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NATIONAL HEALTH REFORM AND PENSION REFORM: CAN IT HAPPEN AND CAN CONGRESS GET IT RIGHT?

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Mr. Gordon specializes in the practice of Employee Retirement Income Security Act of 1974 (ERISA) and employee benefits law in Washington, DC. He served under an appointment by the late Senator Jacob K. Javits as Minority Counsel for Pensions, U.S. Senate Labor and Public Welfare Committee, and assisted in the drafting and enactment of ERISA.

MR. BARNET N. BERIN: Since 1976, Michael S. Gordon has specialized in the practice of employee benefits law in Washington, D.C. Since 1985, he has had his own law firm, currently representing both collectively bargained plans and noncollectively bargained employee benefit plans. From 1970 to 1975, Mr. Gordon served, under appointment by the late Senator Javits, as Minority Counsel for Pensions, U.S. Senate Labor and Public Welfare Committee. He assisted in the drafting and enactment of ERISA.

Prior to his service with the Senate, Mr. Gordon was an attorney with the U.S. Department of Labor, specializing in the regulation of trade unions and employee benefit plans. In 1965, he was the Department of Labor's (DOL's) legal advisor to the President's Cabinet Committee on Corporate Pension Funds, which issued a report recommending reforms in the private pension area. Mr. Gordon then participated in drafting legislation, introduced in 1968, which was an early forerunner of ERISA. He received a U.S. Department of Labor Distinguished Achievement Award for this contribution.

Mr. Gordon has testified before Congressional committees, presidential committees, and has spoken and written extensively on employee benefit plans and on ERISA. He's currently chairperson of the Advisory Board to the Bureau of National Affairs Pension Reporter and a member of the Board of Directors of the Pension Rights Center in Washington, D.C. He also is an appointed member of the Pension Research Council at the Wharton School at the University of Pennsylvania.

I've always found Mike Gordon to be interesting and informed. He will discuss "National Health Reform and Pension Reform: Can It Happen and Can Congress Get It Right?"

MR. MICHAEL S. GORDON: When I was approximately six years old, my father took me down to his law offices on LaSalle Street in Chicago. He introduced me to everybody, and then put me in an office to play until lunchtime. Then we went out to lunch. We went in an elevator which seemed to stop at every floor. At one floor, it opened up and this rather stooped elderly fellow with a cane walked in. They had elevator operators in those days. The elevator operator said, "Make way for Mr.

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Beck." Everybody got out of the way. We went down to the main floor and the elevator operator said again, "Let Mr. Beck go through, please." Mr. Beck walked out in the lobby. At that time, I thought I had never seen anybody so old. I asked my father, "Who is Mr. Beck?" My father said, "He's the actuary." I said, "What is an actuary?" He said, "An actuary tells you when you're going to die."

Since that time I've had actuary phobia. Those of you who came in contact with me when I worked on the Hill in connection with ERISA may recall some of the symptoms of this disease, but I'm happy to say that I am cured.

Is Congress going to enact national health insurance this year? My guess is probably not, but no one can tell. If Congress does pass a health bill, it is likely to be a terribly flawed product, one that will require years of work to fix up and one that may permanently sour the American public on a governmentally arranged solution to the nation's health problems. What about pension reform? It is somewhat certain that comprehensive pension reform is not in the picture this year. Next year is a different story, but even next year, Congress is unlikely to rush into governmentally arranged solutions to major pension reforms, especially after what happened to health insurance.

Let's turn first to health insurance. How did legislation that appeared to have such an auspicious beginning become so problematic? How did it happen that within the last several weeks the following has been reported by the press? The House Energy and Commerce Committee was so deadlocked on health reform that Representative John D. Dingell (D-MI) spoke of throwing up his hands. A House Education and Labor Subcommittee cleared a bill known as Clinton Plus that could not be supported by any Republican or moderate Democrats.

