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FUNDING NATIONAL HEALTH INSURANCE WITH 24-HOUR WORKERS' COMPENSATION

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It has recently been reported that the Clinton administration's national health care plan includes important elements of both workers' compensation and automobile insurance.[1] These two systems pay more than $42 billion a year for injuries and illnesses resulting from workplace and traffic accidents.[2] With the enormous political pressure to reduce the federal deficit coupled with the continuing national interest in a basic system of health care for all Americans, it should come as no surprise that national leaders are intrigued with the prospect of integrating workers' compensation insurance into a national health insurance system.

Virtually all working Americans are now covered by health insurance part of the time. If you are injured at work or become sick because of your job, the workers' compensation system pays your medical bills. And pay it does. The current workers' compensation system pays on a cost plus basis. The worker is usually allowed to go to any medical provider he or she wants. The providers know their bills will get paid by an insurance company as long as the worker is ill. The insurance company tacks on its own administrative costs, sometimes takes a little profit and sends the bill to the employer. An enormous amount of money is paid by employers to insurance companies and self-funded plans for part-time health coverage.

The current cost-plus system of workers' compensation could not be more inefficient and is riddled with fraud. There are no incentives to contain costs. The worker often elects to go to a provider who will encourage over-utilization. Disputes concerning whether the sickness or injury was job related fill untold numbers of hearing and court rooms and keep countless numbers of lawyers busy.

Funding Health Insurance... Continued on Page 3

THE FABE CASE: A NEW DIRECTION?

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The case of *United States Dept. of the Treasury, et al. v. Fabe*, ____ U.S. ____ 113 S.Ct. 2202, 61 U.S.L.W. 4579 (1993), is one we feel is timely and important not only to those of us involved in the area of insurance company insolvency, but to others as well as a window into the latest view of the Supreme Court concerning what protection from the federal government may still exist under the McCarran-Ferguson Act.

The *Fabe* case arose out of the insolvency of American Druggists Insurance Company which was ordered liquidated by the Ohio courts in 1986. The United States government was the holder of $10.7 million worth of surety bonds issued by the company. The government asserted a priority in the insolvency proceedings under the Federal Priority Act.[1] The Ohio insurer liquidation priority statute[2] set claims by the federal government at a level beneath those for administrative expenses, policyholders, employees seeking compensation and general creditors. The American Druggists' receiver brought a declaratory action in federal court arguing that Section 2(b) of the McCarran-Ferguson Act[3] (15 U.S.C. Section 1012) made the Ohio priority statute immune from federal preemption by the federal act.

Fabe - A New Direction... Continued on Page 6

CONTENTS OF THIS ISSUE

Funding National Health Insurance . 1
Fabe - A New Direction? 1
President's Message 2
Implications of Fabe 8
Supreme Court Antitrust Exemption 14
California Insurance Code 15
The Catch-22 Factor 17
Wisconsin Restricts Rights 19

The Numbers Keep Getting Bigger

The employers' costs of workers' compensation in 1984 was about $25 billion.[3] Thereafter, costs began to grow very rapidly. For 1991, the cost was up to $62 billion.[4] Comparing this to overall payroll costs demonstrates the significant impact workers' compensation insurance premium has on the cost of doing business. In 1984, workers' compensation insurance accounted for about 1.7% of the national payroll. The 1991 ratio was 2.7%.[5]

These premium figures don't include significant dollars being spent by employers to self-insure their workers' compensation benefits. From 1980 to 1991, self-insurance has grown from 10.9% of total property/casualty premiums to 22.2%. Between 1980 and 1991, self-insurance grew from $7.1 billion to $40.2 billion for an average yearly increase of 17.1%.[6] The largest portion of self-insurance dollars goes to fund workers' compensation benefits. It has been reported that 40% of all self-insurance volume in 1990 went for workers' compensation benefits.[7]

The rapid increase in the cost of workers' compensation insurance is primarily attributable to the escalating cost of medical care. In 1980, 33% of all benefit payments for workers' compensation fell into the area of medical care.[8] In 1992, it is estimated that approximately 44% of the total workers' compensation dollar went to pay medical costs.[9]

Comparing this to what is happening to health care expenditures nationally completes the picture. National health care expenditures between 1980 and 1989 were up 142%. Health care expenditures within the workers' compensation system during that same period were up 239%.[10]

A Key For Success

Much effort has been directed toward figuring out why health care costs have increased so rapidly in recent years. If the reasons for the continued rise in workers' compensation health care costs can be determined, perhaps some remedies can be found.

