# Patients' Bill of Rights Legislative Comparison, July 2001

| Patient Protections | Ganske-Dingell H.R. 526 | McCain-Edwards S. 1052 as passed | Ganske-Dingell-Norwood-Berry H.R. 2563 | House GOP Bill H.R. 2315 |
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| **EXTERNAL APPEALS** | | | | |
| Ensures unbiased selection of external review entity. | Yes. | Yes. McCain amendment strengthened protections to ensure no bias in review. | Same as original Ganske-Dingell, but includes McCain amendment strengthening against any 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 cannot submit the fee. | Same as Ganske-Dingell. | 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 cannot 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 that patient 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. | Same as Ganske-Dingell, but includes McCain/Gramm amendment clarifying reviewers cannot authorize benefits that are not covered under the plan and Reid amendment clarifying the types of medical expertise needed to review appeals. | 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 ever 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 | Yes. | Yes. | Yes. | No. No protections to have case reviewed according to medical |

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| patient's medical condition requires. | | | | exigencies and no protections against plan terminating treatment before patient can appeal. |
| **LIABILITY** | | | | |
| 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 Institute of Medicine finds that the number of uninsured has increased more than one million as a result of the liability provisions. | Yes, same as Ganske-Dingell, but includes Bond amendment limiting the application of the liability provisions if Institute of Medicine finds that the number of uninsured has increased more than one million. Also, includes additional language to clarify that the bill does not create any new causes of action against physicians, hospitals, and other health professionals; clarifies the protection against personal liability for boards of directors, including those individuals who volunteer. | No. 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 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. | Yes, but includes the important modifications added in the Snowe amendment: exempts self-insured, self-administered plans from liability, removes all federal liability for injuries caused by failure to comply with the terms and conditions of the 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. | 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 directly participate in decision that | Yes, includes "direct participation" protection for | Yes, includes "direct participation" protection for employers but also | Allows employers to designate a party to assume their liability, but |

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| | causes injury or death. Clarifies that actions like choosing a health plan or choosing which benefits to cover are not "direct participation." | employers but also Snowe amendment 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. | Snowe amendment 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, but also adds language to clarify that the scope of the designated decision maker protection extends to trusts as well as the trustees themselves. | 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 decision makers 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 could provide no relief. Either party can still request review. | Yes. Thompson amendment further raised the bar for exhaustion by requiring exhaustion unless patient is seeking injunctive relief, requiring the court to admit as evidence and consider any external review decision. | Yes, includes Senate-passed provision requiring exhaustion unless patient is seeking injunctive relief, requiring the court to admit as evidence and consider any external review decision. | Patient must exhaust all administrative remedies and have affirmative review decision in order to proceed to court. |
| 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. | Same as Ganske-Dingell, but includes 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 and limits on attorneys' fees passed in the Senate. | Caps awards for damages in federal courts at $500,000, prohibits punative damages, 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. | Includes class action limits from original Ganske-Dingell bill as well as additional limits added in the Senate. | Prospectively and retrospectively bans class actions across health plans and prospectively and retrospectively bans RICO suits. |
| **PATIENT PROTECTIONS** | | | | |
| Access to nearest emergency room in an emergency according to prudent layperson standard. | Yes. Follows Medicare guidelines for maintenance and post-stabilization care. | Yes. | Same as Ganske-Dingell. | No. Lesser protections for neo-natal care. |
| Point of Service option. | Yes. | Yes. | Yes. Also includes language clarifying point of service applies to pathology services. | Would not protect individuals working for small businesses. |

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| Direct access to Ob-Gyn care. | Yes. | Yes. | Yes. | No. Requires ob-gyn to seek prior authorization, except for annual exams, 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. | Yes. |
| Access to specialty care. | Yes. | Yes, includes minor technical changes to eliminate any potential ambiguity to access to specialty care. | Yes, also includes technical changes made in the Senate eliminating any potential ambiguity to access to specialty care. | 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 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. | Yes. | No. Omits those with "potentially disabling" conditions and uses limited definition of "serious and complex condition" Brethat 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 is needed. |
| Bans gag clauses. | Yes. | Yes. | Yes. | Unclear whether it protects patients against gag clauses in subcontracts. |
| Access to needed drugs. | Yes. | Yes. | Yes. | No. Fails to protect patients from additional cost sharing for medically necessary off-formulary drugs. |
| Access to clinical | Yes. | Yes. Reid amendment made | Yes, includes technical changes made | Access to FDA approved trials |

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| trials. | | technical changes to ensure access to National Cancer Institute trials. | in Senate and an additional further clarification on those changes. | 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. | Yes, corrects outdated technical reference to Medicare statute. | 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. | Yes. | No. Plans can retaliate 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. | Yes. | No. |
| Prompt payment of providers. | Yes. | Yes. | Yes. Includes technical clarification to ensure more stringent state laws would continue in effect. | No. |
| Non-discrimination of providers based on licensure. | Yes. | Yes. | Yes. | Yes. |
| Provides patients with access to information about health plan. | Yes. Plans must also provide 30 days advance notice of changes in benefits. | Hutchison amendment added requirement that individuals be provided information on disenrollment. | Yes, includes provision added in Senate requiring provision of information regarding disenrollment. | Yes, but does not require plan do disclose excluded 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. | No. |
| Protection for infants | No. | Santorum amendment defined | Yes, includes language added by | No. |

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| who are born alive. | | clarified existing law that a child is any individual birthed that has a heart beat or movement at the moment it is birthed. | Senate amendment. | |
| Ombudsman program for consumer assistance. | No. | Yes, Reid amendment included a provision establishing an ombudsman program for consumer assistance with health insurance questions. | Yes, includes language added by Senate amendment. | No. |
| **SCOPE** | | | | |
| 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. | Yes, includes changes added in the Senate to clarify 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. The bill corrects a problem with the Senate-passed bill which gave deference to state interpretation of the federal law, that would make enforcement of a federal floor an impossibility. 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 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. | Yes. | No. Fails to protect state and local government workers (e.g., police officers, fire fighters, doctors, etc.) |
| Application to federal health programs. | Applies to FEHBP. Similar protections were extended to Medicare, Medicaid, FEHBP, DOD, and VA by the Clinton Administration. | Nickles amendment applied protections to federal health insurance programs. | Includes a Sense of the Congress pertaining to federal health insurance programs that requires the appropriate Secretary to take steps necessary to ensure compliance, where it is found that these protections don't currently exist, and requires a GAO study to determine other necessary steps to bring these federal health insurance programs into compliance. Also includes clarifying language explicitly stating that the bill does not apply to excepted benefits plans like long term care insurance and disability | No. |

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| **TAX/ACCESS PROVISIONS** | | | | |
| 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. | Yes, includes provisions from Ganske-Dingell bill on group purchasing arrangements. | No. Allows creation of Association Health Plans (AHPs) that undermine state patient protection laws and allow associations to cherry-pick healthy individuals. |
| Medical savings accounts. | Expansion of MSAs: increases the number of individuals who may purchase these policies to 1 million, and expands eligible businesses that can participate. Recognizes GAO report on cost selection issues associated with MSAs. | No. | Includes provisions from Ganske-Dingell bill. | 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. Provides 100% deductibility for self-employed. | No. | Yes. | No. |
| Protects Social Security Trust Fund. | No. | Yes. | Yes. | No. |