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HEALTH

Georgia Health Care Freedom Act: Amend Chapter 1 of Title 31 of the Official Code of Georgia Annotated, Relating to General Provisions Relative to Health, so as to Enact the “Georgia Health Care Freedom Act”; Provide a Short Title; Provide that Neither the State nor Any Department, Agency, Bureau, Authority, Office, or Other Unit of the State nor Any Political Subdivision of the State Shall Expend or Use Moneys, Human Resources, or Assets of the State of Georgia to Advocate or Intended to Influence the Citizens of this State in Support of the Voluntary Expansion by the State of Eligibility for Medical Assistance in Furtherance of the Federal Patient Protection and Affordable Care Act; Provide for Enforcement; Provide for Applicability; Amend Chapter 1 of Title 33 of the Official Code of Georgia Annotated, Relating to General Provisions Regarding Insurance, so as to Provide that No Department, Agency, Instrumentality, or Political Subdivision of this State Shall Establish Any Program; Promulgate Any Rule, Policy, Guideline, or Plan; or Change Any Program, Rule, Policy, or Guideline to Implement, Establish, Create, Administer, or Otherwise Operate an Exchange, or Apply for, Accept, or Expend Federal Moneys Related to the Creation, Implementation, or Operation of an Exchange; Prohibit the State and Its Departments, Agencies, Bureaus, Authorities, Offices, or Other Units of the State and Its Political Subdivisions from Providing Navigator Programs; Provide for Applicability; Amend Article 1 of Chapter 24 of Title 33 of the Official Code of Georgia Annotated, Relating to General Provisions Regarding Insurance Generally, so as to Require that a Health Benefit Policy that Provides Coverage for Intravenously Administered or Injected Chemotherapy for the Treatment of Cancer Shall Provide Coverage no Less Favorable for Orally Administered Chemotherapy; Provide a Short Title; Provide for Definitions; Prohibit Certain Actions; Provide for Related Matters; Provide for Effective Dates; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTIONS: O.C.G.A. §§ 31-1-40, -23 (new);
 § 33-24-56.5 (new)

BILL NUMBER: HB 943

ACT NUMBER: 529

GEORGIA LAWS: 2014 Ga. Laws 243

SUMMARY: The Act requires that a health benefit policy that provides coverage for intravenously administered or injected chemotherapy for the treatment of cancer shall also provide coverage no less favorable for orally administered chemotherapy. Additionally, the Act prohibits the state from using money, resources, or assets to influence Georgia citizens to support the voluntary expansion of the Affordable Care Act, prohibits the establishment of an insurance exchange or applying for or accepting federal money relating to the establishment of an insurance exchange, and prohibits the establishment of a Navigator program.

EFFECTIVE DATE: O.C.G.A. §§ 31-1-40, -23, Apr. 15, 2014; § 33-24-56.5, Jan. 1, 2015

History

As part of a sweeping reform of medical coverage in the United States, Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010 to increase Americans’ access to insurance and reduce overall healthcare costs.¹ Thirteen states jointly filed suit to challenge the Act’s constitutionality,² and in an amended complaint Georgia and six other states joined the challenge.³ Ultimately, in a

1. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119–1025 (2010); Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2571 (2012).

2. Florida *ex rel.* Bondi v. U.S. Dept. of Health & Hum. Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011).

3. *Id.* The original complaint included thirteen states: Florida, South Carolina, Nebraska, Texas, Utah, Alabama, Louisiana, Michigan, Colorado, Pennsylvania, Washington, Idaho South Dakota, and

2012 decision, the United States Supreme Court affirmed the constitutionality of much of the ACA, but rendered the Medicaid expansion optional for states.⁴ The ruling held that the ACA's individual mandate was a permissible "tax," but rejected its provision conditioning states' Medicaid eligibility on their adoption of expanded Medicaid coverage.⁵

The ACA included provisions that called for the creation of state-run insurance exchanges or marketplaces to facilitate enrollment in the new programs.⁶ In many states—including Georgia—programs were created to facilitate enrollment and help answer questions for new enrollees.⁷ Due to Georgia's high number of uninsured residents, the University of Georgia's College of Family and Consumer Science established the University of Georgia Health Navigators program.⁸

Significant political debate surrounding the ACA has continued in the wake of the Supreme Court's ruling and the Act's implementation.⁹ Representative Jason Spencer (R-180th) led the charge against the ACA in Georgia.¹⁰ His first attempt at blocking the

North Dakota. Complaint, Florida *ex rel.* Bondi v. U.S. Dept. of Health & Hum. Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91). The first amended complaint added seven states: Mississippi, Arizona, Nevada, Georgia, Alaska, Indiana, and North Dakota. Amended Complaint, Florida *ex rel.* Bondi v. U.S. Dept. of Health & Hum. Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91). Finally, the second amended complaint added three states: Ohio, Kansas, and Wisconsin. Second Amended Complaint, Florida *ex rel.* Bondi v. U.S. Dept. of Health & Hum. Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-91).

