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Senators Have Their Say on the Health Care Overhaul

The first week of the Senate health reform debate began slowly with only a handful of amendments coming to a final vote. Over the weekend, the pace quickened, and a half dozen additional amendments reached the Senate floor for a vote during rare Saturday and Sunday Senate sessions. Many of the week's amendments addressed coverage of benefits and measures to fund the Senate's reform efforts. Throughout the week, Republican Senators held daily sessions on the Senate floor warning of the harm to seniors that would result if the Senate failed to reject the reform bill's nearly \$500 billion in cuts to fee-for-service Medicare and Medicare Advantage. In the coming week, we are expecting a bipartisan amendment from Sen. Ben Nelson (D-NE) and Sen. Orin Hatch (R-UT) on abortion coverage and, perhaps, a motion by Majority Leader Harry Reid (D-NV) to cut off debate on certain aspects of the health reform bill by filing for cloture on a manager's amendment or on the underlying reform bill. Of course, the latter seems to presuppose that all or most of the hot-button issues – e.g., the public option, abortion coverage and immigration – have been resolved to the satisfaction of 60 senators.

The first set of votes did not come until last Thursday. By a vote of 61-39, the Senate passed an amendment, proposed by Sen. Barbara A. Mikulski (D-MD), to expand women's access to preventive services such as mammograms and allow the federal government to require such care to be covered, without copayments, by insurers. The amendment, supported by Democrats and a few Republicans, was a response to the U.S. Preventive Services Task Force's recent recommendations that women age 50 and older should have screening mammography every two years, and women in their 40s should decide whether to have a screening mammography on an individual basis after talking with their doctors. Notably, the Senate rejected by a vote of 58-42 an amendment proposed by Sen. John McCain (R-AZ) to override the \$500 billion in Medicare cuts which serve as a significant funding source for the expanded health care coverage under the Senate leadership's reform bill.

Other amendments that passed during the first week of the Senate debate included a proposal submitted by Sen. Michael F. Bennet (D-CO) to guarantee that current

Medicare benefits will not be reduced by any measures in the health care reform legislation. This amendment passed with unanimous support, and was intended to clearly communicate to seniors that the Act will be used to further protect and strengthen Medicare. Sen. Sheldon Whitehouse (D-RI) also was successful in obtaining an amendment expressing that surpluses generated by the health reform bill for the Social Security trust fund be reserved for Social Security only, and that savings generated from the long term care program created by the CLASS Act be dedicated for that program only. By a 97-1 vote, Sen. Debbie Stabenow's (D-MI) amendment to ensure that there is no reduction or elimination of any benefits guaranteed by law to participants in Medicare Advantage plans also passed. According to Sen. Stabenow, the purpose of the amendment is to affirm that, despite cuts to private insurance companies that operate Medicare Advantage Plans, "nothing in the [Act] would cut benefits for seniors." Furthermore, Sen. John Kerry (D-MA) offered an amendment to protect Medicare's home health benefits, which passed by unanimous vote.

The Senate also rejected further amendments during the week, including one sponsored by Sen. Blanche Lincoln (D-AR) to limit the tax deductibility of salaries earned by health insurance executives. Sen. John Ensign (R-NV) was not able to pass an amendment to limit fees awarded to plaintiffs' lawyers in medical malpractice actions. A motion made by Sen. Mike Johanns (R-NE) to send the \$848 billion reform package back to the Senate Finance Committee with instructions to remove all cuts to home health care coverage also failed.

Despite the spirited but civil action on the Senate floor last week, much of the debate and negotiation of the Senate health reform bill occurred during closed door meetings. With the most controversial issues yet to reach the Senate floor, this week could signal whether Majority Leader Reid has a chance to muster 60 votes to pass health reform with some combination of the 58 Democratic Senators, the two Independents who caucus with them and either or both of the Republicans from Maine, Sens. Olympia Snowe and Susan Collins, who are still being heavily courted for their support of the health reform package.

Will Health Reform Improve Long Term Care?

Both the Senate and House health reform bills provide for a national, voluntary insurance program which would pay Americans with long term functional limitations cash benefits for non-medical living assistance. This program, called the Community Living Assistance Services and Supports Act (the "CLASS Act"), was ardently supported by the late Sen. Edward M.