The Senate Labor and Human Resources Committee on June 9 cleared a Clinton-type bill that encountered virtually total Republican opposition, which will likely be joined later by conservative-to-moderate Democratic opposition. Subsequently, chairperson Edward M. Kennedy (D-MA) attempted to upstage chairperson Daniel P. Moynihan (D-NY) of the Finance Committee by holding a press conference adjacent to the Finance Committee while Moynihan was giving his own press conference on his version of the Clinton bill.

There was an attempt to honor chairperson Dan Rostenkowski's (D-IL) preindictment commitment to the Health Insurance Association of America (HIAA) to go easy on small insurance companies, among other things, in return for HIAA agreement to temporarily suspend its Harry and Louise television ads—an agreement, I understand, that has apparently fallen through. The House Ways and Means Committee recently worked furiously to amend acting chairperson Sam Gibbons' (D-FL) bill to meet a 72-hour deadline. The Gucci-clad lobbying crowd mobbed the House Ways and Means Committee in shorts and polo shirts, reminiscent of the high legislative artistry practiced by Ways and Means during the tax reform era.

The staff of the Finance Committee was instructed to work out a compromise health bill which seemed to center on delaying employer mandates, the ostensible cornerstone of the administration's approach to universal health insurance. However, the committee failed to reach agreement on any major area of reform. Chairperson

Moynihan is planning to introduce his own version of the Clinton bill, which was conceded to lack bipartisan support.

Then House Majority Leader Richard A. Gephardt (D-MO) opined that it is virtually impossible to meet a July 4 deadline for floor action on health reform. He thinks it's possible by mid-August when Congress takes its recess, but Gephardt doesn't think that failure to enact health reform will hurt Democrats in the November elections—a view not shared by the White House.

On June 12, White House officials indicated they might be prepared to accept a three-to-five-year phase-in of employer mandates as proposed by Senator John B. Breaux (D-LA) of Louisiana. Senate Majority Leader Robert Dole (R-KS) had previously threatened to block any employer mandate approach. It now appears the White House is hoping to salvage health reform by directing a compromise that contains some form of delayed employer mandates, but even that is not certain.

Well, it doesn't take a rocket scientist to be able to tell that Congress is tearing itself to pieces over this subject. So why is this happening to the greatest domestic reform since Social Security? Now, I know there will be those of you who will say that it was bound to happen once the White House began to bleed profusely from its numerous self-inflicted wounds; and no doubt there is a certain element of truth to this which is difficult to ignore. But I would suggest that the health proposal that was unleashed by the administration would still have encountered the most formidable difficulties even if the White House had managed to retain its original luster.

At a simplistic level, it can be argued that once the 1,364-page Clinton bill was submitted, pervasive confusion was inevitable after the president declared the only thing in the bill not negotiable was the universal access principle. If the president didn't want to commit to anything else in this mammoth proposal, then why should the public. Not surprisingly, they haven't done so, at least not to the extent of exerting the kind of pressure on Congress that is needed to compel adoption of a consensus on health reform. Is it any wonder, then, that Congress is without a compass and has been seeking one feverishly, but so far to no avail?

I think that, in order to understand what has happened, it is necessary to put some distance between ourselves and the health reform politics currently being practiced in Washington. Instead, we need to consider some of the necessary preconditions to any major institutional reform, especially one of such magnitude as health reform. The first thing to note is that something as sweeping as health reform can only be accomplished successfully when times are desperate or times are sufficiently good that the costs of reform are perceived as manageable; an example of the former is Social Security and an example of the latter is ERISA.

While many Americans would concede the existence of a health insurance crisis, it is doubtful that most of them would perceive this crisis in such stark terms that the criterion of desperation would be met. Thus, the kind of mass anxiety that would move Congress to act swiftly or in a radical way is missing and not all the political hype in the world is going to change that.

On the other hand, the economy, although improving, is still regarded by most Americans as a fragile one. Thus, they are not sure that the costs associated with fundamental health reform are tolerable. Many Americans would regard the various alternatives to financing health reform as a series of Hobson's choices. So Congress has been reduced to dealing with this issue with mirrors.

