

Department of Legislative Services
Maryland General Assembly
1999 Session

FISCAL NOTE
Revised

Senate Bill 261 (Senators Green and Hollinger)

Judicial Proceedings

Managed Care Entities - Health Care Treatment Decisions - Liability

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 bill requires an enrollee to exhaust various appeals processes and notify the carrier of the claim before instituting a cause of action against the carrier. The bill also requires an enrollee to submit the claim for review with the Insurance Commission upon the carrier's request.

The provisions in this bill may be construed only prospectively and may not be applied to any cause of action arising before July 1, 1999.

This bill takes effect July 1, 1999.

Fiscal Summary

State Effect: Indeterminate but potentially significant expenditure increase for the State Employee Health Benefits Plan. Indeterminate minimal increase in special and general fund revenues.

Local Effect: Expenditures for local jurisdiction employee health benefits could increase by an indeterminate but potentially significant amount depending upon the current type of health care coverage offered and the number of enrollees. Revenues would not be affected.

Small Business Effect: Potential meaningful. Health insurance costs for small businesses and self-employed persons could increase by an indeterminate but potentially significant amount if carriers increase their premiums as a result of this bill.

Fiscal 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. Carriers are liable for damages proximately caused by its agents or employees, but a carrier may claim as a defense that the carrier did not control, influence, or participate in the health care treatment decision and 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 is limited by Maryland's personal injury liability cap, which is currently \$560,000, 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 and agrees to submit the claim to a review by the Insurance Commissioner. 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, and stay the action for up to 30 days for the purpose of resolving the claim. 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 if the requirement to exhaust appeals processes places the enrollee's health in serious jeopardy.

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

State Expenditures: Expenditures for the State Employee Health Benefits Plan could increase by an indeterminate but potentially significant amount beginning in fiscal 2000. CareFirst Blue Cross Blue Shield estimates that the bill's provisions will substantially increase litigation costs, which would then be passed onto employers, such as the State plan, as increased premiums. It is unknown at this time how the bill's requirements would affect

other carriers under the State plan.

Various recent studies by the U.S. Congressional Budget Office and the Kaiser Family Foundation on similar legislation suggest that the fiscal impact will not be as extensive as managed care organizations have predicted, and instead estimate premium increases between 0.1 and 1.2%. These figures are based on the assumption that managed care plans will take other cost-saving measures to minimize litigation costs, such as adopting relaxed review criteria and standards of medical necessity, purchasing liability insurance, establishing mandatory arbitration procedures, and increasing oversight and monitoring of providers.

As a point of reference only, if all carrier premiums increase by 1%, expenditures for the State Employee Health Benefits Plan could increase by \$2.7 million in fiscal 2000. This figure reflects \$532 million annual expenditures for the State plan, a January 1, 2000 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.

No effect on expenditures for the Medicaid program. No effect on the Judiciary.

State Revenues: Special fund revenues could increase by an indeterminate minimal amount in fiscal 2000 because the bill's requirements could subject carriers to rate and form filings. Each carrier that revises its rates and amends its insurance policy must submit the proposed change(s) to the Maryland Insurance Administration (MIA) and pay a \$125 rate and form filing fee. The number of carriers who will file new rates and forms as a result of the bill's requirements cannot be reliably estimated at this time because carriers often combine several rate and policy amendments at one time when filing with MIA.

If carriers raise their premiums as a result of the bill's requirements, general fund revenues may increase by an indeterminate minimal amount as a result of the State's 2% insurance premium tax on increased premiums. The State's premium tax is applicable only to "for-profit" insurance carriers.

Additional Comments: According to a report by the Kaiser Family Foundation on managed care plan liability, current laws in most states generally permit consumers to sue managed care plans for actions that injure them. In many states, however, managed care plans effectively avoid such lawsuits under corporate practice of medicine laws. These laws have been interpreted by many courts as barring suits against HMOs and other carriers on the ground that carriers cannot be sued for medical malpractice if they are prohibited from practicing medicine. According to the State Board of Physician Quality Assurance, there is an implied prohibition in Maryland against the corporate practice of medicine by entities

other than hospitals, related institutions, and HMOs (Health - General Article, §§ 19-351, 19-704).

Information Source(s): Kaiser Family Foundation, U.S. Congressional Budget Office, Department of Health and Mental Hygiene (Board of Physician Quality Assurance, Health Care Access and Cost Commission, Medicaid, Health Services Cost Review Commission), Judiciary (Administrative Office of the Courts), Maryland Insurance Administration, Department of Budget and Management (Employee Benefits Division), CareFirst Blue Cross Blue Shield, Department of Legislative Services

Fiscal Note History: First Reader - March 1, 1999
Inc/jr Revised - Corrected - March 8, 1999

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