

Limits on Abortion Coverage Under H.R. 3962

On November 7, 2009, during floor debate on the Affordable Health Care for America Act (H.R. 3962), the House adopted an amendment to broaden the bill's prohibition on federal funding for abortion. The amendment was offered by Representative Stupak and six other Members and was adopted by a vote of 240 to 194 (with one Member voting "present").¹

Current law

Federal funding of abortion services has been prohibited through the annual legislative appropriation for Medicaid and other federal programs since 1976.² These restrictions, named after Representative Henry Hyde, their original author, today prohibit federal funding for abortion services except in the case of rape or incest, or in cases in which a physical condition places a woman's life in danger if a pregnancy is continued.³ The annual legislative language specifically reserves the power of state and local governments and other entities to spend their own funds for abortions (as 17 states currently do for their Medicaid beneficiaries, using state funds kept completely separate from Medicaid funds).⁴ The legislation also reserves the right of Medicaid managed care providers to offer abortion coverage using state funds.⁵

In addition, federal law prohibits coverage of abortion through the Federal Employee Health Benefit Program, the Indian Health Service, the Peace Corps, federal prisons health services, Medicaid in the District of Columbia, and the military.⁶ For women in the military who are serving overseas and women in the Peace Corps, this ban effectively denies them access to an abortion if they are stationed in countries where abortion is

¹ 155 Cong. Rec. H12962 (Nov. 7, 2009).

² See, e.g., Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524, 802-803 (Mar. 11, 2009).

³ "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 benefits are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion. . . . 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." 123 Stat. at 802-803.

⁴ "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)." Sec. 508(b), 123 Stat. at 803.

⁵ "Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from [sic] 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)." Sec. 508(c), 123 Stat. at 803.

⁶ Heather Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, Guttmacher Policy Review, Vol. 10, No. 1. Winter 2007, at 14-15.

illegal or unsafe. Specifically, the law prohibits the use of funds appropriated for these various programs in the annual budget bill from being used to cover abortion. The language used varies by program, but for the Federal Employee Health Benefits Program (FEHBP), for example, the ban is phrased as a prohibition on payment for abortion and for any administrative expenses in connection with an FEHBP plan that offers such coverage.⁷ Effectively, this means that no plan can be offered to federal employees through the FEHBP that includes abortion coverage, since some minimum level of administrative expense would be necessary to offer the plan, even if only private funds were used to pay for any abortion coverage.

Federal law also prohibits recipients of federal funds from discriminating against individuals or entities based on their refusal to provide or cover abortions.⁸ It does not prohibit discrimination against individuals or entities based on their willingness to provide or cover abortions.

House legislation as introduced

The health reform bill⁹ introduced by Representative Dingell on October 29, 2009, contained language similar to the Hyde Amendment prohibiting federal funding for abortions and stated that it would not preempt state laws regarding abortion or affect federal laws regarding abortion. However, in constructing the new marketplace for health insurance, the measure also permitted the sale of products covering abortions, so long as subsidy funding was not used to pay that portion of the premium allocable to abortions. While abortion services for which federal funding was prohibited (i.e., abortions other than those related to rape, incest, or the life of the mother) could not be covered as part of the essential benefits package for plans participating in the Health Insurance Exchange,¹⁰ the bill required the Health Choices Commissioner to ensure that the Health Insurance Exchange for each premium rating area included at least one plan with coverage of abortion services (without using federal funding) and at least one plan without abortion coverage, in order to ensure that women purchasing coverage through the Exchange would have a choice of purchasing coverage using their own funds.¹¹ (It is unclear how the Commissioner would have ensured a choice of plans, since plans could

⁷ “Sec. 613. No funds appropriated by this Act shall be available to pay for an abortion, or the administrative expenses in connection with any health plan under the Federal employees health benefits program which provides any benefits or coverage for abortions. Sec. 614. The provision of section 613 shall not apply where the life of the mother would be endangered if the fetus were carried to term, or the pregnancy is the result of an act of rape or incest.” 123 Stat. at 676.

⁸ “None of the funds available in this Act may be made available to a Federal agency 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.” “Health care entity” includes individual providers, organizations, facilities, and plans. Sec. 508(d), 123 Stat. at 803.

⁹ H.R. 3962, 111th Cong. (1st Sess. 2009), status available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03962>.

¹⁰ H.R. 3962, Sec. 222(e)(1).

