

FOREWORD: THE STATE OF AMERICA'S HEALTH CARE SYSTEM

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Thanks to technology, innovation, and creative entrepreneurs, Americans in the twenty-first century enjoy a wide variety of products and services that would astonish previous generations. Many of these innovations allow them to prevent, treat, cure, and recover from serious injuries and diseases that were once fatal.

While medical knowledge and technology have surged ahead, some parts of the health care industry are still struggling to catch up. These include the ability to keep patient records up to date, prevent medical errors, and compensate patients promptly and fairly when errors do occur.

The U.S. Department of Health and Human Services continues to work with the health care industry and employers to transform the practice of medicine by giving consumers of health care more choices and greater flexibility while encouraging people to make healthier decisions in their daily lives. As the contributors to this issue of the *William Mitchell Law Review* demonstrate, these transformations raise interesting issues in health care law.

In essence, the Department of Health and Human Services is working to change the entire dynamic of the health care industry through three major structural shifts. We are helping doctors shift their focus from satisfying third-party insurers to satisfying consumers, from filling out paperwork to caring for patients, and from treating disease to preventing it.

First, we must get an unwieldy and unaccountable health care system to focus its attention and incentives on satisfying the consumer. When third parties make health care decisions, consumers and doctors can both be left unsatisfied. But when consumers make their own decisions, doctors can focus on satisfying them.

[†] Tommy G. Thompson, Secretary of the U.S. Department of Health and Human Services, 2001-05.

We have already made progress by reforming the tax code to encourage direct purchases of health care. The Medicare Prescription Drug, Modernization, and Improvement Act (MMA)¹ not only helps seniors save money on prescription drugs, it also allows Americans of all ages to save money tax-free for future health care expenses by opening Health Savings Accounts (HSAs).

Consumers can save money in these accounts for medical expenses that are not covered by insurance. Unlike some previous accounts, money can accumulate from year to year without penalty. No one needs an employer's permission to open an account, but both the owners of the account and their employers are free to put money in them. HSAs are used in conjunction with low-premium, high-deductible health insurance plans. The contributions to the HSAs can be used to cover costs before the deductible is met.

High deductible health plans have lower premiums than first-dollar plans, making it easier for small business to help employees purchase health insurance. HSAs save their owners (consumers of health care) between ten and thirty-five percent of out-of-pocket health care services. Finally, HSAs are good for health care cost containment: Individuals make better purchasing decisions when their own money is at stake.

And we will continue to work with Congress to provide more help for small businesses in affording health care, such as association health plans, medical liability reform, and health insurance tax credits.

Health Insurance Tax Credits will help more people afford private coverage. An analysis performed by the Health Insurance Association of America found that the tax credits could cut the average cost of individually-purchased single coverage by almost half and family coverage by almost three quarters. The Treasury Department estimates that tax credits will assist up to 4.2 million previously uninsured people.

I suggest we also examine the reinsurance market to see whether it is sufficient to manage the risk of catastrophic health

1. Pub. L. No. 108-173, 117 Stat 2066 (2003); *see* Centers for Medicare & Medicaid Services, Medicare Modernization Update, at <http://www.cms.hhs.gov/mmu/default.asp> (providing regulatory information, links to advisory committee information, and detailed information regarding the new prescription drug benefit available under Medicare); *see also* Medicare Prescription Drug, Improvement and Modernization Act statute, *available at* <http://www.cms.hhs.gov/mmu/HR1/HR1.pdf> (providing the enacted legislation).

care expenses, and if not, whether government action is needed to create such a market.

Second, we need to shift from a system that still operates on the technology of long ago—manila folders, bulky bedside charts, and illegibly written prescriptions—to a system that invests in twenty-first century technology to ensure that physicians have ready access to all the information they need to diagnose and treat their patients. This technology includes PDAs, electronic health records, and computer technology that helps nurses, doctors, and pharmacists dispense medicine in a safe and effective way. Action within the medical community can help address liability concerns. For example, medical personnel can help prevent medical errors if they have easy access at the point of care to the patient's medical history and data about drug interactions and contraindications.