Under these circumstances, the central goal of health reformers ought to be to arrange a legislative agenda that assures that health legislation will not leave substantial numbers of Americans worse off after the legislation than they were before. By worse off, I mean not just in terms of health insurance coverage, but in terms of jobs and economic opportunity. No health proposal is totally convincing on this point; therefore health reform remains at serious risk.

Closely related to this question is the matter of integrating a private, voluntary health insurance system with a compulsory method for financing universal access. No other industrialized western country that adopted universal health insurance did so in connection with as fully a developed private health insurance system as ours. Therefore, the problems created by altering or eliminating private sector health systems were not as great as they are for us.

Under the prevailing circumstances, the goal of health reformers should be to secure necessary reforms with the least amount of disruption to the private health system. Notwithstanding the potential attractiveness of untried theories, just the opposite has occurred. The Clinton bill proposed employer mandates as the preferred method of integration and this issue has become one of the greatest sources of controversy in regard to the attempts of various Congressional committees to come up with an enactable version of the Clinton bill. However, the controversy may be more about political ideology than about the best way of achieving a workable technique of integration.

A decade ago or earlier, employer mandates would have made perfect sense. Back then, the traditional employment relationship was a stable one and large employer entities could be counted on as the dominant element in our nation's economic activity. For better or for worse, this is less and less the case nowadays. The universe of large employer entities is shrinking. The universe of small business is greatly expanding. Not only is most new job creation in small business, but this is the area where traditional employment relationships are being replaced rapidly.

Employer mandates, even with subsidies to small business, run counter to the new economic logic. In political terms, this means that efforts to build a centrist legislative coalition around employer mandates, and even delayed employer mandates are very vulnerable because constituencies affecting both mainstream Democrats, as well as Republicans, perceive themselves as adversely affected by such mandates and will react punitively to legislation that crams this solution down their throats.

Even if delayed mandates could form the basis for successful compromise legislation, and they might, the sustaining power of such legislation is highly suspect because of the implicit danger to small business formation. If universal health insurance is to succeed, it may be necessary to adopt other alternatives, but ones that permit the continuation of employer-sponsored health plans subject to heightened standards of access and solvency, as well as reasonable cost containment.

Although employer mandates may no longer be useful as the decisive organizing principle for health reform, it does not follow that individual mandates, improved cost controls or insurance reforms standing by themselves or in combination are the answer. Nor is it time to throw in the towel on universal health insurance, especially if throwing in the towel would embolden the states to seek ERISA waivers in order to enact state health reform laws that could cripple multistate health arrangements.

It is time to recognize that the same structural economic changes that cast doubt on the practicality of employer mandates also carry the potential for depriving more Americans than ever before of adequate health insurance coverage. Just a week or so ago, Secretary of Labor Robert B. Reich came out with some statistics which show, I think, a drop from 66% to 61% from 1988 to 1993 in employer-sponsored health coverage.

I'm not just referring to the current rage for downsizing; I'm also referring to the significant technological, demographic, and social changes that have weakened traditional employment ties in virtually every skill and occupation. Even if their proposed solutions are subject to criticism, the administration, and especially Mrs. Clinton, have been quite right to insist that the middle class should open their eyes to the lack of security behind their current health insurance arrangements.

From this perspective, it is imperative that we not give up on finding an appropriate model for universal health insurance reform. But it is also more and more evident that the ongoing Congressional machinations to achieve a satisfactory model may do more harm than good. What's especially distressing are the threats that failure of Congress to enact health reform before the November elections will lead to political retaliation during the elections.

No durable health reform program can be enacted on the basis of such threats or without meaningful bipartisanship. At this stage of the proceedings, and in the interest of ultimately achieving a satisfactory set of health reforms, the highest act of legislative statesmanship might be for the leaders of both parties to agree not to make this issue a subject for political competition in the November elections. However, given the present political tendencies, it remains to be seen whether acts of health reform statesmanship are still possible; and so realism dictates pessimism over the fate of universal health insurance.