One of the obvious candidates for the disparity is that the health care system for work-related injuries and diseases through the workers' compensation system is substantially different from the health care systems we use for persons who have injuries or diseases that are not work-related. We are much more likely, for example, to have managed health care in place for the non-work-related benefits than are provided through an employee benefit plan. Another important distinction is that workers' compensation benefits traditionally pay beginning with the first dollar of care. There is no use of deductibles or co-insurance to discourage over-utilization. It has also been suggested that there is substantial "cost shifting," minimal control over choice of physicians and inefficiency because much of the workers' compensation benefits are paid in an adversarial arena where causation is often hotly disputed.[11]

Fraud Prevention

Some experts believe that more than $17 billion or 10% of all claim dollars are lost each year to all types of insurance claim fraud.[12] This includes claimant fraud, provider fraud, premium fraud, understatement of payroll, bogus employee information and experience modification avoidance. It is suggested that by introducing even the simplest cost containment measures and curtailing a workers's free choice of medical provider, much of this fraud will be eliminated. An often quoted "Minnesota study" found that the same claim file that was marked "workers' compensation" cost exactly twice as much as the same claim file that was going to be handled through Blue Cross and Blue Shield.[13]

Workers' Compensation Has Stood Still

Although there have been a lot of changes in American society over the past 80 years, the workers' compensation system has changed very little. When workers' compensation started, our society did not have the governmental and social services that exist today. There was no Medicaid and there was no Medicare. There were no group type medical and hospitalization policies. Workers' compensation now fragments delivery, provides overlapping coverage and injects confusion about responsibility for treatment and causation. Workers' compensation is far from being integrated with other social and economic aspects of our society.

Back in 1910, the typical injury occurred to a worker at a workplace because of a single traumatic event. For example, there may have been a train wreck or mine explosion which would have been fairly easy to determine was work-related. Over time, the workers' compensation system has increasingly had to deal with a work force that is more likely to have diseases or injuries that have cumulative causes over an extended period of time. Carpal tunnel syndrome is an example where substantial resources have been directed to sorting out whether the condition has its origin in the workplace. Several decades ago no one ever imagined that asbestos related illnesses and injuries would emerge with significant impact on the cost of workers' compensation insurance.

Funding Health Insurance. . . Continued on Page 4

Funding Health Insurance. . . Continued

The Winners And The Losers

Adopting a national health insurance plan requiring employers to pick up all or a major portion of the cost of coverage would undoubtedly increase overall labor costs. However, it is projected that a net savings would be achieved by merging the two health care systems for employers who now provide both workers' compensation insurance benefits as well as major medical type benefits. For example, the introduction of better cost containment devices, managed health care, lower administrative costs and the ability to minimize duplicate payments for non work-related and work-related injuries and diseases would produce a net cost savings. On the other hand, small employers who do not provide major medical type benefits would be saddled with additional costs of providing 24-hour coverage.

Insurance industry analysts suggest that monoline workers' compensation companies or automobile insurance companies that do not sell health insurance or operate health maintenance organizations will lose significant market share under such a plan.[14] Integrated companies, particularly those who have penetrated the HMO market, would probably find themselves with enormous growth potential.

A Proposed Plan

Turning workers' compensation insurance into 24-hour coverage would go a long way towards funding a national system of health insurance. Employers who are already providing health coverage would pay less overall. The savings earned in abandoning the inefficient workers' compensation system would be passed along to the other employers who now only provide on the job coverage.

A comprehensive plan would require employers to provide 24-hour health coverage for all workers. The cost of dependent coverage could be the subject of a collective bargaining agreement, but the system should require that all dependents who do not already participate in the system be covered. It is submitted that the employer be required to pay part of the cost of dependent coverage.

To work best, the system would require workers to pay deductibles and co-insurance. This requirement should be mandatory and not be allowed to be bargained away.

Although employers would have free choice to buy health insurance from any insurance company, the system would encourage employers to enroll in managed health care providers like a Health Maintenance Organization or Preferred Provider Organization.

