

Department of Legislative Services  
Maryland General Assembly  
2000 Session

**FISCAL NOTE**

Senate Bill 9 (Senators Green and Hollinger)

Judicial Proceedings

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**Managed Care Entities - Health Care Treatment Decisions - Liability**

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This bill establishes the liability of a health insurer, nonprofit health service plan, HMO, and dental plan organization (carrier) for damages that an enrollee suffers as a result of the carrier's health care treatment decision.

The provisions in this bill may be construed only prospectively and may not be applied to any cause of action arising before July 1, 2000.

The bill takes effect July 1, 2000.

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**Fiscal Summary**

**State Effect:** Expenditures for the State Employee Health Benefits Plan could increase by a significant amount in FY 2001. Minimal general fund revenue increase from the State's 2% insurance premium tax on for-profit carriers. Minimal special fund revenue increase for the Maryland Insurance Administration from the \$125 rate and form filing fee.

**Local Effect:** Expenditures for local jurisdiction employee health benefits could increase if carriers raise their premiums as a result of the bill's requirements. Revenues would not be affected.

**Small Business Effect:** Meaningful. Health insurance costs for small businesses could increase by a significant amount.

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**Analysis**

**Bill Summary:** The bill imposes the duty to exercise ordinary care on a carrier when making health care treatment decisions and imposes liability for damages for harm to an enrollee for failure to do so. A carrier is liable for damages proximately caused by its agents or employees, but a carrier may claim as a defense that: (1) the carrier did not control, influence, or participate in the health care treatment decision; and (2) the carrier did not deny or delay payment for health care services recommended by a health care provider. The requirement that a carrier exercise an ordinary duty of care does not create an obligation for the carrier to provide an enrollee with a health care service or treatment that is not generally covered under its health benefit plan. Noneconomic damages resulting from a cause of action against a carrier are limited by Maryland's personal injury liability cap, which is currently \$575,000, but may vary depending on when the injury occurs.

An enrollee (or representative of the enrollee) may not maintain a cause of action against a carrier unless the enrollee: (1) has exhausted the utilization review appeals process or the carrier's internal grievance process; and (2) gives written notice of the claim to the carrier and agrees to submit the claim, upon the carrier's request, to the Insurance Commissioner for review. An exemption from the above requirement will be made if the enrollee asserts that harm has already occurred to the enrollee and the review by the Commissioner would not be beneficial to the enrollee.

If an enrollee has not exhausted all appeals and grievance processes, a court may not dismiss the cause of action, but may instead order the parties to submit to an independent review, mediation, or other nonbinding alternative dispute resolution process, and the court may stay the action for up to 30 days for the purpose of resolving the claim. If the requirement to exhaust appeals processes places the enrollee's health in serious jeopardy, the bill does not prohibit an enrollee from pursuing other appropriate remedies, such as injunctive relief, a declaratory judgment, or other relief available under the law.

The bill also repeals the "corporate practice of medicine" defense generally available to managed care plans and other carriers.

**Current Law:** The federal Employee Retirement Income Security Act of 1974 (ERISA) preempts Maryland law as it relates to most employer-sponsored employee health benefit plans. ERISA's preemption of state laws related to liability applies regardless of whether the employer plan is insured or self-insured. An enrollee in an ERISA plan may sue only the carrier to recover the actual cost of any benefits denied and may not collect noneconomic damages.

**Background:** This bill is intended to provide a clear statutory basis on which a person may sue a carrier or managed care organization and is modeled on a Texas law enacted in 1997 that requires managed care organizations to exercise ordinary care when making health care

treatment decisions and imposing liability for resulting damages.

The Texas statute was challenged by Aetna U.S. HealthCare, which argued in federal court that the law was preempted by ERISA. In September 1998, a federal district court judge ruled that the provisions of the Texas law giving individuals the right to sue their carrier are not preempted by ERISA if such a suit is based on a “quality of care” issue, not a “denial of benefits” issue. A Fifth Circuit opinion in another Texas case affirms this distinction between “quality of care” and “denial of benefits” causes of action. While these federal court rulings do not directly affect Maryland law, most states and the federal government are watching how Texas’ HMO liability law is interpreted by the courts.

At the federal level, similar legislation is being considered in Congress. The Senate passed a Republican-sponsored version of the Patients’ Bill of Rights Act of 1999 in July (S1344) that amends ERISA to include a grievance procedure for enrollees. The House passed HR 2723 in October, a bipartisan measure, establishing the right to sue insurance companies for damages resulting from denial of care or maltreatment. Congress has not reconciled the substantial differences in the House and Senate bills. It is anticipated, therefore, that legislation will be revisited in the 2nd session of the 106th Congress, which convened on January 24, 2000. To date, Congress has not yet addressed the liability issue.

**State Expenditures:** State Employee Health Benefits Plan expenditures could increase by a significant amount in fiscal 2001. According to a U.S. Congressional Budget Office study of similar federal legislation, removing the ERISA preemption as a barrier to damage awards against health plans would increase health care premiums by 1.4%. For illustrative purposes only, if carrier premiums increase by 1.4%, expenditures for the State plan could increase by \$2.3 million in fiscal 2001. This figure reflects \$325 million in annual expenditures for medical, dental, and mental health benefits, a January 1, 2001, effective date for new premiums, and a mix of 60% general funds, 20% special funds, and 20% federal funds. Twenty percent of the expenditures are reimbursable through employee contributions.

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### **Additional Information**

**Prior Introductions:** An identical bill, SB 261, was introduced in the 1999 session and received an unfavorable report by the Senate Judicial Proceedings Committee. SB 84 was also introduced in the 1998 session but was not reported by the Senate Judicial Proceedings Committee.

**Cross File:** HB 943 (Delegates Zirkin and Vallario) - Economic Matters.

**Information Source(s):** United States Code, National Conference of State Legislatures, U.S. Senate, U.S. House of Representatives, U.S. Congressional Budget Office, Henry J. Kaiser Family Foundation, Department of Health and Mental Hygiene (Medicaid, Maryland

Health Care Commission), Maryland Insurance Administration, Department of Budget and Management (Employee Benefits Division), Department of Legislative Services

**Fiscal Note History:** First Reader - March 6, 2000  
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