4. *Sebelius*, 132 S. Ct. 2566. *See also* Rick Badie, *Obamacare Deadline*, ATLANTA J.-CONST. (Mar. 20, 2014, 8:05 AM) (on file with Georgia State University Law Review).

5. *Sebelius*, 132 S. Ct. at 2596.

6. *The Navigator Program: Information and Resources*, GEORGIANS FOR A HEALTHY FUTURE (Apr. 19, 2013, 4:30 PM), <http://healthyfuturega.org/archives/4960> [hereinafter *The Navigator Program*].

7. *See* Jonathan Oberlander & Krista Perreira, *Implementing Obamacare in a Red State —Dispatch from North Carolina*, 369 N. ENG. J. MED. 2469, 2470 (2013).

Enroll America, a nonprofit group working to promote the ACA in states whose governments are not running their own exchanges, has set up shop in North Carolina. It aims to use techniques adapted from the Obama presidential campaign to identify, find, and canvass uninsured persons and connect them to enrollment resources. Enroll America plans to purchase advertising promoting the ACA in North Carolina, something the Obama administration is also doing.

Id.

8. *The Navigator Program*, *supra* note 6. Georgia has one of the highest numbers of uninsured in the nation, some 1.86 million residents. *Id.*

9. *See, e.g.*, Karl Rove, *The Obamacare Debate is Far From Over*, WALL ST. J. (Apr. 9, 2014), <http://online.wsj.com/news/articles/SB10001424052702303603904579491582027843434>.

10. Rep. Spencer has a history of attacking Obamacare. *See* SB 236, as introduced, Ga. Gen. Assem. 2013 (requiring health insurance companies to identify which portion of premium increases are

ACA, House Bill (HB) 707, intended to strike back at the ACA's costs by prohibiting the use of any state funds in the implementation of the law or for creating Navigator programs to encourage enrollment.¹¹ During HB 707's presentation, Representative Spencer outlined that "the people's bill," as he referred to it, was a direct response to "the unaffordable care act, [] one of the most egregious federal laws of our time" and reflective of the will of 37,000 signatories to a petition initiated by Georgians for Healthcare Freedom.¹² Spencer unapologetically admitted that he designed the bill to "throw[] up road blocks to limit the state from implementing portions of the Obamacare."¹³ Although the General Assembly modified HB 707 during its progression, its ultimate aim was to "prevent the federal government from commandeering the resources of state or local government to promote, enforce, or administer the federal health insurance provisions of [the ACA]."¹⁴ The second portion of Representative Spencer's offensive was included in HB 990,¹⁵ which sought to prevent the ACA's expansion of Medicaid within Georgia.¹⁶

attributable to the ACA); 2014 Ga. Laws 349 (excluding form coverage elective termination of pregnancy); 2014 Ga. Laws 293 (prohibiting the State from expanding the eligibility requirements for Medicaid without legislative approval). On his website, Rep. Spencer states:

Fighting Obamacare: I have been one of the lead legislators in the General Assembly introducing Tenth Amendment initiatives that push back against the endless encroachments of the federal government into state affairs. I am the primary author of HB 707, The Georgia Healthcare Freedom Act and the HB 707 amendment to HB 943.

Federalism and Preservation of Liberty, SPENCER STATE REP., <http://spencer4ga.com/federalism-and-preservation-of-liberty/> (last visited Sept. 11, 2014).

11. See HB 707, as introduced, 2014 Ga. Gen. Assem.; Badie, *supra* note 4. In its original form, HB 707 even went as far as empowering the Attorney General with authority to bring suit to enjoin violations of the prohibitions and issue advisory rulings. HB 707, as introduced, 2014 Ga. Gen. Assem.

12. Video Recording of House Proceedings, Mar. 3, 2014 at 47 min., 22 sec. (remarks by Rep. Jason Spencer (R-180th)), <http://www.gpb.org/lawmakers/2014/day-30-crossover-day> [hereinafter House Video].

13. Jason Spencer, *Week Ten: Legislative Session Adjourns Sine Die*, GA. PUNDIT (Mar. 23, 2014), <http://gapundit.com/2014/03/23/rep-jason-spencer-week-ten-legislative-session-adjourns-sine-die/>. Many indicated dissatisfaction at the bill's targeting of the Navigator programs. See Jim Galloway, *Dialing up the Rhetoric on Obamacare in Georgia*, ATLANTA J. CONST. (Dec. 18, 2013, 6:00 PM) <http://www.ajc.com/weblogs/political-insider/2013/dec/18/dialing-rhetoric-obamacare-georgia/>.

14. House Video, *supra* note 12 at 48 min., 13 sec.

15. 2014 Ga. Laws 293. For additional discussion on HB 990, see Amber Bishop & Jayna Easton, *HB 990*, 31 GA. ST. U. L. REV. 191 (2014).

16. 2014 Ga. Laws 293.

