

Patients' Bill of Rights Legislative Comparison, July 2001

Patient Protections	Ganske-Dingell H.R. 526	McCain-Edwards S. 1052 as passed	House GOP Bill H.R. 2315
Ensures unbiased selection of external review entity	Yes.	Yes. McCain amendment strengthened protections to ensure no bias in review.	Unclear. The bill includes language similar to Ganske-Dingell, but clearly states the plan or issuer will pick the reviewer. Does not empower the Secretary or the state to audit decisions to ensure fairness.
Requirements to access external review	Up to 180 days to file for appeal, filing fee of up to \$25. Allows review to proceed even if individual can't submit the fee.	Same as Ganske-Dingell.	Up to 90 days to file, filing fee of \$50, claim must be for more than \$100, or physician must certify in writing significant risk to patient. Does not include protection that review starts even if patient can't submit fee on time.
Standard for determination ensures external reviewers make medical decisions based on sound medical practice considering the patient's individual medical decision.	Yes. Allows medical reviewers to consider all relevant and reliable medical evidence, as well as expert opinion, and other findings, in light of the patient's individual medical circumstances to make a determination on the case. Does not bind the reviewer to only "expert consensus" or "scientific/clinical evidence" which does not exist, particularly for children or the disabled. Allows reviewers the flexibility to modify a decision so patients can get appropriate care quickly.	Yes. Amendments by McCain and Gramm clarified that reviewer cannot authorize benefits that are not covered under the plan. Reid amendment clarified types of medical expertise needed to review appeals decisions.	No. Reviewer only must base decision on the patient's condition and scientific evidence. In areas where such scientific studies have not or may not ever be done, it would be virtually impossible to challenge a plan's decision (even if the HMO's decision itself wasn't based in science); the HMO would always win. Reviewers can modify plan's decision, leaving patients in an endless loop of appeals to get the right care. In making determination, reviewer may be bound by the plan's policies, undermining the independence of the review. Does not allow for appeal of denials based on terms that are substantially equivalent to "medically necessary" so clever HMO lawyers could keep people out of review by denying care using different terms (i.e., reasonable and necessary).
Ensures decisions are made as quickly as patient's medical condition requires.	Yes.	Yes.	No. Problems similar to Breaux-Frist: no protections to have case reviewed according to medical exigencies and no protections against plan terminating treatment before patient can appeal.
Holds the plan accountable for medical decisions that cause injury or death.	Yes. Decisions involving medical judgment that result in injury or death heard in state court.	Yes. Bond amendment limits the application of the liability provisions if the GAO finds that the number of uninsured has increased more than one million	No. Similar problems to Breaux-Frist: narrow and inadequate federal remedy displaces state law; federal remedy only available in limited circumstances where the reviewer decided in the patient's favor. Cause of action is only against the designated decision-maker. Ability of

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		as a result of the liability provisions.	designated decision-maker to “allocate responsibility” along with lack of protections to ensure ultimate accountability leaves loopholes that would leave consumers with no remedy.
Holds the plan accountable for violations of rights and duties that cause injury or death (not involving medical judgment).	Yes. Provides remedy in ERISA (federal court) for non-medical-related plan actions that injure or kill.	Snowe amendment exempts self-insured, self-administered plans from liability under the bill for the performance of non-medical duties or violations of the plan’s requirements. Snowe amendment also removed all federal liability for injuries caused by a failure to comply with the terms and conditions of a plan.	Limited cause of action under ERISA, non-economic damages capped at \$500,000.
Preserves existing right for legal accountability in state courts.	Yes. Preserves current law cases against plans for direct, vicarious, and corporate liability and quality of care.	Yes.	No. Replaces existing state law accountability for injuries that are “based on or otherwise relate to” a health plan’s administration of benefits with a narrow and inadequate federal remedy. Further constraints on state law accountability, providing that injured patients can only get redress in cases where the external reviewer has sided in their favor and the plan has failed to comply.
Protects employers	Yes. Employers not liable unless they directly participate in decision that causes injury or death. Clarifies that actions like choosing a health plan or choosing which benefits to cover are not “direct participation.”	Yes, includes “direct participation” protection for employers but Snowe amendment also added additional protections for employers allowing them to transfer all liability to a designated decision-maker who shall assume all liability. Exempts self-insured, self-administered employer plans from all federal liability. Protects individual members of employer plan boards from individual liability.	Allows employers to designate a party to assume their liability, but loopholes could leave no party liable at all. No protection against designated decision-maker asserting decision was made by another party to escape liability. Ability to allocate responsibility to different designated decisionmakers create complex legal web that will obfuscate ability to locate any responsible party.
Exhaustion required	Yes, unless patient is already killed or irreparably harmed and thus the appeals process	Yes. Thompson amendment further raised the bar for exhaustion by requiring	Patient must not only exhaust all administrative remedies but also have affirmative review decision in order to proceed to court.