Now, moving on to the pension front, there is some possibility that PBGC changes, along with so-called simplification measures, could be enacted this year, especially if health reform collapses. I noted in a recent *Wall Street Journal* that there was testimony from Senator James M. Jeffords (R-VT) before the Finance Committee in which he urged a speedup of the funding of pension plans; it is his feeling that funding has been watered down in order to help finance health benefits.

I don't know whether he's right about that or not, but there certainly seems to be an interest in speeding up funding and using that as a means to help correct some of the PBGC's deficit problems. However, I have concluded that one shouldn't hold one's breath about this subject. There is still jurisdictional friction between the tax and the labor committees regarding the PBGC, and some elements of the business community are unhappy about the proposed legislation.

What I find odd about the administration's proposed PBGC reforms is that they are essentially nothing more than warmed over soup from the prior administration, and Representative J.J. Pickle (D-TX), with a nod in the direction of organized labor by subtracting underfunded plan benefit freezes from the previous equations. Somehow, one might have expected something more innovative from this administration, but there seems to be an unwillingness, even an intolerance, to the serious exploration of fresh thought on the PBGC subject. It seems to me that PBGC is destined to remain a chronic source of dissatisfaction as long as major renovations are avoided.

There is also an outside possibility that Congress could enact legislation reversing the Merten's decision, which limited the availability of ERISA remedies against nonfiduciaries. Some key legislators, as well as the administration, are up in arms about this issue, particularly since, in the parallel Central Bank of Denver case, the Supreme Court also held that private investors may not sue, under the Securities and Exchange Act of 1934, professionals who aid and abet corporations and their managers in fraudulent securities schemes.

Moreover, the Supreme Court added some more fuel to the fire in the O'Melveny & Myers case by ruling that federal common law does not permit the FDIC to secure damages from lawyers and other professionals who served failed banks and savings and loans. Although it is more than likely that election-year politics, coupled with the concerns of professional groups, may force this legislation to be deferred until next year, the growing problems of corruption in the professions make it a safe bet that legislative proposals to undo Merten's are not going to readily disappear.

In terms of big picture future retirement policy, the major battle that is looming ahead is between three schools of thought: (1) those interested in only pursuing incremental changes and adjustments can be termed the incrementalists, (2) those who perceive the arrival of a new economic era and want to initiate a fundamental overhaul of national retirement income policy going well beyond ERISA, and perhaps even well beyond tax reform can be called the new agers, and (3) those who simply want to stop any further pension legislation of any kind on the theory that we have had more than enough lately, and who believe that what we all need is an extended rest and recovery period can be called the standpatters.

We need not dwell too much on the views of the standpatters, which are more or less self-evident, except to note that within their ranks are those who are convinced that the deficit-driven tax reform laws of the 1980s twisted retirement income policy in so many self-defeating ways that it is dangerous to attempt any major new retirement policy initiatives without some ironclad guarantees of noninterference from the tax policy planners. Because it is unlikely that such guarantees will be provided, the wisest course, from this perspective, is to put off most retirement policy proposals and attempt to also head off tax-motivated raids on pension plans.

While many in the pension industry can identify with the standpatters, the underlying changes in the nation's economy referred to earlier have affected pension programs, as well as health and welfare plans. The decline of defined-benefit pension plans and the startling growth of 401(k) plans has made a strong impact on retirement policy planners. That factor, along with the increased aging of the nation's population, has aroused legitimate concern over the future sufficiency of old-age income.

The incrementalists believe that mild tinkering with the current private pension system will go a long way to alleviate some of these concerns. For example, they would like to restrict lump-sum cash-outs from pension plans in order to better assure the availability of these funds for retirement purposes.