Although the General Assembly did not pass HB 707, significant portions of its language were added to HB 943.¹⁷ HB 943 was originally unaffiliated with Representative Spencer's movement against the ACA.¹⁸ The bill, entitled the "Cancer Treatment Fairness Act," sought to increase parity in the delivery of anti-cancer medication, more commonly known as chemotherapy.¹⁹ Specifically, the bill sought to specify that coverage for orally administered chemotherapy should be no less favorably provided in health benefit policies than the more common intravenously administered chemotherapy.²⁰ On March 18th, 2014—the thirty-ninth day of the legislative session and the twilight of the 2014 legislative calendar—language from HB 707 was added to HB 943.²¹

Origins of House Bill 707

Representative Jason Spencer introduced HB 707, which was co-sponsored by Representatives David Stover (R-71st), Scott Turner (R-21st), Michael Caldwell (R-20th), Edward Lindsey (R-54th) and Kevin Cooke (R-18th).²² According to Representative Spencer, the bill had five objectives: (1) to prohibit any State agency from using resources to advocate for the expansion of Medicaid; (2) to prohibit the state from running an insurance exchange; (3) to refuse federal grant money for the purpose of creating or running a state exchange; (4) to prohibit any arm of the State from operating a navigator program; and (5) to prohibit the Office of the Insurance Commissioner from investigating or enforcing any alleged violation of the federal health insurance requirements mandated by the ACA.²³

17. Badie, *supra* note 4. Rep. Spencer stated, "thus, I accepted this version of HB 707 now part of House Bill 943 which was short of my ambition to prevent the federal government from commandeering any resource of state or local government to promote, enforce or administer Obamacare." *Id.*

18. See HB 943, as introduced, 2014 Ga. Gen. Assem.

19. See Audio Recording of House Insurance Committee, Feb. 19, 2014 at 23 min., 10 sec. (remarks by Rep. Lee Hawkins (R-27th)) (on file with Georgia State University Law Review) [hereinafter Insurance Committee Recording].

20. *Id.*

21. Andy Miller & Charles Craig, *Anti-ACA Bill Gets Late-Night Approval*, GA. HEALTH NEWS (Mar. 19, 2014), <http://www.georgiahealthnews.com/2014/03/anti-obamacare-bill-late-night-approval/>.

22. HB 707, as introduced, 2014 Ga. Gen. Assem.

23. House Video, *supra* note 12 at 48 min., 28 sec.

The House read HB 707 for the first time on January 14, 2014.²⁴ The House Judiciary Committee offered a substitute that made several changes to the originally proposed bill and removed significant language relating to the role of the federal government.²⁵ More importantly, the Judiciary Committee removed provisions relating to the State Attorney General's ability to enforce the noncompliance provisions HB 707 sought to enable.²⁶

The House read HB 707 for a third time on March 3, 2014. Representative Spencer's presentation received critical questioning from Minority Leader Stacey Abrams (D-89th).²⁷ Leader Abrams posed several hypotheticals to Representative Spencer to illustrate the negative unintended consequences of the bill, specifically focusing on the fact that the prohibitions on the Insurance Commissioner's enforcement abilities would leave Georgian's without local recourse and have the effect of denying them the same healthcare coverage and protections as citizens are able to receive in other states.²⁸ Despite the pushback, the House voted to pass the amended substitute by a vote of 115 to 59 with five representatives not voting and one member excused from voting.²⁹

After adoption by the House, Senate Majority Whip Cecil Staton (R-18th) made a motion in the Senate Rules committee to table the bill.³⁰ Democratic Leader Senator Steve Henson (D-41st) seconded the motion and, along with other Republicans, voted to table the

24. State of Georgia Final Composite Sheet, HB 943, May 1, 2014.

25. See HB 707 (LC 28 6887ER), 2014 Ga. Gen. Assem. (stating "the people of the several states comprising the United States of America created the federal government to be their agent for certain enumerated purposes, and nothing more," and continuing "the assumption of power that the federal government has made by enacting the federal Patient Protection and Affordable Care Act of 2010 interferes with the right of the people of the State of Georgia to regulate health care as they see fit and makes a mockery of James Madison's assurance in Federalist No. 45 that the 'powers delegated' to the federal government are 'few and defined,' while those of the states are 'numerous and indefinite'").

26. Compare HB 707 (LC 28 6887ER), 2014 Ga. Gen. Assem., with HB 707 (LC 29 5981S), 2014 Ga. Gen. Assem.

27. House Video, *supra* note 12 at 51 min., 13 sec. (remarks by Rep. Stacey Abrams (D-89th)).

28. *Id.* Rep. Abrams's hypotheticals illustrated that a Georgia resident who was denied coverage due to an insurer's determination that he or she had a pre-existing condition would now be unable to contact their elected Insurance Commissioner about their grievance, and would instead, need to seek assistance from the Internal Revenue Service, a step that even Rep. Spencer was unsure about the mechanics of. *Id.* at 51 min., 53 sec. (remarks by Rep. Jason Spencer (R-180th)).

