

swinging the pendulum too far, what you are going to require are some investors to actually be defrauded and not gain any recovery before you will straighten out the law. We ought to straighten it out now and not allow that situation to happen. We tried to address the issue of joint and several liability versus proportionate liability. We had this extension of the statute of limitations, and we are doing aiders and abettors today, and tomorrow we are going to do the "pirate's cove."

The Senator from California has, I think, some very worthwhile amendments to offer as well. This is not a balanced bill. That point needs to be made and needs to be made very clear. This is not a balanced bill. There are certain problems we want to get at, and we ought to do that. This bill overreaches. It is unbalanced. I think we will pay a high price for it.

The PRESIDING OFFICER. The Senator from New York has used all of his time.

Mr. BRYAN. Mr. President, I will yield back the remainder of my time. I want to thank my colleague, Senator SARBANES, for making the point that I think needs to be made here, that if the recovery is premised and predicated upon aider and abettor recovery; whether the conduct is intentional, whether it is knowing, or reckless, no recovery. The only way in which you can attach liability is under an aiding and abetting theory. That is the point he has made.

The Senator from Connecticut quite correctly points out that with respect to others that are primary, then the level of misconduct, whether intentional or knowing, creates the joint and several liability situation, and the reckless conduct which the Senator from Maryland and I agree ought to be included as well.

That is when you get the proportionate liability. There is no question about proportion or joint and several. There is no recovery if the cause of action is based upon aiding and abetting. That is the point he has made so clear.

Mr. SARBANES. The Senator put it very clearly. The point we were trying to make, the aiders and abettors walk scot-free as far as private lawsuits are concerned under this legislation.

Mr. BRYAN. This is my understanding.

Mr. SARBANES. We try to attach liability that way.

Under the different theories of liability, there is an argument over recklessness and knowingly and so forth.

The bill never attaches liability to the aider and abettor; is that correct?

Mr. BRYAN. That is my understanding.

Mr. SARBANES. I understand in many suits that an important part of the recovery, on the part of the innocent investor, is from the aiders and the abettors.

Mr. BRYAN. That is my understanding.

Tomorrow, as we complete the debate, I will have additional data to

share with my colleagues. I have never been involved in this area as an attorney representing a class action or defending this, but the issue is quite substantial, and the impact, I think, will astonish some of our colleagues. It is not just an academic discussion among Senators in good faith trying to craft a piece of legislation.

The impact is profound. There must be reasons, when these actions are brought, they are brought under a theory of aiding and abetting. It must be the only way to get into court against some of this misconduct with lawyers, accountants, bankers, and others. We simply wipe them out. "You folks can do whatever you want. You are home free." That is a public policy that, in my view, is indefensible.

Mr. SARBANES. If the Senator will yield for a second, I would like to bring this discussion towards close by saying there is a point where I agree very strongly with the Senator from Connecticut.

At the outset of his statement he gave praise to the very strong statement which the Senator from Nevada had made on this issue. I want to fully associate myself with that judgment. I think he is absolutely right. I urge all my colleagues, and their staffs that are following this issue, to go very carefully through the opening statement which the Senator from Nevada made when he presented his amendment. It was a very powerful statement as to why aiders and abettors ought not to be completely free from liability.

Mr. BRYAN. I notice a number of colleagues are about ready to join the floor with other amendments.

I will simply share one additional statistic in closing and yielding the remainder of my time. Chairman Levitt has stated, of 400 pending SEC cases, 80 to 85 rely on aiding and abetting theories of liability. We are talking about a substantial number.

I yield the floor and yield back the remainder of my time.

Mr. ROCKEFELLER. I ask unanimous consent that the Senator from West Virginia be allowed to speak for 5 minutes as if in morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

MEDICARE SELECT

Mr. ROCKEFELLER. Mr. President, because I know a lost cause when I see one, I concede that the majority leader is succeeding in passing what is known as the Medicare select legislation tonight. The conference report will pass tonight. Nobody else will comment on it, but I will. I just hope I will not be tempted into saying, "I told you so" a year from now if some troubling signs turn out to be an omen of serious problems.