On the other hand, the new agers are skeptical about both the feasibility and the effectiveness of this kind of tinkering. New agers think that the underlying structural changes in the economy, especially those that relate to breaking away from traditional employment relationships, require building a new type of private pension system on top of the old one, but without harming the old one. How that is to be accomplished is as yet unclear, as is the relationship of such an approach to comprehensive ERISA reforms, such as those proposed by Senator Howard Metzenbaum (D-OH).

The conventional wisdom has been that when Congress finishes with health reform, it will go on to pension reform. Regardless of whether that indeed turns out to be the case, it is essential that the broadest inquiry possible be directed to the question of retirement income needs in the 21st century and the role of private pensions in meeting those needs.

Fortunately, there is still time to consider this problem without having to contend with the kinds of political pressures that are tying Congress up in knots on health reform. Thus, there is a good chance that Congress can get pension reforms right, even if they get health reforms wrong. It is up to all of us, especially those of us who carry professional responsibilities in the pension field, to assist in such an effort. We owe it to the institutions and professions that we serve, but most of all we owe it to the next generations of older Americans whose future is in our hands.

MR. BERIN: I'll ask the first question. It seems to me that the health care dilemma is an unsolvable problem because of all the parties involved and the positions that they've taken. In dealing with an unsolvable problem like this, one approach is to tackle part of it and phase it in. Hopefully, you can self-correct and then phase in another part. Do you have any reaction to that, Mike?

MR. GORDON: I think that it creates problems. The main problem that I see is that a phase-in approach might encourage states to legislate stronger legislation which could interfere with existing health arrangements or arrangements which are, to some extent, even encouraged by a partway approach. There are some states—California, for example—which are very vociferous about proceeding ahead with universal access insurance on their own. I think it's going to be very difficult to stop them given the political pressures created by partway approaches.

I think you can hold off that sort of pressure by making a bipartisan effort to go back to the drawing board and determine if something can be put together. It might not necessarily happen this year, but we need a firm commitment to put something together that we can all feel more comfortable with. Something like that happened in

ERISA. ERISA was basically almost totally abandoned in 1972 as a result of the action of the Senate Finance Committee in opposing the reforms that were being proposed. There was a reaction to that politically and the next year the labor committees were able to get the cooperation of the tax committees and merge ideas together in such a way that it was ultimately successful.

MR. FRANK RUBINO: You said that several years ago was a better time to pass employer mandates—large corporations were stronger; whereas today their power has deteriorated somewhat. If employer mandates were passed, in your opinion, do you think this deterioration would have been accelerated?

MR. GORDON: Yes.

MR. P. ANTHONY HAMMOND: Could you talk about what effect the Congressional Budget Office's estimates of the budget's impact will have on passing both health reform and pension legislation? If the Congressional Budget Office (CBO) doesn't score it, it doesn't really get considered in the Congress and in the committees; how they score it often has an effect on which legislation gets passed or considered.

MR. GORDON: I think it was Disraeli who said there are lies, there are damn lies, and then there are statistics. I shouldn't say that before this group. When it comes to trying to talk about the projected cost of health reform, we get many different numbers, and many different projections. I'm not equipped to be able to technically evaluate CBO's proficiency at doing this.

Just a short time ago, the CBO entered into a big argument with Representative James H. Cooper (D-TN). The CBO came out with figures that were much higher than the estimated cost of his bill and just about shot it to death. He disagreed vehemently and engaged in a conflict with them about it. I think the latest numbers seem to indicate that Clinton-type bills will run something like $40 billion annually.

There are only three ways that I can see that you're going to be able to cover that kind of number. That's either by raising taxes, by reducing entitlements substantially, or by engaging in some type of drastic cost control, which amounts to severe rationing, or some combination of the foregoing. I don't really think the American public is ready for that.

FROM THE FLOOR: Mr. Gordon, you said you didn't think any major health care reform would pass, but you mentioned a bipartisan effort. I'm going to ask you to speculate just a little bit more. What do you think the chances are of something bipartisan coming to pass? What will pass? When will it pass? Do you think medical care savings accounts might be part of the solution?