29. Georgia House of Representatives Voting Record, HB 707 (Mar. 3, 2014).

30. Stephanie Miller, *Anti-Obamacare Legislation Killed. Lawmaker Blasts Fellow Republicans*, BROOKHAVEN POST (Mar. 18, 2014), <http://brookhavenpost.co/anti-obamacare-legislation-killed-lawmaker-blasts-fellow-republicans/14535>.

bill.³¹ The move effectively killed HB 707 as the Rules Committee did not meet again during the 2014 session.³²

Bill Tracking of HB 943

Consideration and Passage by the House

Representatives Lee Hawkins (R-27th), Richard Smith (R-134th), Matt Ramsey (R-72nd), Sharon Cooper (R-43rd), Bruce Broadrick (R-4th), and Virgil Fludd (D-64th) sponsored HB 943.³³ The House read the bill for the first time on February 7, 2014 and for a second time on February 10, 2014.³⁴ The bill was then assigned to the House Committee on Insurance, which favorably reported by substitute on February 19, 2014.³⁵ The Committee expressed concern that the bill may have faced resistance if targeted towards specific diseases or cancer, and suggested the language be made more generally applicable.³⁶ The House read the Committee substitute as amended on February 21, 2014.³⁷ The House passed the Committee substitute by a vote of 158 to 6 with four representatives not voting and twelve members being excused from voting.³⁸

Consideration and Passage by the Senate

Senator Renee Unterman (R-45th) sponsored the bill in the Senate.³⁹ The Senate first read the bill on February 24, 2014, before it was assigned to the Senate Committee on Insurance and Labor.⁴⁰ The Senate read the bill a second time on March 12, 2014, and the Senate Committee on Insurance and Labor favorably reported by substitute

31. *Id.*

32. *Id.*

33. Georgia General Assembly, HB 943, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20132014/HB/943>.

34. State of Georgia Final Composite Sheet, HB 943, May 1, 2014.

35. *Id.*

36. Insurance Committee Recording, *supra* note 19, at 32 min., 50 sec. (remarks by Rep. Lee Hawkins (R-27th) and Senator Ed Harbison (D-15th)).

37. State of Georgia Final Composite Sheet, HB 943, May 1, 2014.

38. Georgia House of Representatives Voting Record, HB 943 (Mar. 3, 2014).

39. Georgia General Assembly, HB 943, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20132014/HB/943>.

40. State of Georgia Final Composite Sheet, HB 943, May 1, 2014.

on the same day.⁴¹ On March 13, 2014, the Senate read the bill for a third time and passed it by a vote of 47 to 0.⁴²

On March 18, 2014, the thirty-ninth day of the session, Representative Edward Lindsey (R-54th) offered an amendment to the Senate substitute.⁴³ The amendment added the language from HB 707.⁴⁴ This amendment dramatically changed the scope of HB 943 and for the first time, added amended Part One, the “Georgia Health Care Freedom Act.”⁴⁵ The language tracked very closely to the language in the final proposed revision of HB 707, primarily clarifying exceptions to the proposal’s prohibition on the use of State resources to advocate for the ACA or attempting to influence public policy.⁴⁶

The adopted language excluded HB 707’s language restricting the Insurance Commissioner from enforcing health insurance related provisions of the ACA.⁴⁷ Removing this language “was an 11th hour negotiation with the governor’s office,” Representative David Stover (R-71st) said.⁴⁸ The same day, the House agreed to the Senate substitute as amended by the House by a vote of 106 to 48, with twelve representatives not voting, and fourteen representatives excused.⁴⁹ Finally, near midnight, the Senate agreed to the House amendment to the Senate substitute by a vote of 37 to 17 with two senators not voting.⁵⁰

The Act

The Act amends Chapter 1 of Title 31 of the Official Code of Georgia Annotated, relating to general health provisions and enacts

41. *Id.*

42. Georgia General Assembly, HB 943, Bill Tracking, <http://www.legis.ga.gov/Legislation/en-US/display/20132014/HB/943>.

43. *Id.*

44. *Compare* HB 943 (LC 37 1788S), 2014 Ga. Gen. Assem., with 2014 Ga. Laws 243.

45. HB 943 (LC 37 1788S), 2014 Ga. Gen. Assem.

46. *Compare* HB 943 (LC 37 1788S), 2014 Ga. Gen. Assem., with HB 707 (LC 28 7202S), 2014 Ga. Gen. Assem.

47. *Compare* HB 943 (LC 37 1788S), 2014 Ga. Gen. Assem., with HB 707 (LC 28 7202S), 2014 Ga. Gen. Assem.

48. Sarah Fay Campbell, *Weakened Anti-Obamacare Legislation In Deal’s Hands*, TIMES HERALD (March 27, 2014), <http://www.times-herald.com/local/20140320-LEgis—Obamacare-bill-passes>.

