

Health Matters By Wendy K. Mariner

Patients must have rights

The first unifying policy initiative that the new administration should undertake is a national bill of patient rights. President Clinton, a strong advocate for patients' rights, expanded health benefits for children and streamlined Medicare and Medicaid but failed to gain universal health coverage. Reliance on managed care and the market has left Americans with unprecedented numbers of uninsured citizens, rising premiums and a bewildering corporate bureaucracy.

The Bush administration probably will not press for universal health care. An increasingly competitive health insurance market is likely to treat people less as patients and more as consumers who must protect themselves from error and exploitation.

In these circumstances, what Americans need and want most is the ability to deal with their health care providers and insurers as equals and to be treated fairly. This requires legal protection of their rights as consumers and as patients.

States cannot provide this protection. The federal Employee Retirement Income Security Act (ERISA) deprives many patients in private employer-provided health plans of the rights afforded to all others by preempting state laws. This distorts the market and has fueled a backlash against managed care. Federal legislation is required.

A federal bill of patient rights would be easier to enact than other major policy initiatives: Patient protection does not require new bureaucracy and has popular, bipartisan support. House and Senate bills passed in 2000 laid the groundwork, and Senators John McCain and Edward Kennedy are introducing a bill like the House

version.

Senate republicans objected to the House version because it amended ERISA to permit patients to sue their HMOs for negligent wrongdoing. But HMO liability is a more market-friendly option than detailed regulation.

President George W. Bush may support some patient protections. Although he favors limiting liability for most consumer claims, he said in the presidential election debates that if he were elected, "people will be able to take their HMO insurance company to court."

A history lesson

Past history qualifies the probabilities. In 1995, Bush vetoed a Texas patient-protection bill and only allowed a 1997 version to become law, without his signature, after an intense battle, and after the bill was changed to require that most patients exhaust HMO internal appeals and submit to independent review before suing.

The Texas law appears to work well, but has a limited scope. It does not apply to self-insured ERISA plans, which remain protected from suit. Also, as the U.S. Court of Appeals for the 5th Circuit found in Aetna's challenge to the law, the law makes HMOs vicariously liable only for their own physicians' medical malpractice; HMOs are not liable for coverage decisions such as the denial of benefits. *Corporate Health Insurance Inc. v. Texas Department of Insurance*, 214 F.3d 526 (5th Cir. June 20, 2000), pet. cert. filed on Oct 24, 2000.

The 5th Circuit held that ERISA pre-empted the Texas law's imposition of independent

review of HMO administrative and benefit decisions. Thus, the law changed little in Texas and nothing in ERISA and shows the need for federal restructuring of ERISA.

ERISA pre-emption of state law results in arbitrary variations in patient rights, which is inefficient and counterproductive. Surveys show that Americans want their health plans to act responsibly and be directly accountable to patients. This is a national problem that Congress can and must solve.

A federal bill of patient rights should provide for fair, independent review of all decisions about patient care in all health plans, whether on treatment or benefit coverage. It should also require transparency and maximal simplicity in plan operations, protection of patient privacy and protection against discrimination. This should help ensure appropriate care without straitjacketing health plans. They also should help prevent errors that can endanger patients. When prevention fails, a federal bill of patient rights must hold health plans legally accountable, giving all patients the right to sue health plans for deliberate or negligent wrongdoing.

A federal bill of patient rights will not solve all the nation's health problems because it is limited to consumer protection and insurance reform. But it is the least – and perhaps the most – Americans can expect in the near future.