Even though it would be ideal to include income disability protection in a system of national health insurance, it would add a great deal of cost and may be too much for the economy to absorb. The existing method of replacing lost income would remain. Currently workers' compensation provides a certain level of benefits for job related sickness, injury or death. Social Security provides a very modest income disability benefit. Insurance companies would have to provide basic coverage and not be allowed to discontinue benefits if an insured makes a claim. There should be extension of benefits until the insured enters the Medicare system. Insurers should be allowed to underwrite the risk and charge an actuarially sound premium. Once on the risk, however, the coverage would be portable and insurers could not cancel. There would have to be an assigned risk pool for employers who could not get standard coverage for their workers.

Much of the existing system of state regulation of insurance would stay in place. Right now, there is very little regulation of health insurance rates. Insurers are generally allowed to charge anything they want restrained only by the marketplace. Some insurers have used this freedom to price themselves out of the market when they wouldn't otherwise be able to cancel coverage. There would either have to be federal standards for the regulation of the rate charged for basic coverage prescribed by law or the establishment of regional boards or commissions to perform this function so that a uniform national policy could be maintained. Efficient provider groups would be rewarded by being allowed to charge lower premiums to gain a greater market share. Care should be taken by the rate regulators, however, so that zealous insurers do not price themselves into insolvency.

To make sure that promised benefits will be available, employers should not be allowed to self-insure their catastrophic exposure unless they are financially responsible. Most states presently have systems in place where the state industrial commission issues a "certificate of self insurance" to a financially sound employer. Although Congressman Dingle has studied federal solvency regulations of insurers, state guaranty funds have done a good job so far and there is no need to "fix" what is not broken.

The Employee Retirement Income Security Act of 1974 (ERISA) provides an existing method of distributing employee welfare benefits. All state law is preempted and employee remedies are prescribed and limited. Insurers have no bad faith or punitive damage exposure - an additional cost savings to the system.

Those who are unemployed and do not have dependent coverage through their spouse would be able to go out and buy their own coverage. Since premiums spent by

Funding Health Insurance . . . Continued on Page 5

Funding Health Insurance. . . Continued

employers are fully deductible as an ordinary and necessary business expense, individuals should also enjoy full deductibility of money spent for insurance premium. Some additional assistance from the government in the form of tax credits would be available for those who have low incomes. Indigents who do not enroll in any plan would, nevertheless, be covered upon presenting themselves to a medical provider. The initial medical provider would enroll the indigent and premiums would have to be paid during the period of enrollment by a pool of money created by numerous sources including local, state and federal government, employers and workers.

Activity Of The National Association of Insurance Commissioners

The Workers' Compensation (D) Task Force has formed a working group on 24-hour coverage. A public hearing on an exposure draft of 24-hour coverage and pilot project model act was held at the 1993 summer national meeting of the NAIC in Chicago, Illinois. A survey of activities in various states having adopted or considering adopting enabling legislation for 24-hour workers' compensation insurance were presented.

Resistance To Change

Resistance to the plan would most likely come from various interest groups. The inefficient health provider would probably be the most vocal and powerful. Independent physicians and health care providers would fear that much of their business would go to health maintenance organizations that stress cost containment. Their concerns would be well founded. Nevertheless, there should be enough employers and individuals who will buy traditional indemnity type insurance coverage to provide most of the inefficient doctors and medical providers with big incomes and profits.

Within the insurance industry, the property and casualty carriers may fear that their workers' compensation market share will shift to health insurers. For the same reason, health insurers may welcome this change. It is believed, however, that both sides of the industry would benefit from an increased market share. Insurance agents who are also politically powerful will probably be concerned about efficiencies that will be encouraged in the "distribution system." They would probably view this change as reducing their commissions. Since there is so little commission already in health insurance, it is not believed that many insurance agents would be affected.

Some lawyers may object, particularly if they are involved in the inefficient system that now exists in workers' comp to determine if an injury or sickness was caused on the job. Twenty-four hour workers' comp coverage would render this decision making process unnecessary. It is not believed that many lawyers practice in this area and those that do would still be left with clients who have income disability claims that would remain subject to the existing system of determining causation.