49. Georgia House of Representatives Voting Record, HB 943 (Mar. 18, 2014).

50. Georgia Senate Voting Record, HB 943 (Mar. 18, 2014).

the “Georgia Health Care Freedom Act.”⁵¹ The Act also amends Chapter 1, Title 33 of the Official Code of Georgia Annotated and provides that the state of Georgia shall discontinue its Navigator programs.⁵² Finally, the Act amends Article 1 of Chapter 24 of Title 33 of the Official Code of Georgia Annotated and requires that that a health benefit policy that provides coverage for intravenous chemotherapy medication shall not be less favorable than coverage for orally administered chemotherapy.⁵³

Part One: The Georgia Health Care Freedom Act

Section One of Part One of the Act prohibits the “state [or] any department, agency, bureau, authority, office, or other unit of the state [or] any political subdivision” from using “moneys, human resources or assets to advocate or intended to influence the citizens” in supporting or expanding the ACA.⁵⁴ The Act specifically does not prohibit any state “officer or employee” from “advocating or attempting to influence public policy” as performing official duties, acting on personal time, or “providing bona fide educational instruction about the federal [ACA] in institutions of higher learning or otherwise.”⁵⁵ The Act also specifies that it should not be construed as forbidding participation in Medicaid programs.⁵⁶

Section One of the Act also prohibits the State or its subdivisions from establishing or changing any program, rule, policy, guideline, or plan, or from accepting federal money for the purposes of establishing a state run exchange.⁵⁷ Finally, the section prohibits the State or its subdivisions—including the University of Georgia—from continuing its Navigator program once the grants that were in effect expire.⁵⁸

51. 2014 Ga. Laws 243; O.C.G.A. §§ 31-1-40, -23 (Supp. 2014).

52. *Id.*; see *infra* note 65.

53. 2014 Ga. Laws 243; O.C.G.A. § 33-24-56.5 (Supp. 2014).

54. O.C.G.A. § 31-1-40(a) (Supp. 2014).

55. O.C.G.A. § 31-1-40(c) (Supp. 2014).

56. O.C.G.A. § 31-1-40(d) (Supp. 2014).

57. O.C.G.A. § 33-1-23(b) (Supp. 2014).

58. O.C.G.A. § 33-1-23(c) (Supp. 2014).

Part Two: Cancer Treatment Fairness Act

Section Two of the Act provides that a “health benefit policy” shall provide insurance coverage for orally administered chemotherapy in a manner that is “no less favorable” than coverage for “intravenously administered or injected chemotherapy.”⁵⁹ Further, it provides that an insurer and any “entity through which the insurer offers health services” shall not vary the terms of policies to avoid compliance with the Act, provide incentives to encourage individuals to accept “less than the minimum protections available under this Code section,” penalize health care practitioners for recommending the care required by the Act, incentivize practitioners to not provide the care required, or increase the cost-sharing requirements for “intravenously administered or injected chemotherapy.”⁶⁰

*Analysis**Original Intent*

During the initial consideration of HB 707 in the House Judiciary Sub-Committee, Representative Spencer cited reasons justifying the bill. Spencer indicated that as a result of the ACA, insurance premiums and deductibles had continued to rise for Georgians, and that the ACA represented a violation of Georgia’s sovereign immunity repugnant to the Constitution and the Tenth Amendment.⁶¹ In Spencer’s view, the ACA directly imposed new taxes on the State through its employee benefit plan, and the federal government’s attempt to usurp State assets in that manner provided strong legal footing for the Bill.⁶²

Spencer was joined at the hearing by Bruce Fein—a lawyer specializing in constitutional law—who was consulted in the development of the bill and its language.⁶³ Fein posed that the bill

59. 2014 Ga. Laws 243 § 2-2, at 246.

60. 2014 Ga. Laws 243.

61. Video Recording of House Judiciary Subcommittee Hearing Part 1, Feb. 3, 2014 at 0 min., 20 sec. (remarks by Rep. Jason Spencer (R-180th)), <https://www.youtube.com/watch?v=TZ69rUpBiN0> [hereinafter House Committee Video 1].

62. *Id.* at 4 min., 30 sec.

63. *Id.* at 5 min., 45 sec. (remarks by Mr. Bruce Fein, Bruce Fein & Associates, Inc.)

was not intended to nullify a federal statute; rather, it was an act by the state sovereign to indicate that it would not allow its assets and governmental authority to be utilized to implement a federal policy which it believes is misguided.⁶⁴ This type of activity, Fein continued, was wasteful and distracting to state employees that were being forced to implement a federal law the state disagreed with.⁶⁵

Comparing HB 707 and HB 943

Some language from HB 707 was directly incorporated into HB 943.⁶⁶ The language from HB 707 that was added to HB 943 prohibited the state from using money, resources or assets to influence Georgia citizens to support the voluntary expansion of the ACA.⁶⁷ HB 943 allows for advocating and influencing public policy as part of professional duties during an employee's personal time without the use of state resources for "educational instruction . . . in [an] institution of higher learning or otherwise."⁶⁸ Also included in HB 943 is language prohibiting the establishment of an insurance exchange—or applying for or accepting federal money relating to the establishment of an insurance exchange—and prohibiting the establishment of a Navigator program.⁶⁹

64. *Id.* at 6 min., 30 sec.

