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Re: AN ACT to amend the general obligations law, the civil practice law and rules and the public health law, in relation to holding health care organizations responsible for the consequences of their decisions

S. 417 (Breslin)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans of New York

The Blue Cross and Blue Shield Plans of New York strongly oppose enactment of this bill, which would impose unfair liability standards on health insurers and managed care health plans making routine coverage determinations. Perversely, enactment of this bill would actually diminish the accessibility of health care services and the affordability of health care coverage.

1. THE PROVISIONS OF THIS BILL SEEKING TO IMPOSE LIABILITY FOR COVERAGE DETERMINATIONS BY HEALTH PLANS ARE LIKELY PREEMPTED BY ERISA

On June 21, 2004, in *Aetna Health, Inc. v. Davila*, the U.S. Supreme Court ruled that the Employment Retirement Income Security Act (ERISA) preempts state laws that allow health plan participants to sue their health plans for negligence in the connection with coverage decisions. See 542 U.S. 200. This ruling is based on the finding that the remedial provisions of ERISA provide the only judicial remedies available to an ERISA plan beneficiary. Based on this ruling, the provisions of this bill seeking to permit enrollees of insured or self-insured private sector employer-sponsored plans ("ERISA plans") to impose such liability upon health plans will likely be found to be preempted by ERISA.

2. ENROLLEES IN NEW YORK HEALTH PLANS HAVE ACCESS TO AN INDEPENDENT REVIEW OF CERTAIN COVERAGE DECISIONS

Since the initial proposal of this legislation a number of years ago, many laws have been enacted to ensure that health plans are accountable to their enrollees. A good example is the External Appeal Law of 1998, which provides New Yorkers with the right to appeal health plan decisions regarding medical necessity to an independent external appeal agent Since its implementation, the external review process has provided several thousand New Yorkers with an effective avenue to appeal denials of coverage. With approximately half of health plan initial coverage decisions overturned as a result of the utilization of the external appeal process, enrollees have a timely and cost-effective means to ensure that coverage decisions are appropriate.

3. THIS BILL WOULD INCREASE HEALTH CARE COSTS BY SUBJECTING HEALTH INSURERS AND MANAGED CARE HEALTH PLANS TO CIVIL LAWSUITS.

The most obvious impact of this bill would be the additional costs health insurers and managed care health plans would have to pay in malpractice premiums and in the potential financial liability to prevailing plaintiffs and their lawyers. These costs alone would be significant. Another important effect would be that insurers and health care plans would be far less likely to deny any claim for services, approving all claims, no matter how frivolous, for fear of potential liability. The result would be an essential return to indemnity-type usage patterns that in the past has lead to runaway premium increases. Combined with other costs of health plan liability, the aggregate cost increase would be substantial.

A study by the Barents Group suggested that health insurance premiums could increase from 2.7 to 8.6% as a result of imposing tort liability on health plans. Such an increase would amount to $1,511 per household per year in increased premiums.

4. THIS BILL MAY ACTUALLY ERODE—NOT ENHANCE—PHYSICIAN AUTONOMY.

Under existing industry practices, coverage determinations are based on information provided by the enrollee's physician and on the diagnoses and treatments provided to the enrollee. If, as this bill proposes, health plans were to be held liable for making such determinations, health plans' management of providers' diagnoses and treatments would transform radically. Rather than a useful quality and cost control measure, health plans would view control over providers' medical decisions as a matter of absolute necessity. Instead of giving providers more control over patient care, passage of this bill would require health plans to micro-manage provider decisions in an effort to minimize the health plan's liability exposure for inappropriate treatments provided to enrollees.

5. THIS BILL IMPOSES EXTRAORDINARY LIABILITY STANDARDS ON HEALTH INSURERS AND MANAGED CARE HEALTH PLANS.

The bill provides that actions filed against health plans are not subject to existing statutory laws governing joint and several liability. Health plans would thus be deprived of laws that were designed to discourage trial lawyers from suing "deep pockets" in order to boost the likelihood of a high award. Under the bill as proposed, a health plan that is 1% responsible for damages to an enrollee could be held liable for 100% of the award. The bill would thus encourage trial lawyers to include the health plan in any malpractice lawsuit against a provider, regardless of how minuscule the health plan's share of negligence (if any).

6. THIS BILL WOULD HAMSTRING A HEALTH PLAN'S ABILITY TO CONTROL COSTS THROUGH LEGITIMATE COST CONTROL MEASURES.

Passage of this bill would eliminate two cost control measures currently employed by managed care health plans: utilization management and provider incentive programs. In the face of potential tort liability, health plans would be far less likely to deny any procedure for fear of a lawsuit. The Barents Group study cited earlier estimated that health plan liability for utilization management determinations would eliminate 60 to 90% of the health plan's ability to control costs through utilization controls. The study also suggested that the numbers would be higher in the absence of provider incentives to minimize overuse of health care resources. This bill would specifically prohibit the use of provider incentive programs, virtually eliminating any provider utilization controls and exacerbating the cost increases associated with the bill.

7. THIS BILL WOULD ENCOURAGE FRIVOLOUS LAWSUITS AGAINST PROVIDERS AND HEALTH PLANS ALIKE.

This bill adds a "deep pocket" to the potential list of defendants against which a malpractice lawsuit could be brought. The bill therefore creates an incentive for lawyers to file frivolous actions in hopes of achieving a quick settlement from the health plan. The rise in the number of lawsuits will increase the amount that health plans spend to defend such actions, in addition to straining an already overburdened court administration system. This bill would run counter to public policy by encouraging frivolous litigation at the expense of health insurance purchasers.

For all these reasons, the Blue Cross and Blue Shield Plans strongly urge that this bill not be enacted into law.

Respectfully submitted,

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