LEGISLATIVE GENERAL COUNSEL
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H.B. 67
1st Sub. (Buff)

Representative Carl Wimmer proposes the following substitute bill:

HEALTH SYSTEM AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Carl Wimmer

Senate Sponsor: J. Stuart Adams

LONG TITLE

General Description:

This bill prohibits a state agency or department from implementing federal health care reform passed by the United States Congress after March 1, 2010, unless the state Legislature specifically authorizes the implementation by statute.

Highlighted Provisions:

This bill:

- makes legislative findings;
- prohibits a state agency or department from implementing any provision of the federal health care reform unless the Legislature approves the implementation in statute after receiving a report regarding:
  - whether the federal act compels the state to adopt the particular federal provision;
  - consequences to the state if the state refuses to adopt the particular federal provision; and
  - impact to the citizens of the state if reform efforts are implemented or not implemented.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

ENACTS:

63M-1-2505.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **63M-1-2505.5** is enacted to read:

63M-1-2505.5. Freedom from federal health reform efforts -- Preservation of state reform efforts.

(1) The Legislature finds that:

(a) the state has embarked on a rigorous process of implementing a strategic plan for health system reform pursuant to Section 63M-1-2505;

(b) the health system reform efforts for the state were developed to address the unique circumstances within Utah and to provide solutions that work for Utah;

(c) Utah is a leader in the nation for health system reform which includes:

(i) developing and using health data to control costs and quality; and

(ii) creating a defined contribution insurance market to increase options for employers and employees; and

(d) the federal government proposals for health system reform:

(i) infringe on state powers;

(ii) impose a uniform solution to a problem that requires different responses in different states;

(iii) threaten the progress Utah has made towards health system reform; and

(iv) infringe on the rights of citizens of this state to provide for their own health care by:

(A) requiring a person to enroll in a third party payment system;

(B) imposing fines on a person who chooses to pay directly for health care rather than use a third party payer;

(C) imposing fines on an employer that does not meet federal standards for providing health care benefits for employees; and

(D) threatening private health care systems with competing government supported health care systems.

(2) (a) A department or agency of the state may not implement any part of federal health care reform passed by the United States Congress after March 1, 2010, unless:

(i) the department or agency reports to the Legislature's Health Reform Task Force and the Legislative Executive Appropriations Committee in accordance with Subsection (2)(b); and

(ii) the Legislature passes legislation specifically authorizing the state's compliance with, or participation in, federal health care reform.

(b) The report required under Subsection (2)(a) shall include:

(i) the specific federal statute or regulation that requires the state to implement a federal reform provision;

(ii) whether the reform provision has any state waiver or options;

(iii) exactly what the reform provision requires the state to do, and how it would be implemented;

(iv) who in the state will be impacted by adopting the federal reform provision, or not adopting the federal reform provision;

(v) what is the cost to the state or citizens of the state to implement the federal reform provision; and

(vi) the consequences to the state if the state does not comply with the federal reform provision.

Section 2. **Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.

Legislative Review Note
as of 2-4-10 1:20 PM

1st Substitute H.B. 67, would prohibit a state agency or department from implementing the provisions of any federal health care bill passed by Congress after March 1, 2010, unless the Utah Legislature specifically authorizes the agency to do so by statute. It is difficult to predict whether the bill would conflict with federal law because the final content of the federal health care bill currently in Congress is still unknown. However, there are several constitutional issues raised by 1st Substitute H.B. 67.

1st Substitute H.B. 67 might violate the Supremacy Clause (Art. VI) of the U.S. Constitution. The Supremacy Clause provides that federal law will preempt state law if: both state law and federal law regulate the same area; and compliance with both federal and state law is not possible; the objectives behind the statutes are inconsistent; or the statutory schemes are incompatible. There is some Supreme Court authority that suggests a "presumption against preemption" That is, when considering preemption, the Supreme Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605(1991), (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). In the case of health care reform, there is precedent that supports a federal purpose for Congress to act. Congress has the power to pass legislation regarding health care under the Commerce Clause (Art. 1, Sec. 8, Cl. 3) and the Taxing and Spending Clause (Art. 1, Sec. 8, Cl. 1) of the U.S. Constitution. In addition, the federal government has legislated in this field for well over fifty years, since Medicare and Medicaid were enacted in the mid-1960s. Because 1st Substitute H.B. 67 directs the state not to implement the federal law unless the Legislature approves the reform, it is at least an obstacle to compliance with federal law and could, therefore, be considered to be in conflict.

1st Substitute H.B. 67 also implicates the 10th Amendment, which appears to protect state sovereignty by reserving for the states those powers that are not specifically given to the Federal Government in the Constitution. In a number of cases, the Supreme Court has interpreted the 10th Amendment as a "truism" that does not deprive the Federal Government of "authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Kenneth May, "Supreme Court's Views As to Validity of Federal Legislation Under Tenth Amendment," 72 L. Ed. 2d 956 §5. *See also* United States v. Darby, 312 U.S. 100 (1941). In Garcia v. San Antonio Metropolitan Transit Authority the Supreme Court clearly reasserted Congress' power under the Commerce Clause to regulate even intrastate economic activities that affect interstate commerce. 469 U.S. 528, 537 (partially overruled on 11th Amendment state immunity grounds.). *Garcia* flatly overruled National League of Cities v. Usery, which appeared to briefly revive the 10th Amendment as a limit on federal power. 426 U.S. 833 (1976). A few recent decisions appear to cut back against the broad holding of *Garcia*, but given the strength of the *Darby* and *Garcia* line of cases, it is at least unclear, if not unlikely, that the Court would invalidate an exercise of the commerce power as violative of the 10th Amendment.

Finally, 1st Substitute H.B. 67, may violate Article V, Sec.1 of the Utah Constitution which is the doctrine of separation of powers. The separation of powers doctrine prohibits one department of government from interfering with, encroaching upon, or exercising the powers of either of the other branches of state government. The standard of review used by courts in separation of powers analysis is whether one branch of government is encroaching on a core function of another branch of

government. Because 1st Substitute H.B. 67 would prohibit the executive branch from enacting any provision of federal law without legislative approval, the prohibition of 1st Substitute H.B. 67 could infringe on a core function of the executive branch depending on what the federal law requires.

Office of Legislative Research and General Counsel