Kennedy, is now being championed through the Senate by Kennedy's successor, Sen. Paul G. Kirk, Jr. (D-MA). Last Friday afternoon, by a vote of 52-47, the Democratic majority in the Senate rejected a proposed amendment to the Senate health reform bill which would have removed the CLASS Act from the reform legislation. In his remarks on the Senate floor, Sen.

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Will Health Reform Improve Long Term Care? (cont'd.)

Kirk, speaking in support of the CLASS Act, argued that the cash benefits from this self-funded insurance program would allow Americans with disabilities to live with more independence and dignity in home-based settings (and not nursing homes), without depleting their savings and while reducing the role and financial burden on Medicaid, often the payor of last resort for non-medical living assistance.

Today, if a person has functional limits which prevent independent living without non-medical custodial assistance – *i.e.*, assistance with feeding, bathing or dressing – then the person might need to enter a nursing home at an average annual cost of \$70,000 or hire a home care attendant at the cost of \$21 - \$29 per hour. While Medicare covers medical services, it typically only pays for short-term stays in skilled nursing facilities where medical or rehabilitative care is being furnished. Individuals who cannot perform all activities associated with daily living without assistance or who require regular supervision may be forced to seek Medicaid coverage if private insurance and their personal assets are insufficient to cover the costs of the care needed.

The goals of the CLASS Act are to provide American workers with an alternative financing source for non-medical long term care services and support that encourages at-home living for individuals with functional limitations, for as long as possible, and does not require them to exhaust their savings and family resources or turn to an already over-burdened Medicaid system for payment. For a modest monthly premium, participants in the CLASS Act program would be entitled to cash payments that would enable them to purchase services and supports such as housing modifications, assistive technologies, supplies and equipment, home care attendants and transportation. The CLASS Act cash benefits would supplement any other coverage or benefits to which a participant is entitled under private long-term care insurance policies, Medicare, Medicaid, Social Security or disability coverage.

To gain access to the benefits under the CLASS Act, working adults would have to pay premiums into the insurance program for a minimum of five years. The amount of the premiums would be determined by the Secretary of the U.S. Department of Health and Human Services (“HHS”), who has a mandate to maintain the solvency of the program for 75 years. All workers would be automatically enrolled into the program, but could elect to opt out of participation. After the five-year vesting period, the benefits of not less than an average of \$50 per day could be paid out of a trust fund consisting of the worker’s contributed premiums plus interest earned on the contributions. These cash benefits would be payable only to the worker who paid the premium and would not be available for family dependents. Excess benefits could be carried over from month to month, but would not accumulate from

year to year and would not be payable to survivors upon the worker’s death.

The Congressional Budget Office (“CBO”) has estimated that the CLASS Act program would remain fiscally solvent over the 75-year period, attract many millions of participants and be self-sustaining, financed by the premiums of workers and supported by the HHS Secretary’s annual adjustments of premiums and benefits to ensure the program’s solvency. The CBO also has predicted a substantial savings to Medicaid due to reduced demand for Medicaid benefits for long term services and support. The outlook from the Centers for Medicare and Medicaid Services (“CMS”), however, is not so optimistic. CMS predicts that the CLASS Act program could not sustain itself in the long run because participants who remain enrolled in the program would likely be high utilizers of the program’s cash benefits. This high utilization would force the HHS Secretary to raise premiums to a level where the program would become unattractive to healthy workers. CMS has further predicted that, beginning in the year 2025, expenses in the CLASS Act program would exceed the program’s revenue.

Critics of the CLASS Act argue that the program would be financially unsustainable without taxpayer subsidies and/or contributing to the federal deficit, as suggested by CMS. Private long term care insurance carriers also argue that the CLASS Act will simply create consumer confusion between the products that insurers offer and the government cash benefit. Due to confusion or complacency, the availability of this government program may lead consumers to forgo private long term care insurance which provides better protection against the risk of more expensive nursing home care needs. Still, others question the effectiveness of a voluntary government run insurance program and speculate whether workers will participate in the CLASS Act program in sufficient numbers when they are not now protecting their assets and their families by purchasing private long term care insurance.

It may be too early to tell whether the CLASS Act will survive to the final version of health reform legislation. Still, this is not the first time in the health reform debate that the CBO and CMS have reached inconsistent conclusions about the viability of a health reform measure.