For some reason, many of my colleagues on the other side of the aisle are adamant about rushing to expand a pilot project limited to 15 states into one for all 50 States. The conference re-

port is an agreement to make this extension, but only for 3 years instead of the 5 years that had been passed by the House. I still think 3 years is too long, but I have assurances from the chairman of the Finance Committee that we will have a hearing or hearings, and a good faith process, to consider whether any changes are warranted.

What is Medicare select? Medicare select is a managed care insurance policy that is sold to senior citizens to fill in the gaps of Medicare coverage, of which there are many. It differs from other MediGap policies because it only pays Medicare's cost sharing amounts if the senior citizen receives his or her medical care from an insurer's selected network of health care providers.

What bothers me is the rush to expand this limited program before an evaluation of this demonstration project, done at the direction of Congress is completed and reviewed in oversight hearings. As the proponents of this push to expand the program know, the independent researchers evaluating the pilots will have their analyses completed by mid-August and a draft final report submitted by October.

Leapfrogging over a careful effort to review a demonstration project, in order to decide if and how to expand the approach, is not the way to do business with Medicare and its beneficiaries. I think it is a mistake. I think it is bad precedent. I have to wonder whether it has to do with special interests eager to see this program quickly expanded. I think it is a mistake to ignore emerging signs that this approach to the marketing of medigap policies may be costing Medicare rather than achieving savings. When the majority of this body has just told senior citizens of America they want to cut Medicare by \$270 billion, where is the sense in also extending a program for 3 years that might drain Medicare even more.

Just in recent days, another yellow line started flashing. Based on reports routinely submitted to the Government from the top notch research firms conducting the Medicare select study for HCFA, some startling findings have been reported on how the Medicare select program is operating. They are finding that Medicare select enrollees had significantly higher Medicare costs in comparison to seniors with regular medigap insurance. The Congressional Budget Office agrees that the new study raises serious questions about the operation of the Medicare select program.

On average, Medicare's costs have increased 17½ percent—higher—under Medicare select, which we are expanding to all 50 States. Only one State, Missouri, experienced lower Medicare costs for its Medicare select enrollees. Mr. President, 8 States had higher Medicare costs for its Medicare select. Alabama, 12 percent higher; Arizona, 23 percent; Florida, 8 percent; Indiana, 57 percent higher; almost 6 percent in

Kentucky; 7.5 percent in Minnesota; 12 percent higher in Texas; and 14 percent higher in Wisconsin. And so it goes. Researchers believe the bulk of these cost increases were a result of greater hospital costs.

This information was not available to the Congressional Budget Office when it did its cost estimate of the original Medicare select legislation. At that time, CBO was forced to rely on very preliminary research that was done by these same researchers. The information then was limited to case-study information and did not include actual analyses or a comparison of utilization data.

Mr. President, this is why I remain troubled about this legislation, this conference report, which will be passed tonight and then become the law of the land. Serious questions have been raised about the operation of the Medicare select program, yet a conference report is about to be passed that gives the green light to 3 years of taking this program to every single State.

It is maddening that just when there is all the railing about the Medicare trust fund and its solvency, some of my colleagues are so anxious to expand this program with a disregard for its potential drain on the part A trust fund.

There are all kinds of questions to answer before I would be comfortable expanding or extending this program. That is why Congress for this evaluation. That is why I believe we wait for the final report and take 3 hours out of our day in the Finance Committee to hold a hearing on what was learned. Instead, we are seeing this rush to pass a bill.

The independent researchers have a full year of data from 1994 and are currently in the process of analyzing this data. It will take them about a month to complete their analysis of this insurance data. The data cited previously mostly reflects Medicare's cost experience in 1993. While the researchers have already controlled for many variables, they plan to try to better pinpoint the reason for these very significant Medicare cost increases. This additional information—which will be available in only 1 month—would provide Congress with much better information and will tell us if the Medicare cost increases of Select enrollees are a one-time phenomena or a continuing trend. It would also help us figure out the reasons for the higher Medicare costs of beneficiaries enrolled in Medicare select plans. It would provide us with information which would make sure we didn't enact a major new expansion that primarily benefits insurance companies without making sure the Part A trust fund was not going to be drained of funds.