65. *Id.* at 7 min., 20 sec.

66. Compare HB 707 (LC 28 7202S), 2014 Ga. Gen. Assem., with 2014 Ga. Laws 243; Badie, *supra* note 4. Some legislators recognize that HB 707 was the harsher of the two bills, but both were intended to send a message that Georgia was going to "fight tooth and nail" against the ACA's provisions. See Telephone Interview with Sen. Chuck Hufstetler (R-52nd) (Jun. 4, 2014) (on file with Georgia State University Law Review) [hereinafter Hufstetler Interview].

67. See O.C.G.A. § 31-1-40 (Supp. 2014).

68. O.C.G.A. § 31-1-40(c) (Supp. 2014).

69. O.C.G.A. § 33-1-23 (Supp. 2014). The Navigator program was "designed to help consumers, small business owners and employees navigate the ACA" and was run by the College of Family and Consumer Sciences at the University of Georgia. Mariana Viera, *Health Navigators Ended After Bill Pushed Through Georgia General Assembly*, RED AND BLACK (Aug. 26, 2014, 5:07 PM) http://www.redandblack.com/uganews/politics/health-navigators-ended-after-bill-pushed-through-georgia-general-assembly/article_5c24d6f2-c6a5-11e3-9ccf-0017a43b2370.html. According to Deborah Murray, the Associate Dean of the College of Family and Consumer Sciences, "the navigator program sought to educate people about the law, to help them sign up for Medicaid or for coverage on the national exchange . . . [p]eople who had never had insurance and hadn't had insurance in a long time got affordable, high-quality insurance. . . . People were so appreciative and relieved to know they could now afford health care." Melissa Landon, *New Georgia Law Targeting Obamacare Prohibits Extension Service Navigators Who Help Enrollment*, RURAL BLOG (May 29, 2014, 2:18 PM), <http://irjci.blogspot.com/2014/05/new-georgia-law-targeting-obamacare.html>.

There are, however, some notable differences between HB 707 and HB 943. HB 943 states “nothing in this Code section shall be construed to preclude the state from participating in any MEDICAID program.”⁷⁰ Perhaps most notably missing from HB 943 is the language from HB 707 that prohibits the Commissioner of Insurance from enforcing “any health care insurance related provision of the [ACA]” or acting as an agent of a federal agency designed to investigate violations of the ACA.⁷¹ Looking to the future, this language could be pursued in an attempt to allow the state to further sour attitudes towards the ACA by removing insured Georgian’s ability to seek protection from the local agent. HB 943 makes it clear that the Georgia government does not support the ACA as it clearly disallows the creation of an insurance exchange and prohibits using funds to garner support for the ACA.

ACA Related Prohibitions’ Implications on State Health Care

ACA implementation “varies substantially across the country.”⁷² Only ten states have fully implemented the ACA by setting up insurance marketplaces, expanding Medicaid coverage, and enacting most or all of the law’s insurance-industry reforms.⁷³ Three states—Maine, South Dakota, and Virginia—are implementing insurance reforms even though they have each declined to expand Medicaid or manage their own health insurance marketplaces.⁷⁴ Thirty-four states do not have their own insurance exchanges, but eleven of those states have decided to embrace the Medicaid expansion.⁷⁵ Of the twenty-four states that have not expanded their Medicaid programs, only one—Idaho—has its own insurance market place.⁷⁶ Finally, “five states—Alabama, Missouri, Oklahoma, Texas, and Wyoming—have

70. O.C.G.A. § 31-1-40(d) (Supp. 2014).

71. *Compare* HB 707 (LC 28 7202S), 2014 Ga. Gen. Assem., with 2014 Ga. Laws 243.

72. Oberlander & Perreira, *supra* note 7 at 2470.

73. Geoffrey Cowley, *How States Are Implementing Obamacare*, MSNBC (Feb. 6 2014), <http://www.msnbc.com/msnbc/obamacare-state-policies>. The ten states are California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New York, Oregon, and Vermont, and the District of Columbia. *Id.*

74. *Id.*

75. *Id.* Those states are Arizona, Arkansas, Delaware, Illinois, Iowa, Michigan, New Jersey, North Dakota, Ohio, Pennsylvania and West Virginia. *Id.*

76. *Id.*

refused to play any role in implementing the health care law.”⁷⁷ Georgia has left enforcement to the federal government, refused to set up its own state based insurance marketplace exchange, and opted not to expand Medicaid coverage.⁷⁸