People involved in existing state regulation of workers' compensation benefits and insurance may also resist change. Although state insurance regulators would probably be given an enhanced role in the national system, they typically are concerned about federal intrusion in their area of regulation which remains the largest interstate industry that is presently regulated exclusively by the states. A lot of resistance would come from state industrial commissions that are heavily involved in resolving causation disputes. These industrial commissions, however, would still be left with the job of making those determinations.

Small employers who currently don't provide health insurance coverage would be concerned about the cost of this additional employee benefit. Applied across the board and, perhaps, with some governmental assistance beyond deductibility of premiums, these small employers may accept national health coverage as fulfilling the desire of the vast majority of the American people.

ENDNOTES

1. Kerr, Peter, "Health Insurance Merger: A Risky Mix?" *New York Times National*, May 9, 1993 at 12; *The Arizona Republic*, "Health-Care Plan Would Merge Coverage," May 8, 1993 at A12.
2. Kerr, *supra*.
3. Burton, John F., Jr., Ph.D., "24-Hour Health Coverage: Clockwork or Time Bomb?," remarks made at the annual meeting and seminars of the Society of Chartered Property and Casualty Underwriters, October 11-12, 1992, San Francisco, California.
4. Burton, *supra*.
5. Burton, *supra*.
6. *Insurance Advocate*, "Johnson & Higgins Self-Insurance Study," December 23, 1991 at 37.
7. *Insurance Advocate*, *supra*.
8. Burton, *supra*.
9. *National Council on Compensation Insurance*, "Issues Report," 1992 at 7.
10. Burton, *supra*.
11. *National Council On Compensation Insurance*, *supra*. at 7.

Funding Health Insurance. . . Continued on Page 20

Wisconsin Restricts Rights. . . Continued

ing any subrogation interests. Reasoning that the parties are competent to enter into contracts, and that "the injured party should have the right to settle on its own terms," the Court held that such agreements are enforceable.

The *Schulte* ruling provides strong incentive for injured parties and liability insurers to settle their disputes. Insurers can now settle with injured parties, include an indemnification clause, and be forever free of recovery efforts by subrogated insurers. Injured parties can likewise be free of such recovery efforts, provided they seek a *Rimes* "made whole" hearing.

ENDNOTES

1. Refers to *Rimes v. State Farm Mut. Auto Ins.*, 106 Wis.2d 263, 316 N.W.2d 348 (1982), the seminal "made whole" subrogation case in Wisconsin on which this court heavily relied.

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Funding Health Insurance. . . Continued

12. *National Council On Compensation Insurance, supra*. at 12.

13. Thornquist, *Health Care Cost and Cost Containment in Minnesota's Workers' Compensation Program*, John Burton's Workers' Compensation Monitor One (May-June, 1990).

14. Kerr, *supra*.

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Implications of Fabe. . . Continued

11. Section 1012 (2)(b).
12. 393 U.S. 453 (1969).
13. *Id.* at 460.
14. The *National Securities* case involved a merger of two Arizona insurance companies which was approved by the Arizona Director of Insurance. The SEC sued to unwind the merger claiming material misrepresentations and omissions were made in communications to stockholders. The company argued unsuccessfully that application of federal securities law would cause the state merger law to be superseded, and that such is not permitted under the McCarran-Ferguson Act because the state law concerned the regulation of insurance. In fact, the court found that the state and federal laws were compatible, and therefore no conflict existed which would trigger McCarran-Ferguson
15. *Id.*
16. *See, National Securities.*
17. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982); *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).
18. *Fabe*, LEXIS 4023, at *21.
19. *Id.*
20. *Id.*
21. *Id.* at *24.
22. *Id.* at *22-23.
23. *Id.* at *23.
24. *Id.* at *25-26.
25. *Id.* at *26.
26. *Id.* at *27
27. *Id.* at *31-33.
28. *Id.* at *33.
29. *Id.*
30. *Id.* at *9.
31. *Id.*
32. *Id.* at *6, *20, *23, *26, *27, *31 and *32.
33. *Id.* at *26-27.
34. *Id.* at *26.
35. NAIC Model Insurers Liquidation and Rehabilitation Act.
36. C.S. Lewis, *Mere Christianity*, at 129, Macmillan (1952 rev. ed.).
37. *Fabe*, LEXIS 4023 at *32.