Are sick seniors merely signing up for Medicare select managed care products in record numbers? This would be an unexpected finding since people with serious health care problems normally avoid managed care plans, if

they can. Or, are sick seniors somehow being steered into Medicare-select plans by insurance companies and away from risk-based HMO's? In addition to analyzing 1994 utilization data, the research team is also completing work on beneficiary survey which will include beneficiaries' own stated reasons for signing up with the Medicare select plan.

Mr. President, it is not often that legislators are able to have research of this caliber available on a Medicare legislative initiative. Yet, we are choosing to ignore the red flag that these research findings have raised.

According to the Congressional Budget Office, the Medicare Program is currently overpaying HMO's by about 5.7 percent per person because of Medicare's payment methodology which does not take into account the tendency of healthier seniors to sign up with HMO plans. This legislation before us today could—because of the special advantages Medicare select insurers have been granted in obtaining discounts from hospitals—have a similar effect. Insurance companies make money while the Medicare Program loses money.

Mr. President, the legislation before us today is preferable to the House bill that was originally brought to the Senate floor. Instead of extending the Medicare select program to 50 States for 5 years, this legislation expands it to 50 States for 3 years. This is still longer than I would have liked. It is longer than the original Senate bill which was the result of a compromise reached between myself and the majority leader, Senator DOLE, and Senators PACKWOOD and CHAFEE. The legislation will also allow the HHS Secretary to discontinue the program if the Secretary determines that the Medicare select programs is resulting in higher premium costs to beneficiaries or in higher program costs to the Medicare Program.

Mr. President, I look forward to an oversight hearing in the Finance Committee on the Medicare select program which—under a prior agreement with Senators DOLE and PACKWOOD—will be held once the final evaluation study has been completed. And I am committed to working with the chairman of the Medicare Subcommittee, Senator DOLE, on any legislative modifications that may be necessary based on the committee's oversight hearing, the RTI study, or from the results of a GAO study—that was added to the Senate bill and retained in the conference agreement—that requires a study of the medical underwriting practices of Medigap insurance policies. Again, I hope I will never have to say "I told you so" on behalf of the Medicare Program and the senior citizens who count on us to look before we act.

Mr. President, I yield the floor.

MEDICARE SELECT POLICIES ACT—CONFERENCE REPORT

Mr. CHAFEE. Mr. President, I submit a report of the committee of conference on H.R. 483 and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated.

The assistant legislative clerk read as follows:

The committee on conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill H.R. 483, a bill to amend title XVIII of the Social Security Act to permit Medicare select policies to be offered in all States, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of June 22, 1995.)

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. CHAFEE. Mr. President, I ask unanimous consent the conference report be considered and adopted, the motion to reconsider be laid upon the table, and a statement by Senator PACKWOOD be included in the RECORD at the appropriate place.

The PRESIDING OFFICER. Without objection, it is so ordered.

The conference report was agreed to.

Mr. PACKWOOD. Mr. President, I am very pleased with the conference agreement on Medicare select. The agreement is very close to the bill passed by the Senate. The only major change is extending the program 3 years instead of 18 months. This is reasonable extension. It gives States sufficient time to take the necessary legislative or administrative actions to allow Medicare select policies to be sold in their states. It also allows insurers sufficient time to develop products, bring them to market, and accumulate enough experience for a meaningful evaluation of Medicare select policies.

This legislation will allow people in all the States to have access to very popular, lower cost type of Medicare supplemental insurance. Remember, Medicare supplemental insurance is private insurance that people buy with their own money to cover medical expenses not paid for by Medicare. There is no Federal money involved.

Some concerns have been raised about Medicare select. Since Medicare select is a new type of supplemental insurance and the full implications of Medicare select for the Medicare Program are not known, this legislation contains a safety valve. The Secretary of Health and Human Services is to study Medicare select. If the Secretary finds that Medicare select is saving seniors money on supplemental insurance, is not adding additional costs to the Medicare Program, and has not negatively affected quality or access to