In December 2004, the Senate Committee on State Affairs (“Committee”) issued an Interim Report to the 79th Legislature. The Committee was charged with conducting a study of several health care issues and providing recommendations to the 79th Legislature. Charge number four directed the Committee to:

Study the April 2003 United States Supreme Court decision in *Kentucky Association of Health Plans v. Miller* to determine its impact on Texas laws regulating health insurance plans under the Employee Retirement Income Security Act of 1974 (ERISA) and make recommendations to changes in state law to conform with recent federal court decisions.2

In *Miller*,3 the U.S. Supreme Court upheld state “any willing provider” (AWP) laws.4 Kentucky HMOs brought suit against the Kentucky Commissioner of Insurance arguing that provisions of a Kentucky law that prohibited health plans from discriminating against health care providers was preempted by the federal ERISA. ERISA generally preempts any state law that “relates to” employee benefit plans unless the law is deemed to “regulate insurance.”5

The Kentucky statute provided that “[a] health insurer shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation established by the health insurer . . . “6 The HMOs who brought the suit maintained exclusive provider networks with certain doctors, hospitals, and other healthcare providers. Prior court decisions have held that laws must be specifically directed toward the insurance industry to be deemed laws which regulate insurance, i.e., laws of broader application that simply have some bearing on insurers do not qualify. The HMOs argued that the AWP law was directed at healthcare providers as well as insurers and regulated the relationship between insurers and third-party providers. Therefore they contended that the law was not “specifically directed” towards the insurance industry. The Court rejected these arguments, noting that providers could “still enter exclusive networks with insurers who

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2 Id. at 40.


4 See Ronald L. Scott, *Supreme Court Upholds “Any Willing Provider” Laws*, Health Law Report, INTERNAL MED. WORLD REP. (May 2003) (some sections of this article discussing the Miller case are reproduced herein).

5 See *Miller*, 123 S. Ct. 1472-3.

6 Id. at 1474, citing KY. REV. STAT. ANN. § 304.17A-270.
conduct business outside the Commonwealth or who are not otherwise covered [by the Kentucky AWP statute].”

According to the National Conference of State Legislators (NCSL), nearly half of the states have enacted AWP laws, but most of the laws are limited to pharmacies or pharmacists. The Kentucky law may be the broadest AWP law in the nation. The NCSL cites findings from a number of studies concluding that AWP laws may increase health care costs. One study found that AWP laws increase administrative costs by 34% to 52%. Other studies indicated that AWP laws increase HMO health care costs by 5.8% to 18.4% and increase HMO premiums by 9.1% to 28.7%.

Compared to the Kentucky statute, Texas has a narrow AWP statute relating only to pharmacists and pharmacies. The statute prohibits health insurance policies or managed care plans from denying “a pharmacy or pharmacist the right to participate as a contract provider …if the pharmacy or pharmacist agrees to provide pharmaceutical services that meet all terms and requirements” of the policy or managed care plan. The Senate Committee noted that Fifth Circuit held the Texas AWP statute invalid in a 1997 opinion. The Court held that the statute was preempted by ERISA. The Committee Report said that in light of the Miller decision, “the Texas pharmacy AWP statute is, arguably, not preempted by ERISA and is enforceable.”

The Committee Report recommends that the Legislature reconsider the public policy considerations of the Texas AWP statute in light of the Miller decision, but makes no specific recommendation as to whether such public policy considerations support reenactment, repeal, or even enactment of a broader AWP statute.

AWP laws were enacted in response to pressure from both providers and patients. Providers wanted the right to participate in managed care networks, and patients wanted the right to choose their own physician. However, AWP laws may negatively affect some providers and consumers. Providers in exclusive networks discount their rates and agree to comply with other contractual requirements and in return benefit from higher patient volume. AWP laws may therefore diminish the reasons for entering into such discounted arrangements. In addition, the HMOs who sued in Miller believe that AWP laws “will frustrate their efforts at cost and quality control, and will ultimately deny

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7 *Id.* at 1475.
8 *See* NCSL *Any Willing Provider* (Issue Brief Dec. 12, 2002).
9 *See* Tex. Ins. Code Art. 21.52B.
10 *Id.*
11 *Tex. Pharmacy Ass’n v. Prudential Ins. Co. of America*, 105 F.3d 1035 (5th Cir. 1997).
12 *See* Committee Report at 42 citing *Tex. Pharmacy Ass’n*, 105 F.3d. at 1038. The Texas AWP statute also contained a nonseverability clause, so the Fifth Circuit Court held the entire statute invalid. *See* Committee Report at 43 citing *Tex. Pharmacy Ass’n*, 105 F.3d. at 1039.
13 *See* Committee Report at 43. The Committee also believes that the Texas AWP statute satisfies the two Miller tests, i.e., (1) “the state law must be specifically directed toward entities engaged in insurance;” and (2) “the state law must substantially affect the risk pooling arrangement between the insurer and the insured.” *Id.*
14 *See* Miller, 123 S. Ct. at 1474.
15 *Id.*
consumers the benefit of their cost-reducing arrangements with providers.”16 One writer noted that extending the Texas statute to provide coverage of additional health care providers “would certainly provide more choices for patients.”17 However, the Legislature may also be sensitive to the increased costs associated with providing such additional choices.

16 Id.
17 See Sandra K. Foreman, U.S. Supreme Court Upholds Kentucky’s Any Willing Provider Statutes (posted 6-14-03), available at http://www.law.uh.edu/healthlawperspectives/Managed/030614USSupreme.html.