When errors do occur, patients should be compensated fairly and quickly. In addition, we need to address skyrocketing liability premiums that are driving doctors out of medicine.²

We have outlined a framework for addressing this national problem. Under our proposal, patients injured by medical errors would collect full actual, out of pocket damages—and a reasonable amount of recovery for pain and suffering and other non-economic damages—but not the unlimited amount that is now possible in many states.

We would also enact key medical liability procedural reforms, including the elimination of joint and several liability, a uniform statute of limitations, collateral source rule reform, and reasonable limits and court approval of attorney contingency fees.

Third, we must shift from a health care system that waits for people to get sick and only then tries to treat them—often at great expense—to a system that invests in prevention and keeping people healthy. Before MMA, Medicare would cover expensive operations but not the drugs and screenings that could prevent patients from needing those operations. Now, it covers prescription drugs and preventive screenings.

We are working to encourage Americans of all ages to prevent chronic disease. The choices we make every day, about what to eat, how to exercise, and whether to avoid risky behaviors, make a big

2. U.S. Gen. Accounting Office Rep. to Cong. Requestors, *Medical Malpractice Insurance, Multiple Factors Have Contributed to Increased Premium Rates*, GAO-03-702 (June 2003), available at <http://www.gao.gov/new.items/d03702.pdf> (last visited Jan. 21, 2005).

difference in our health. And people who turn healthy choices into habits need less health care, are more productive, and live longer. We have spread the word with the President's Healthier US initiative,³ my Steps to a Healthier US campaign,⁴ and many other projects.

These transformations will help modernize the health care industry. In most markets, consumers understand how much something costs. They weigh the costs and benefits of each option and make a rational decision. This is not how health care works today in America. Often, individuals are insulated from the true costs of their choices because their employer prepays for care they do not control and may not use.

When the health care industry completes the structural shifts I have outlined, consumers will find it much easier to get the kind of modern health care they deserve. They will have more choice and more control over their care. They will have more flexibility in how they buy their care. They will have more control over how they spend their paychecks. They will be able to take their health insurance and their health records with them easily when they change doctors, change jobs, or travel. And consumers will be more accountable for the results of their health care choices, just as they are for other consumer choices they make.

Think about how we maintain our cars. We buy auto insurance for major accidents but pay directly for routine expenses and maintenance like gas and oil changes. This saves us money. Why could our health care system not operate in the same manner? People would have more control of their health spending. They would not have to pre-pay for everything. They could afford better insurance against big catastrophic risks and more expensive procedures, and pay for routine expenses more directly. Those who make health care decisions will not only be healthier and consume less care—they will pay lower premiums.

The key in all of this is unlocking more choices. More choice leads to higher quality and lower costs. We have seen this in industry after industry.

3. See Healthier US initiative, at <http://www.healthierus.gov> (detailing the need for the initiative and its goals).

4. See Steps to a Healthier US Initiative, at <http://www.healthierus.gov/steps/index.html> (providing information about how Steps to a Healthier US advances the President's Healthier US initiative in an effort to help Americans live healthier lives).

Just compare telephone service in the 1970s to telephone service today. In 1970s America, you only had one choice: a clunky black or beige telephone, attached to the wall, with a rotary dial. Long-distance calls were extremely expensive. Today, thanks to consumer-driven competition, we have cell phones that can fit in our pockets, and that are constantly getting better and cheaper. We have long-distance calls we can afford.

If you look at the health care industry, there is some choice and competition, and there has been great progress on quality. But the cost savings we have seen in other industries have not arrived yet. That is why we need to shift our focus to the consumer. The more choices consumers have, the more their choices will control prices and guarantee high quality.

As people learn more about their health, their health care, and their options for buying health care, they can make more rational, better-informed, more healthful decisions for themselves and their families. Everyone who works in the health care field can help Americans understand these choices.