¹¹ H.R. 3962, Sec. 303 (e).

not be required to cover (or prohibited from covering) abortion¹² and the public health insurance option was only permitted, but not required, to cover abortion services).¹³ Plans covering additional abortions would have had to assure that no affordability credits (subsidies) would be used for abortion.¹⁴

Finally, the legislation as introduced prohibited health plans participating in the Health Insurance Exchange from discriminating against providers or facilities on the basis of either their willingness or unwillingness to provide or cover abortions,¹⁵ a requirement that might have affected network adequacy.

Changes made by the Stupak Amendment

The amendment offered by Representative Stupak and others¹⁶ would codify the language of the Hyde Amendment in federal authorizing legislation (the Hyde Amendment applies to annual appropriations laws). The Amendment goes beyond Hyde, adding a prohibition against the receipt of subsidies by any plan that covers abortions beyond those permitted under the Amendment (i.e., rape, incest, or to save the life of the mother as a result of a physical condition). The Amendment reserves the right of nonfederal entities (including individuals and state or local governments) to pay for or purchase separate supplemental coverage for abortions if that separate coverage is not paid for with: 1) any funds authorized or appropriated by the Act, 2) individual premium payments for which an affordability credit (subsidy) has been applied, or 3) other nonfederal funds required to receive a federal payment, such as a state's required Medicaid expenditures.

The Amendment also reserves the right of an entity offering a nonfederal qualified health benefit plan to offer separate supplemental coverage for abortions if: 1) premiums for that supplemental coverage are paid entirely with funds not authorized or appropriated by the Act, 2) administrative costs and all covered abortion services offered through the supplemental plan are paid for using only premiums collected by the plan, and 3) if abortion coverage is offered as part of a broader insurance plan (for non-subsidized beneficiaries), the entity must offer an otherwise-identical plan that does not cover abortions (other than those that can receive federal subsidies).

The Amendment also deletes the original bill's requirement that the Exchange include at least one plan that offers broader abortion coverage and at least one plan that limits coverage to federally permissible levels. This change eliminates the requirement of a choice of plans in relation to abortion coverage. Finally, the Amendment removes the prohibition on discrimination against a provider or entity based on willingness to provide

¹² H.R. 3962, Sec. 222(e)(2).

¹³ H.R. 3962, Sec. 222(e)(3).

¹⁴ H.R. 3962, Sec. 303(e)(2).

¹⁵ H.R. 3962, Sec. 304(d).

¹⁶ Text of the amendment available at http://docs.house.gov/rules/3962/Stupak3962_108.pdf.

or cover abortion services, so that only providers or entities that are unwilling to provide or cover abortion are protected.

In effect, entities that wish to cover a broader range of medically indicated abortions than those permitted under federal law also will have to offer a plan without abortion coverage (to which subsidies could be applied). Entities also may market a separate rider for abortion coverage solely for private purchase. Health plans that wish to accept subsidies will have to limit coverage only to federally permissible abortions.

Implications

By limiting both the use of federal funds and the offering of plans to subsidized beneficiaries, the Stupak Amendment reaches farther than the Hyde Amendment, barring participation in the subsidized insurance market by plans that offer a broader range of abortion services. Entities can market entirely separate plans not open to subsidized enrollees and may sell riders for purchase with private financing. In effect, the amendment significantly broadens the national market for health insurance that is subject to a ban on the marketing of plans that offer abortion coverage. While unsubsidized women and employers participating in the exchange would be able to purchase such coverage, the challenges associated with administering plans that vary in their coverage from those that are mass-marketed limit the viability of this supplemental market.

By definition, an unintended pregnancy is not something a woman expects and therefore, women are unlikely to purchase supplemental insurance to cover the health care costs associated with terminating a potential unintended pregnancy. With a weak market for the limited supplemental or alternative plans, additional administrative burdens associated with offering such plans, and no requirement to offer these plans in the Exchange, there may in fact be no plan that covers abortion in any given Exchange. Under the Amendment, women who may have had abortion coverage as part of a benefit package purchased on the individual market or through an employer-sponsored plan are likely to lose that coverage when they switch to a plan purchased through the Exchange.

A longer analysis of this issue focusing on coverage for medically indicated abortions and implications for the broader insurance market can be found at:
http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_FED314C4-5056-9D20-3DBE77EF6ABF0FED.pdf.