

Forum Session

NATIONAL
HEALTH
POLICY
FORUM

ERISA Health Plan Liability: Examining Models for Reform

Friday, February 18, 2000

(Rescheduled from January 25 due to snow)

9:00 am - Continental Breakfast

9:30 to 11:30 am - Discussion

Hyatt Regency Capitol Hill

400 New Jersey Avenue, N.W.

Congressional A Room

A roundtable discussion featuring

J. Clark Kelso

*Professor of Law and Director
Institute for Legislative Practice
McGeorge School of Law
University of the Pacific
Sacramento, California*

Patricia A. Butler

*Independent Health Policy Analyst
Boulder, Colorado*

Randall R. Bovbjerg

*Principal Research Associate
Urban Institute
Washington, D.C.*

And a panel of other experts and stakeholders (listed inside)

Reregistration required: Please call Dagny Wolf at 202/872-1392 as soon as possible.

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ERISA Health Plan Liability

As the year begins, congressional conferees face the daunting task of resolving differences between “patient protection” bills passed by the House and the Senate in 1999. Among the key questions they must grapple with is how to reform the legal remedies available to individuals in employee health plans for resolving disputes over coverage. The Employee Retirement Income Security Act of 1974 (ERISA) currently requires private-sector employee health plans to establish internal claims appeal processes and allows plan participants disputing coverage denials to sue for equitable relief. Although the law permits participants to seek recovery of benefits in a federal court, it does not allow them to collect damages awards for personal injuries caused by plan denials of payment or medical services or to redress unreasonable delays, fraud, malice, emotional distress, or other harms.

Both the House and the Senate bills would further define the internal appeals processes required under ERISA and add new requirements for external review of benefit denials. While the Senate bill would not expand health plan liability, the House bill takes the added step of stripping back ERISA’s preemption of state law to allow plan participants, beneficiaries, or their estates to sue under state laws to recover damages resulting from personal injury or for wrongful death.

By now, the Forum audience should have received a background paper analyzing the complex forces driving the debate over how to refashion the administrative and legal remedies available to participants in ERISA health plans and outlining some of the policy issues raised by the approaches taken by the House and the Senate. Entitled “ERISA Health Plan Liability: Issues and Options for Reform,” the paper was published independently of this meeting but also is intended to provide background information for those planning to attend.

THE FORUM SESSION

The meeting will begin with three short presentations to be followed by a roundtable discussion involving a panel of experts and stakeholders yet to be announced.

Clark Kelso, of the University of the Pacific’s McGeorge School of Law, will lead off by outlining several models for employee health plan liability, ranging from the “contract-law” type to “tort-law” liability.

Randall Bovbjerg, of the Urban Institute, will discuss his research concerning medical malpractice liability and its implications for expanding the legal remedies available to ERISA health plan participants. Patricia Butler, an independent health policy analyst, then will address the question of whether adding external review requirements to ERISA (without also adding court remedies) would offer sufficient protection for plan participants, given the consumer concerns that have arisen. The discussion will then open up to include the expert panel as well as members of the audience.

Key Questions

The questions to be addressed include the following:

- What are the major options available for reforming ERISA’s legal remedies? Are there useful models for reforming health plan liability that policymakers have yet to consider?
- What might be the benefits and risks of giving employee health plan participants greater access to the courts to redress injuries caused by plan fiduciaries?
- Would adding a requirement for external review of coverage denials suffice to protect consumers without also expanding their access to the courts? If so, what type of external review process would best help consumers?

FORUM SESSION

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NHPF is a nonpartisan education and information exchange for federal health policymakers.

- How would the internal and external review requirements in the House and Senate bills interact with whatever legal remedies might be permitted?
- If Congress opts to expand court remedies available to ERISA health plan participants, what would be the advantages and disadvantages of creating a new federal cause of action as contrasted to pulling back ERISA preemption to allow people greater access to state law remedies?

Speakers

J. Clark Kelso, J.D., is a professor of law and director of the Institute for Legislative Practice at the University of the Pacific's McGeorge School of Law in Sacramento, California. A graduate of the Columbia University School of Law, Kelso clerked for the Honorable Anthony M. Kennedy on the United States Court of Appeal for the Ninth Circuit. At the Institute for Legislative Practice, he has worked closely with the leadership in the California Senate and Assembly and within the judicial and executive branches on constitutional amendments, legislation, and rules of court to improve and reform the California judiciary and the administration of justice. He is the author of "Alternative Approaches to Liability: Models for Health Plan Liability," published in 1999 by the Henry J. Kaiser Family Foundation, and has worked with the California legislature on legal issues involving health care reform and health care dispute resolution.

