as rising premiums and increases in the number of uninsured. Based on the evidence in Texas thus far, however, it would be a mistake to draw this conclusion.

The congressional conferees should realize that, because the Texas law is so young, it is still too early for any determination to be made about its success or failure. In addition, the Texas law differs substantially from the provisions of the Norwood–Dingell patients' rights legislation passed by the House last October.

What the Texas Law Allows. On September 1, 1997, the Texas Health Care Liability Act (S.B. 386) became law. Sponsored by State Senator David Sibley (R–Waco), it passed the state legislature by a sizeable majority. S.B. 386 created a new cause of action against three entities in the event of a failure to exercise ordinary care. These entities are: a health insurance carrier, a health maintenance organization (HMO), or other managed care entity.

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Immediately following its enactment, S.B. 386 was challenged in federal court. In *Corporate Health Insurance v. Texas Department of Insurance,* the plaintiffs claimed that the law was preempted by the Employment Retirement Income Security Act (ERISA) and other federal laws. On September 18, 1998, federal Judge Vanessa Gilmore ruled, essentially, that the right to sue was not preempted by ERISA, but that the independent review provisions were. Both sides are appealing different provisions of that decision.

A few weeks later, on October 18, 1998, the first case under the new law (*Plocica v. NYLCare*) was filed in State District Court. The defendant requested that it be moved to federal court. The court granted this motion on November 19, 1998. In March 1999, the federal court remanded *Plocica* back to the State District Court. Essentially, this means that, until March 1999, it was not clear to trial attorneys where to file a liability suit under this new law.

By March 2000, one year after *Plocica* was remanded back to state court, between seven and ten lawsuits had been filed in Texas under the new law. However, not one has even gone to jury. Therefore, there has not been a single judgment or single dollar awarded in any of the cases as of this time. Only after judgments come down and damages are awarded will the effects of this new law be felt.

Although malpractice awards against doctors in Texas are subject to caps, awards against HMOs and the other entities open to liability in S.B. 386 are not. HMOs and other entities are thus potentially subject to unlimited damage amounts. H.R. 2990 also does not cap state damage awards.

No Employer Liability in Texas. Significantly, the Texas legislation *specifically exempts employers from any liability in all cases.* Section 88–002(e) states:

> This chapter does not create any liability on the part of an employer, an employer group purchasing organization, or a pharmacy licensed by the State Board of Pharmacy that purchases coverage or assumes risk on behalf of its employees.

There are no exceptions. This is not true of H.R. 2990 under consideration by congressional conferees.

Employer Liability under H.R. 2990. Supporters of the Norwood–Dingell bill claim that it would protect employers from lawsuits. However, this is not the case if an employer "exercise(s)...discretionary authority to make a decision on a claim for benefits." The courts have not made clear what constitutes "discretionary authority." Employers would be at the mercy of imaginative plaintiff lawyers and courts as they find ways through this supposed barrier of protection.

To get around this, an employer might consider turning the administration of the plan over to a third party. But even this is not likely to provide sufficient protection against litigation. Lawyers no doubt would be aggressive in finding ways around the protection provided by the law; so employers could not rely on the courts to protect them from expensive lawsuits. Moreover, under the House bill, merely by sponsoring a plan, employers would be placing all of their assets at risk.

There is nothing in H.R. 2990 to say that employers cannot be sued, so they would still have to defend themselves against lawsuits. As lawyers and plaintiffs explore the limits of the new expansion of liability, employers would be burdened with the cost of this defense, *even if* the suits brought against them were not successful. Contrast this with the protections in the Texas bill, which makes it clear that employers cannot be held liable; there is no incentive to sue them in Texas.

Conclusion. The Texas law, regardless of its strengths or weaknesses, cannot be used as proof that Congress need not fear the likely consequences of expanding liability for health plans. It is far too soon to draw any conclusions from the Texas experience. More important, the Texas law is significantly more narrow than the legislation now being considered by the conference committee.

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