In analyzing the potential ramifications HB 943 can have on healthcare in Georgia, another southern state—North Carolina—may provide some clues. North Carolina passed legislation in 2013 similar to HB 943 that rejected establishing an insurance exchange and expanding Medicaid.⁷⁹ Because of the state’s decision, some individuals are now ineligible for both Medicaid and subsidized coverage in the state exchange.⁸⁰ This type of approach will have the direct result of more uninsured patients than if the state had implemented the Medicaid expansion.⁸¹

There is another important ramification of North Carolina’s actions. Similar to Georgia residents, residents of North Carolina are completely relying on the federally run insurance exchanges.⁸² However, the federal program has been plagued with problems resulting in confusion, frustration, and decreased coverage.⁸³ HB 943 will likely lead to difficulties in Georgia for residents attempting to obtain the newly mandated insurance. Georgia residents, like the residents in North Carolina, will have to rely on the confusing federal exchanges instead of an exchange sponsored, advertised, and supported by the state government. But Georgia and North Carolina are not the only states resisting the ACA. Nineteen states have placed

77. *Id.*

78. *Id.*

79. John Frank, *NC Senate Republicans Vote to Block Medicaid Expansion, Exchanges*, NEWS OBSERVER (Feb. 4, 2013), http://www.newsobserver.com/2013/02/04/2656119_senate-republicans-vote-to-block.html?rh=1; Renee Chou, Adam Owens & Beidget Whelan, *Lawmakers Forge Ahead to Block Medicaid Expansion*, WRKAL (Feb. 4, 2013), <http://www.wral.com/lawmakers-forge-ahead-to-block-medicaid-expansion/12064031/>. See also SB 4, 2013 Gen. Assem. (NC 2013) (“An act (1) to clarify the state’s intent not to operate a state-run or ‘partnership’ health benefit exchange, (2) to provide that future Medicaid eligibility determinations will be made by the state rather than the federally facilitated exchange, and (3) to reject the affordable care act’s optional Medicaid expansion.”).

80. Oberlander & Perreira, *supra* note 7 at 2470.

81. *Id.*

82. *Id.*

83. Kelly Kennedy, *Health Care Exchange Still Plagued by Problems*, USA TODAY (Oct. 16, 2013, 7:42 PM), <http://www.usatoday.com/story/news/nation/2013/10/16/exchanges-two-weeks-in/2989723/>; Dan Mangan, *Obamacare Glitches Still Plague Health Exchanges*, CNBC (Oct 3, 2013, 2:00 PM), <http://www.cnn.com/id/101082111>.

state law restrictions on Navigator programs, and legislation is pending in six more.⁸⁴

Given the limited scope of the Act initially—prohibiting the expansion of Navigator programs and state supported efforts to implement the ACA mandates—it has been speculated that the Act was purely politically motivated.⁸⁵ Senator Chuck Hufstetler (R-52nd) has challenged the basis for the Act, indicating that as long as the ACA is a part of the “law of the land” then the prohibition in Georgia serves to reflect political ideologies rather than what is best for the citizens of Georgia.⁸⁶

The Act, which the Tea Party groups strongly supported, received strong opposition from Democrats and Republicans alike, as well as from activist groups like the Medical Association of Georgia, the Georgia Hospital Association, and the Alliance of Community Hospitals.⁸⁷ In fact, the lack of formal hearings on HB 707 including input from these groups was a reason it received such strong opposition.⁸⁸ Ultimately, the Act will result in less funding for Georgia hospitals, without having any associated benefit in the tax burden.⁸⁹ Senator Hufstetler looks to states like Arizona where the programs have been implemented at no cost, and to Arkansas where they actually were able to pass on an income tax *reduction* due to the money generated by the insurance premiums.⁹⁰

84. See Jason Millman, *How States Are Still Limiting Obamacare's Outreach Program*, WASH POST (Jun 27 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/27/how-states-are-still-limiting-obamacares-outreach-program/>; Kennedy, *supra* note 83.

85. See Hufstetler Interview, *supra* note 66.

86. *Id.* Sen. Hufstetler argues that “prohibiting any employee from helping people get insurance, is not in the best interest” but does find merit in the prohibition of the Navigator programs, an implementation aspect of the ACA he felt would “be a disaster coming out” and should be left to the Federal government. *Id.* See also Miller *supra* note 21.

87. See Hufstetler Interview, *supra* note 66. Sen. Hufstetler indicated that he “didn’t hear from the Medical Association of Georgia, who [] was not in favor of either one of those bills . . . the Georgia Hospital Association, [or] from the Alliance of Community Hospitals, as well as other non-healthcare groups that were opposed to this legislation.” *Id.*

88. See *id.* Sen. Hufstetler stated “there was not a single hearing on this bill” outside of the health and human services committee meeting which barred any testimony on the subject. *Id.* The lack of any meaningful input on the topic from these organizations indicated to Sen. Hufstetler that the proponents wanted to avoid debate on the subject altogether. *Id.*

89. *Id.* (“[Georgia is] going to share in the [federal] deficit but we’re sending all of the money to other states . . . We may not agree with the law, but don’t punish our state because of that”).

