



SENATOR REID’S HEALTH CARE BILL
Still Not Abortion Neutral

December 3, 2009

Prior to introducing his health care bill, Senate Majority Leader Harry Reid declared that he would “work with pro-choice folks, [and] pro-life folks in the Senate and come up with something that’s fair and reasonable.”¹ Unfortunately, the language in Senator Reid’s national health care bill does not reflect the language of the pro-life Stupak/Pitts Amendment that the House of Representative adopted; rather, it harkens back to the Capps Amendment, the so-called “compromise” amendment that the House Energy and Commerce Committee adopted. In fact, after Rep. Capps reviewed the language in Senator Reid’s bill, she stated that the Senate language appeared to “closely mirror[] my language which [sic] was originally included in the House bill.”² A look at the abortion provisions in the Reid bill confirms this statement.

Hyde Amendment—Much like previous versions of the national health care reform legislation that failed to adequately limit the Federal funding of elective abortion, the abortion provisions in this bill rely on Congress’s continued passage of the Hyde Amendment. Section 1303(a)(1)(B), starting on page 117, distinguishes between “Abortions for which public funding is prohibited” under the Hyde Amendment, often called elective abortions, and “Abortion for which public funding is allowed” under the Hyde Amendment, which, generally, are abortions in case of rape or incest or when the mother’s life is at risk. The remainder of the abortion section distinguishes between these two categories. Therefore, should Congress fail to add the Hyde Amendment to future Department of Health and Human Services appropriation bills, the so-called abortion restrictions in the health care bill would be largely meaningless, since the bill determines the public funding question by looking at the law in effect “as of the date that is 6 months before the beginning of the plan year involved.”

Public Option—The public health insurance option, dubbed the “community health insurance option” in the Reid bill, is permitted to cover elective abortions; however, under Section 1303(a)(1)(C), the Secretary of Health and Human Services must first take steps to ensure

¹ David M. Herszenhorn, *Reid Says Health Bill Will be Done by Christmas*, NEW YORK TIMES, Nov. 10, 2009, available at <http://www.nytimes.com/2009/11/11/health/policy/11health.html>.

² Terence P. Jeffrey, *Reid Introduces Senate Health Bill That Mandates Federally Subsidized Abortion*, CNSNEWS.COM, Nov. 19, 2009, available at <http://cnsnews.com/news/article/57392>.

Federal funds are not used for abortion. However, these restrictions largely amount to the accounting gimmicks that we saw in other versions of this legislation, as described below. The public health insurance option is required to cover abortions for which public funding is permitted to the same extent as Medicaid.

Federal Funding of Abortion Services—Section 1303(a)(2) sets out the rules for the Federal funding of abortion services. Under the Reid bill, “[n]o tax credit or cost-sharing credits may be used to pay for abortions beyond those permitted by the Hyde Amendment.”³ Plans that cover elective abortion services “must segregate from any premium and cost-sharing credits an amount of each enrollee’s private premium dollars that is determined by the Secretary to be sufficient to cover the provision of those services.”⁴ This amount cannot be less than \$1.⁵ Therefore, federal funds may flow to plans that cover abortion services; however, the bill sets out accounting mechanisms to make it appear that no federal funds are used for abortion services. On his program, *Hardball*, Chris Matthews noted that the Capps amendment looked like “an accounting trick.”⁶ He said,

It looks like you're saying, OK, some of the money that goes into an insurance plan will go to abortion, some won't. Everybody knows that money's fungible and that this is basically an accounting trick. And I don't think it'll work with people who have a moral problem with abortion funding by the federal government.⁷

At Least One Abortion Plan in Each Exchange—Section 1303(a)(1)(D), starting on page 120, instructs the Secretary to “assure that with respect to qualified health plans offered in any Exchange established” by the bill, there is at least one plan that provides coverage of elective abortions and one plan that does not provide coverage of elective abortion.

Conscience Laws & Preemption—Section 1303(b)(1) states that nothing in the act “shall be construed to preempt or otherwise have any effect” on State abortion laws; however, it is unclear if this clause will work in practice, since the bill also “requires each exchange to offer at least one plan covering abortion (several states currently prohibit or restrict the coverage of abortion in their state regulated insurance markets).”⁸ Section 1303(b)(2) states that nothing in the act “shall be construed to have any effect of Federal laws regarding . . . conscience protection; . . . willingness or refusal to provide abortion; and . . . discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.” This language represents a significant change in conscience clause protections, since they are currently designed,

³ Democrat Senate Caucus, *The Patient Protection and Affordable Care Act, Section-by-Section Analysis*, at 5, available at http://www.politico.com/static/PPM143_091119_section_by_section.html

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Hardball with Chris Matthews*, MSNBC, Nov. 9, 2009, available at http://today.msnbc.msn.com/id/33828501/ns/msnbc_tv-hardball_with_chris_matthews/.

⁷ *Id.*

⁸ Ranking Member Staffs of the Senate Committee on Finance and the Senate Committee on Health, Education, Labor, and Pensions, *The Patient Protection and Affordable Care Act; Executive Summary*, at 4, available at http://www.politico.com/static/PPM110_091119_gop_summary.html.

to protect doctors who refuse to perform abortions from discrimination based on their unwillingness to provide abortions. The Reid bill radically changes these laws, applying the protections for the first time to *both* willingness or unwillingness to perform abortions. This change falsely equates a doctor's moral objections to abortion with the ability of groups like Planned Parenthood to force insurers who object to abortion to contract with and pay them. This change will mandate that abortion providers now must be included in the provider networks of insurers and hospitals.⁹

Abortion as a Mandated Benefit—Section 1303(a)(1)(A) (pages 116-117), states that nothing in the bill “shall be construed to require a qualified health plan” to cover abortion services “as part of its essential health benefits for any plan year,” and it will be up to “the issuer of a qualified health plan” to determine whether or not abortion services will be covered. However, since the public option may include abortion services, and federal subsidies may be used to purchase plans that include abortion coverage, a specific mandate is not needed to ensure that plans cover abortion.

School Based Health Centers—Section 4101 sets up a grant program for school-based health centers, but, defines such centers as those that do “not perform abortion services.” However, this does not restrict centers from referring students for abortions.

⁹ *Id.*