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	could provide no relief. Either party can still request review.	exhaustion unless patient is seeking injunctive relief, requiring the court to admit as evidence and consider any external review decision.	
Restrictions on damages, attorneys' fees	Does not disturb state laws relating to awards. All state law limits continue to apply. No punitive damages in federal court, \$5 million civil penalty for egregious action.	Thompson amendment added clarification that any cause of action shall be governed by the law (including choice of law rules) of the state in which the plaintiff resides. Warner amendment limiting attorneys' fees also included.	Similar to Breaux-Frist. Caps awards for damages in federal courts at \$500,000 and includes joint and several liability restrictions.
Class Actions	Preserves all existing legal class action and RICO rights. Limits class actions based on the new rights granted under the bill.	DeWine amendment prospectively limits class action litigation to one plan or plan sponsor.	Prospectively and retrospectively bans class actions across health plans and prospectively and retrospectively bans RICO suits.
Access to nearest emergency room in an emergency according to prudent layperson standard	Yes. Follows Medicare guidelines for maintenance and post-stabilization care.	Yes.	No. Lesser protections for neo-natal care.
Point of Service Option	Yes.	Yes.	Would not protect individuals working for small businesses.
Direct Access to Ob-gyn care	Yes.	Yes.	No. Requires ob-gyn to seek prior authorization, except for routine care, which includes annual, prenatal, and perinatal care. Protections do not apply if patient is permitted to choose an ob-gyn as her primary care provider, but fails to do so.
Direct Access to Pediatricians	Yes.	Yes.	Yes.
Access to specialty care	Yes.	Yes.	No. Only requires timely "coverage" of such care. Plan determines whether a specialist is available for you, and controls whether patient gets out of network care if network care is inadequate. Omits those with "potentially disabling" conditions and narrow definition would exclude many needy patients from having a specialist coordinate care. No

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			assurance that pediatric specialists would be available or that patients would have access to specialty care facilities (e.g., children's hospitals, cancer centers). No standing referral requirement.
Continuity of Care	Yes.	Yes.	No. Omits those with "potentially disabling" conditions and uses limited definition of "serious and complex condition" which would exclude many patients in need of a transition period. Creates strict deadline for transitional period, with no flexibility in cases where reasonable follow-up care needed.
Bans gag clauses	Yes.	Yes.	Unclear whether it protects patients against gag clauses in subcontracts.
Access to needed drugs	Yes.	Yes.	No. Fails to protect patients from additional cost sharing for medically necessary off-formulary drugs.
Access to clinical trials	Yes.	Yes. Reid amendment made technical changes to ensure access to National Cancer Institute trials.	Access to FDA approved trials limited only to cancer patients; excludes patients with other serious diseases (e.g., Alzheimer's, Parkinson's).
Prohibits payments to encourage doctors to deny care	Yes	Yes.	No. Plans can offer doctors bonuses for limiting number of referrals and tests they recommend. Bill only includes a study on the matter.
Protects healthcare providers who advocate for patients or report quality of care problems.	Yes	Yes.	No. Plans are not prohibited from retaliating against health care providers who challenge the plan's health care decisions or report quality problems.
Breast cancer treatment	Yes. Inpatient coverage as determined medically necessary by the treating physician. Requires notification of rights and allows for second opinion.	Yes.	No.
Prompt payment of providers	Yes.	Yes.	No.
Non-discrimination of providers based on licensure	Yes.	Yes.	Yes.
Provides patients with	Yes. Plans must also provide 30	Hutchinson amendment added	Yes, but does not require plan do disclose excluded

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access to information about health plan	days advance notice of changes in benefits.	requirement that individuals be provided information on disenrollment.	benefits. Plans are not required to provide any advance notice of a reduction in benefits. Plans are not required to disclose any information about physician compensation that the plan deems to be “proprietary payment methodology.” Plans permitted to disseminate information electronically unless the individual opts out, regardless of whether individual has access to computer.
Genetic information	No.	Ensign amendment provides some protections against genetic discrimination by health plans.	No.
Protection for infants who are born alive	No.	Santorum amendment defined clarified existing law that a child is any individual birthed that has a heart beat or movement at the moment it is birthed.	No.
Ombudsman program for consumer assistance	No.	Yes, Reid amendment included a provision establishing an ombudsman program for consumer assistance with health insurance questions.	No.
Creates a floor of strong protections	Yes.	Yes. Breaux amendment clarified the treatment of state laws that are “substantially compliant” with the federal floor, and requires the Secretary give deference to state interpretations of their own laws and whether the state law complies with the federal standards. States may enter into agreements with the Secretary to enforce the requirements of the bill.	No. Preempts state external and internal appeals rules that currently apply to issuers offering coverage for group plans. “Reasonable basis” and “substantial equivalent” standard, coupled with deference to states in court, makes it difficult for the Secretary to disapprove state certification, even if the protections are meager. Could result in regulatory confusion with the federal government enforcing state provisions.
Protects all Americans with private health insurance	Yes.	Yes.	No. Does not protect state and local government workers.
Application to federal health programs	Applies to FEHBP. Similar protections were extended to	Nickles amendment applied protections to federal health	No.

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	Medicare, Medicaid, FEHBP, DOD, and VA by the Clinton Administration.	programs.	
Incentives for group purchasing pools	Yes. Incentives to allow formation of group purchasing arrangements that provide high quality coverage for employers through grant programs and allowing donations by foundations to establish such groups.	No.	No. Allows creation of Association Health Plans (AHPs) that undermine state patient protection laws and cherry-pick healthy individuals.
Medical Savings Accounts	Limited expansion of MSAs: increases the number of individuals who may purchase these policies to 1 million.	No.	Yes. Full expansion of Archer MSAs. Allows additional individuals to purchase these policies, raises the amount that can be contributed, reduces the deductible.
Tax incentives for purchase of insurance	Tax credit to small employers who offer coverage for the first time to workers through group purchasing arrangements. Also speeds up the 1005 deductibility of health insurance costs for self-employed.	No.	No.