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**Legislative Bulletin……..…March 13, 2003**

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## H.R. 5 — Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2003 (Greenwood)

**Order of Business**: The bill is scheduled for consideration on Thursday, March 13, under a closed rule. The rule allows for a motion to recommit, with or without instructions.

**Summary**: H.R. 5 makes a variety of changes to medical malpractice litigation processes in state and federal court, including capping awards and attorney fees and eliminating joint and several liability. The major provisions of the bill are outlined in further detail below.

The legislation requires that health care lawsuits commence no later than 3 years after the date of injury or 1 year after the claimant discovers the injury (or reasonably should have discovered the injury), whichever occurs first. The only exceptions to the limit are in cases of fraud, intentional concealment, the presence of a foreign body in the injured person, or if the injury occurred to a minor while under the age of 6.

The bill sets a cap on noneconomic damages (pain and suffering) of $250,000 for any lawsuit. A jury is not to be informed of the maximum award, but any amount over $250,000 must be reduced either before the judgment is entered or by amendment after it is entered. No limit is set on actual economic damages. Evidence of collateral source benefits (such as disability or worker's compensation) may also be introduced in a lawsuit to prevent double recoveries.

The bill also establishes a "fair share" rule, under which each party in a lawsuit is liable only for that party's share of damages based on the degree of responsibility. Currently, a defendant is liable for the entire sum of the damages even when only partially at fault. Under the bill, the "trier of fact" (a judge in a bench trial or a jury in a jury trial) would determine the proportion of responsibility for each party involved in the claim.

H.R. 5 establishes a system under which the court shall supervise the payment of damages. Under this system, the court may limit contingent fee payments (where an attorney receives a percentage of the damages) to the claimant's attorney and redirect the payment to the claimant

"based upon the interests of justice and principles of equity." Contingent fees may not exceed:

- 40 percent of the first $50,000 in damages
- 33 1/3 percent of the next $50,000 in damages
- 25 percent of the next $500,000 in damages
- 15 percent of any amount over $600,000.

Under the bill, punitive damages (if otherwise permitted by state or federal law) may be awarded against any person in a health care lawsuit if "it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer." When initially filing a lawsuit, individuals could not make a claim for punitive damages. Rather, the court must review the evidence and determine that there is a "substantial probability" that the claimant would win punitive damages before a claim can be filed.

No punitive damages can be awarded in a suit where compensatory damages are not awarded. Any party in a lawsuit can request that a separate proceeding be used to determine whether punitive damages are to be awarded and the amount of such damages. The maximum award is set at two times the economic damages or $250,000, whichever is greater. Factors to be used when considering punitive damages may only include:

- severity of harm;
- duration of the conduct;
- profitability of the conduct;
- number of products sold or procedures rendered that caused harm;
- any criminal penalties imposed; and
- the amount of any civil fines.

In addition, no punitive damages may be awarded against the manufacturer or distributor of a medical product if the product was approved by the Food and Drug Administration (FDA) or is generally recognized by experts as safe and effective under conditions established by the FDA. Similarly, a health care provider who provides a drug or device approved by the FDA cannot be named in a product liability lawsuit or held liable in a class action lawsuit. An exception is made in cases of fraud or bribery of FDA officials. In a lawsuit related to the packaging or labeling of a drug, the manufacturer or product seller of the drug "shall not be held liable for punitive damages unless such packaging or labeling is found by the trier of fact by clear and convincing evidence to be substantially out of compliance" with FDA regulations.

The bill also allows the payment of future damages totaling $50,000 or more to be paid in periodic payments and allows evidence of collateral source benefits (such as disability payments, workers' compensation, or medical benefits) to be introduced in any lawsuit.

H.R. 5 includes language that the bill preempts state law if state law prevents the application of its provisions, but does not preempt or supersede laws that provide greater protections for health care providers and health care organizations from liability. The bill also does not

preempt any state statutory limit on the amount of compensatory or punitive damages that may be awarded in a health care lawsuit.

The bill also includes a sense of Congress that "a health insurer should be liable for damages for harm caused when it makes a decision as to what care is medically necessary and appropriate" and findings that "our current justice system is adversely affecting patient access to health care services" and health care liability litigation has "a significant effect on the amount, distribution, and use of federal funds."

The provisions of the bill would apply to any lawsuit filed on or after the date of enactment.

**Additional Background**: H.R. 5 is nearly identical to H.R. 4600, passed in the 107th Congress on September 26, 2002, by a vote of 217-203 (Roll Call #421).

**Committee Action**: The bill was referred to the House Committees on Energy and Commerce and Judiciary. Judiciary considered the bill on March 5 and reported it by a vote of 15-13. Energy and Commerce considered the bill on March 6 and reported it by voice vote.

**Administration Position**: An official statement on H.R. 5 is not available, but the Administration issued a Statement of Administration policy on H.R. 4600 in the 107th Congress strongly supporting the bill.

**Outside Support**: H.R. 5 is supported by a variety of health care and business groups, including the American Medical Association, the American Hospital Association, and the U.S. Chamber of Commerce. The National Federation for Independent Businesses (NFIB) and the U.S. Chamber of Commerce are considering H.R. 5 a "key vote."

**Savings to Taxpayers**: The Congressional Budget Office estimates that enacting H.R. 5 will reduce federal spending for Medicare, Medicaid, FEHBP, and other federal health programs, **reducing direct spending $14.9 billion** over the 2004-2013 period. CBO also estimates the bill will result in employers paying less for health insurance (and making more of their compensation to employees in a taxable form, such as wages), **increasing revenues $3 billion** over the 2004-2013 period. Discretionary spending also would be reduced under FEHBP, for savings of $230 million over the 2004-2013 period.

Note: CBO also estimates **state savings on Medicaid of $2.5 billion** over the 2004-2013 period.

**Does the Bill Create New Federal Programs or Rules?**: Yes. The bill creates new federal rules for health care liability lawsuits in state and federal court.

**Constitutional Authority**: The Judiciary Committee, in House Report 108-32, cites Article I, Section 8, Clause 3 (the commerce clause).

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