MR. GORDON: Taking up the last first, it is very hard to know whether that might become part of the solution. Somehow, I have some doubts that will be part of the solution because of its control problem. As far as bipartisanship is concerned, I'm sure that the legislature can probably get bipartisanship on some type of legislation that establishes nothing more than, let's say, a precedent of responsibility in the field and obtaining at some point in the distant future a better approach to universal access. I have problems with that for the reasons that I have indicated.

I think down the road it's possible to reconsider this thing and get bipartisanship, because I don't really think that the problem is Democratic or Republican. I think it relates primarily to what's going on in the health field and the nature of the changing economy. It's not a Republican issue or a Democratic issue. It really needs to be addressed, I think, in a much more thoughtful and professional way than has been done up to this point in time. I think it can be done and I think that we can bring other solutions or at least explore other solutions that may work much better than the ones that have been proposed so far, particularly on the financing end.

FROM THE FLOOR: When you dismiss the medical spending accounts for lack of control, do you mean that it puts control of spending back in the people's hands and takes control away from the politicians? Is that what you mean by lack of control?

MR. GORDON: I think that it's very difficult, given the nature of medical costs and medical problems. It's very difficult to think that some sort of confined medical account is going to be adequate to handle the kinds of problems that have come up. I think it's basically a form of rationing, but I'm not sure it's the best form of rationing.

MR. BERIN: Mike, do you have any sense of priority for covering the uncovered group or improving the funding, or whatever? What's the sense of what might emerge?

MR. GORDON: There's a kind of defensive attitude that really relates back to the tax reform legislation that we had during the 1980s. I don't think Congress wants to get hung up over making further major changes to retirement policy that would somehow invite having to deal with more tax reform. However, I think that there are some thoughtful souls up there, like Senator Bill Bradley (D-NJ) for one, who perceive some of the long-term problems that the pension systems face—not just private pensions, but Social Security as well.

I think that there's an inclination to want to get into it, even if it means that legislation will not be enacted on this subject right away. I think that's healthy. I think it ought to be encouraged. I think if there are certain things that need to be done right now, such as reforming PBGC, improving the funding, and doing some of the other things that I've mentioned, I think that we can attend to that, but we shouldn't keep our eyes off the ball.

The main thing that we have to be concerned about is the future, the long-term future, a future that's going to extend beyond the current deficit. We have to start gearing up for that future now.

MR. HARRY L. SUTTON, JR.: I had a question that kind of reacts to what you were talking about. My understanding is that the trustees of the Social Security Administration have moved up their date of exhaustion of the Social Security Trust Fund about ten years and may be expected to move it up again in another five years. How realistic do you think it is to start means testing Social Security benefits as a means of keeping it solvent? Of course, then you would need to greatly expand the private pension system or retirement system, if in fact there isn't going to be enough income for the people who are going to retire at the time the fund is going to go broke.

MR. GORDON: I think a means testing of Social Security has all the makings of a major political donnybrook and a split of factions in both parties. Even though there's much attention being paid to those mean testing proposals now, I think they're being essentially floated as a way to cut into entitlements and deal with the deficit. Therefore, I'm not sure that they are really the most cogent approach to long-term retirement planning for this country's needs.

I do think the problems of Social Security financing have to be addressed. I think, interestingly enough, in dealing with some of those problems, we're going to be dealing with the questions of coverage, or lack of coverage, in private pension plans; we must try to work out some type of solution, which may not be entirely employer based, to providing private pension income.

What I have in mind is that the breakdown of traditional employment ties may lead us to want to consider arranging some type of privately sponsored occupational retirement savings arrangements which would have complete portability, which could be invested, unlike Social Security, in the private market and which would avoid, to a very great extent, the problems that are caused by these major structural changes and attitudes in the nation's work force.