



FEDERAL HEALTHCARE FUNDING AND ABORTION

I. INTRODUCTION

Nineteen Democratic Representatives recently wrote to Speaker Nancy Pelosi to inform her that they would not support health care reform which includes public funding for abortions. They stated that they would not support a bill unless it included language specifically stating that federal funds would not be used to pay for abortions. They worried that any legislation lacking a specific exclusion would result in government funding for abortions. History supports their conclusion.

II. ANY NEW NATIONAL HEALTHCARE LEGISLATION NEEDS AN ABORTION EXCLUSION

When Medicaid legislation was initially adopted, its terms did not include language which prohibited Medicaid payment for abortions. Thus, until the Hyde Amendment was enacted, the federal government paid for roughly 300,000 abortions per year.¹ By 1976, however, the Hyde Amendment was passed to limit federally-funded abortions.² From 1981 to 1993, this legislation banned the federal government from funding any abortions except those needed to save the mother's life.³ In 1993, however, then-President Bill Clinton broadened the exceptions to include cases of rape and incest.⁴ Because many states opposed funding these abortions, litigation arose.⁵ Not one of those states succeeded in restricting Medicaid-eligible patients from receiving the controversial funds.⁶

State and local laws are preempted insofar as they conflict with the federal law.⁷ Thus, state objections to providing abortions will be overruled by federal statutes which do not specifically exclude abortions from public funding.⁸

¹ NATIONAL COMMITTEE FOR HUMAN LIFE AMENDMENT, THE HYDE AMENDMENT 3 (April 2008), available at <http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf>.

² *Hern v. Beye*, 57 F.3d 906, 908 (10th Cir. 1995).

³ *Id.*

⁴ *Id.* (citing The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 107 Stat. 1082 (1993)).

⁵ See, e.g., *Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 178 (3d Cir. 1995); *Hern*, 57 F.3d at 908.

⁶ *Id.*

⁷ *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996).

⁸ See *infra* notes 11-12 and accompanying text.

Courts have interpreted Medicaid provisions to require participating states to cover all categorically eligible recipients whose medical problems fall within one or more of seven medical categories.⁹ At least one court has held that abortion falls within several of these categories.¹⁰ Further, a district court has “speculated that if Congress had intended the scope of the 1993 Hyde Amendment to be discretionary for the states, it would have explicitly crafted the amendment to have said so.”¹¹ Similarly, multiple appeals courts have held that if Medicaid funds are available for a particular procedure, no state can deny those funds to a qualifying individual.¹²

It is even more alarming, however, that governmentally subsidized abortions are not the only threat. There is a chance that the current legislation, if passed in its present form, would be so broad that it could require all forms of health insurance—public or private—to provide for abortions.¹³ Thus, if national health care is passed without an abortion exclusion, the consequences will be catastrophic. All forms of insurance, public and private, could be required to pay for abortions if the bill does not specifically state that any essential care does not include abortions.

In light of these cases, and the potential for the government to attempt to force private individuals to carry abortion coverage, a specific abortion exclusion is needed to keep the government from directly funding abortions and from mandating private abortion coverage. The prevailing case law is too broad to risk not including such an exclusion. Moreover, exclusions are easy to draft.

III. DRAFTING EXCLUSIONS TO PROTECT PUBLIC POLICIES FROM FUNDING ABORTIONS AND PRIVATE POLICIES FROM BEING FORCED TO COVER ABORTIONS

An exclusion should be similar to the Hyde Amendment. Moreover, the exclusion should be incorporated into the Bill itself, enumerating limitations consistent with the Hyde Amendment

⁹ *Hern*, 57 F.3d at 909-10.

¹⁰ *See id.* at 910 (“Abortion falls under several of these ‘mandatory coverage’ categories, including ‘inpatient hospital services,’ . . . ‘outpatient hospital services,’ . . . ‘family planning services,’ . . . , and ‘physicians’ services furnished by a physician.”) (citing 42 U.S.C. 1396(a)(1), (a)(2)(A), (a)(4)(C), (a)(5)(A)).

¹¹ Note, *Rape and Incest Abortion Funding Under Medicaid—Can the Federal Government Force Unwilling States to Pick up the Tab?*, 35 U. LOUISVILLE J. FAM. L. 121, 132 (1997) (citing *Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 619-20 (E.D. Ark. 1994), *aff’d*, 60 F.3d 497 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 777, *and rev’d, in part, remanded*, 116 S. Ct. 1063 (1996)).

¹² *Elizabeth Blackwell Health Ctr. for Women*, 61 F.3d at 174 (citing *Roe v. Casey*, 623 F.2d 829, 836-37 (3d Cir. 1980)); *Hodgson v. Board of County Comm’rs*, 614 F.2d 601, 610 (8th Cir. 1980); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 134 (1st Cir. 1979).

¹³ It is likely that abortions would not be the specific issue, but that some vaguely written term would be interpreted to cover abortions, just as Medicaid covers procedures not explicitly excluded by the Hyde Amendment. *See, e.g., Hern*, 57 F.3d at 910 (holding that abortion falls under several mandatory care categories for the categorically needy, “including inpatient hospital services, . . . outpatient hospital services, . . . family planning services, . . . and physicians’ services furnished by a physician” (quotations omitted)).

(exclusions added in amendment form could expose them to annual renegotiation). In the past, the Hyde Amendment has been worded a number of different ways:

[1981 Amendment:] “None of the funds appropriated under this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”

....

[1993 Amendment:] “None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.”

....

[2008 Amendment:] “SEC. 507.

(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.

(b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term “health benefits coverage” means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

SEC. 508. (a) The limitations established in the preceding section shall not apply to an abortion—

(1) if the pregnancy is the result of an act of rape or incest; or

(2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.

(b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State’s or locality’s contribution of Medicaid matching funds).

(d) (1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local

government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”¹⁴

Thus, an exclusion should specify that none of the funds appropriated in the Health Reform bill, and no resources in any trust fund to which funds are appropriated in the bill, shall be expended for any abortion. The exclusion should also enumerate that *no health insurance plan that is either fully or partially paid for or subsidized by this bill shall cover abortions.*¹⁵ *Nor shall this legislation require any private plan to cover abortions either directly or by construing any federally mandated minimal level of care to include abortion coverage.* Finally, there must also be language prohibiting the funds from going to any governmental agency or program which discriminates against health care providers for not providing, or referring patients to, abortion services.

¹⁴ NATIONAL COMMITTEE FOR HUMAN LIFE AMENDMENT, THE HYDE AMENDMENT, *supra* note 1, at 1-2 (quoting Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, §§ 507-508, 121 Stat. 1844, 2208-09 (2008) (current version at Pub. L. No. 111-8, §§ 507-508, 123 Stat. 524, 802-03 (2009); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1994) (current version at Pub. L. No. 111-8, §§ 507-508, 123 Stat. 524, 802-03 (2009)); Supplemental Appropriations and Rescission Act of 1981, Pub. L. No. 97-12, § 402, 95 Stat. 95, 95-96 (1981) (current version at Pub. L. No. 111-8, §§ 507-508, 123 Stat. 524, 802-03 (2009))).

¹⁵ However, abortion advocates will likely force measures allowing certain exceptions, such as when the life of the mother is in danger, rape, and incest.