90. *Id.*

Chemotherapy Provisions

Despite its additional aims as passed, the bill was originally drafted to establish parity in the coverage provided for different cancer medications.⁹¹ The Act is not a mandate and does not require insurance carriers to provide oral chemotherapy.⁹² Instead, the Act requires that providers that do cover cancer treatments, including intravenous based chemotherapy, provide at least the same coverage for orally administered chemotherapy treatments.⁹³ This type of coverage parity already exists in twenty-seven other states and the District of Columbia.⁹⁴

As treatment regimens have changed, insurance coverage has been slow to adopt; HB 943 sought to usher carriers in the direction of providing coverage for new treatments, which may differ from their historical patterns.⁹⁵ One of the reasons insurance policies have been slow to adopt orally administered forms of chemotherapy is the different methods used to distribute and administer the drugs.⁹⁶ This discrepancy not only impacts the mechanics of where the costs are

91. See Insurance Committee Recording, *supra* note 19, at 21 min., 5 sec. (remarks by Rep. Lee Hawkins (R-27th)). As explained by Rep. Hawkins during the House Insurance Subcommittee meeting on the bill, there have been significant improvements in the delivery of anti-cancer medication. *Id.* New treatments increasingly minimize the collateral damage that was prevalent in older forms of chemo- and radiation-therapy. *Id.* New orally delivered medications are more targeted, and help directly attack specific cancer cells, while minimizing the impact on the body's surrounding healthy cells. *Id.*

92. *Id.* at 24 min., 30 sec. (indicating that this is a view that is supported by Center for Medicare & Medicaid Services).

93. *Id.* at 25 min., 3 sec. One of the main benefits of the new treatment plans, is that it increases patients quality of life. *Id.* While an intravenous patient requires the surgical placement of a port and often times has a patient attached to an IV stand in a hospital, orally administered treatment regimens are often self-administered by the patient in their own home, allowing them to maintain a higher quality of life and even return to work. *Id.* at 26 min., 50 sec.

94. *Id.* at 27 min., 9 sec. The twenty-seven states that have enacted oral chemotherapy access laws include: Oregon (2008), Indiana (2009), Iowa (2009), Hawaii (2009), District of Columbia (2009), Vermont (2010), Connecticut (2010), Kansas (2010), Colorado (2010), Minnesota (2010), Illinois (2011), New Mexico (2011), Texas (2011), New York (2011), Washington (2011) and New Jersey (2012), Virginia (2012), Maryland (2012), Nebraska (2012), Delaware (2012), Louisiana (2012), Massachusetts (2013), Oklahoma(2013), Utah (2013), California (2013), Florida (2013), Rhode Island (2013) and Nevada (2013). *Fair Access to Cancer Treatment (Fact) Act Issue Briefing Paper*, http://www.accc-cancer.org/ossn_network/AZ/pdf/TACOS-advocacy-oralparity-FACTBriefing.pdf (last visited Sept. 25, 2014); see also Gina M. Stephan, *Update on Parity Laws for Chemotherapy*, COMPLIANCE CORNER (May 6, 2014), <http://www.insurancecompliancecorner.com/update-on-parity-laws-for-chemotherapy-2/>.

95. Insurance Committee Recording, *supra* note 19, at 25 min., 20 sec.

96. *Id.* at 26 min. 50 sec.

collected under benefit plans, but also the patients' individual responsibility under the plan.⁹⁷ In the case of intravenous treatments, the coverage is paid for under the portion of the benefit plan covering hospitalization-related expenses, typically associated with a fixed-fee co-pay.⁹⁸ On the contrary, as orally administered treatments are distributed through the pharmacy, they fall under the pharmaceutical provisions of the benefit plan and usually require the patient to be responsible for a percentage of the overall cost.⁹⁹ This cost can be significant in long-term treatments.¹⁰⁰ The Act places a limit on patient's liability for prescriptions, limiting them to \$200 per filled prescription for any orally administered chemotherapy.¹⁰¹

Although HB 943 was developed in conjunction with the insurance carriers, there are still unknowns about the actual cost implications.¹⁰² The impact on Medicaid was similarly not understood and accordingly was left out of the initial passage of the bill.¹⁰³ A similar approach may ultimately be applied to Medicaid, but passage of such a requirement may not garner support until more data is available about the actual costs associated with the requirement.

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97. *Id.* at 35 min. 9 sec.

98. *Id.* at 25 min. 15 sec.

99. *Id.* at 25 min. 26 sec.

100. *Id.* at 26 min. 49 sec.

101. 2014 Ga. Laws 243 § 2-2, at 246.

102. See Insurance Committee Recording, *supra* note 19, at 28 min., 12 sec. (remarks by Rep. Lee Hawkins (R-27th)). Rep. Hawkins expressed hope that subsequent reviews will actually result in lowering the patient liability below the \$200 per treatment threshold established in the Act. *Id.*

103. *Id.* at 29 min., 25 sec.