Randall R. Bovbjerg, J.D., is a policy analyst and lawyer with more than 20 years of research, practical, and teaching experience in health policy. At the Urban Institute, he recently has conducted numerous studies on medical malpractice. Two current projects are studying the influence of "defensive medicine" on obstetrical practice, especially within managed care organizations, and evaluating no-fault alternatives for liability based on the experience of Virginia and Florida compensation programs for severely injured newborns. Prior inquiries have addressed the industrial organization of liability insurance, the performance of juries, the nature and extent of existing tort reforms, the effects of past reforms of law and insurance, and the development of new reforms. Bovbjerg previously served as an insurance regulator and health analyst at the Massachusetts Insurance Department. He received a J.D. degree from Harvard Law School in 1971.

After moving to Colorado more than 20 years ago and working in state and local government there, **Patricia A. Butler, J.D., Dr.P.H.**, has worked as a

self-employed policy analyst on issues of health care financing, delivery, and regulation with state legislative and executive branch officials as well as with associations representing state governments. She has been a member of the National Academy for State Health Policy (NASHP) since its inception in 1987. Butler received her law degree from the University of California at Berkeley's Boalt Hall School of Law in 1969, and her doctorate in health policy from the University of Michigan's School of Public Health in 1996. Her recent work focuses on ERISA implications for state health policy and consumer rights. Among her publications are "ERISA Preemption Manual for State Health Policy Makers" (forthcoming), published by the Alpha Center and NASHP; "Managed Care Plan Liability: An Analysis of Texas and Missouri Legislation" (1997), published by the Henry J. Kaiser Family Foundation; and "Private-Sector Health Coverage: Variation in Consumer Protections under ERISA and State Law" (1996), co-authored with Karl Polzer and published by the National Health Policy Forum.

Panelists

G. Lawrence Atkins, has more than 25 years of experience in public policy development, policy analysis, and strategic planning at the local, state, and federal level and in the private sector. He is founder and president of Health Policy Analysts, Inc., where he advises a number of Fortune 100 companies; pharmaceutical, insurance, and other health industry companies; and trade associations. He coordinates the Corporate Health Care Coalition, a national coalition of 25 multi-state, self-insured companies that joined together in 1993 to represent the concerns of large corporate purchasers of health care benefits.

Phyllis C. Borzi is of counsel with O'Donoghue & O'Donoghue, a Washington, D.C., law firm, specializing in ERISA and other legal areas affecting employee benefit plans, including health plans, pensions and retirement savings, and discrimination based on age or disability. She is also a research professor at the Center for Health Services Research and Policy, School of Public Health and Health Services, George Washington University Medical Center. From 1979 to 1995, she served as pension and employee benefit counsel for the U.S. House of Representatives, Subcommittee on Labor-Management Relations of the Committee on Education and Labor (now called the Committee on Education and the Workforce).

Paul Dennett joined the Association of Private Pension and Welfare Plans (APPWP) in 1996 and

serves as the organization's vice president for health policy. APPWP is a trade association representing U.S. companies that sponsor or administer health and retirement benefits for more than 100 million Americans. He also currently co-chairs the policy and research committee of the Health Benefits Coalition, a group of large and small employers and trade associations committed to market-driven health care reform and the growth of the private, voluntary health benefits system.

Michael S. Gordon is a Washington, D.C., attorney specializing in the employee benefits field. From 1970 to 1975 he served as minority pension counsel to the U.S. Senate Labor and Public Welfare Committee under Sen. Jacob K. Javits (R-N.Y.) and participated in the drafting of ERISA.

Joanne L. Hustead is director of legal and public policy at the National Partnership for Women and Families, which chairs a diverse coalition of patient and provider groups working to enact comprehensive patient protections into federal law. She is responsible for program development and implementation, policy analysis, public education, and advocacy on a range of health-related topics of importance to women and their families.

Leslie B. Kramerich became acting assistant secretary of the U.S. Department of Labor's Pension and Welfare Benefits Administration (PWBA) on December 6, 1999. Previously, she was the PWBA's deputy assistant secretary for policy, a position she continues to hold. Kramerich now directs a staff of more than 700 people performing administrative, policy, and enforcement functions under ERISA.

Mark Mantooth is Washington counsel in the Division of Legislative Counsel for the American Medical Association (AMA). In this position, he analyzes and drafts federal legislation, briefs AMA board members, and staffs the AMA Council on Legislation. Recently, he has been working extensively on the various patients' rights bills before Congress, while addressing the subject of ERISA reform for the AMA.