

Mr. SMITH of New Hampshire. I too would like to thank Senator FRIST, Senator KENNEDY and Senator GREGG for agreeing to work with us to ensure these two proposals are included in the bioterrorism proposal. I regret that with the end of session quickly approaching, there is not time to incorporate these provisions into the underlying bill. As we all recognized in our support for these proposals, since the September 11th attacks, Americans throughout the country have become concerned about the security of our nation's water supply. While it is widely believed that our water supply is safe, there are a few vulnerabilities that must be addressed. Our bills would provide resources for research into security at facilities and assessment tools while also providing seed money to encourage additional spending on security measures.

Mr. JEFFORDS. Our colleagues on the House side also recognized this need by including water security provisions in the bioterrorism bill, H.R. 3448, that was passed by the House on December 12th. I would like my colleagues' assurance that during conference they will press for adoption of the modified versions of S. 1593 and S. 1608.

Mr. KENNEDY. I intend to press for adoption of these provisions. The security of our nation's water supply is crucial to the health and well-being of our citizens.

Mr. GREGG. I concur, and I intend to press for adoption of these provisions.

Mr. FRIST. I agree and you have my commitment to do the same.

Mr. SMITH of New Hampshire. I again would like to thank my colleagues for agreeing to fight for these provisions during conference. It was with great reluctance that Senator JEFFORDS and I agreed to allow S. 1765 to be brought to the floor without our legislation included so that we can move forward on this important bill and conference it with the House. However, it is important that these immediate needs be addressed and that our proposals be included in the final legislation. I look forward to working with my colleagues to ensure that the provisions we agreed to that comprise the modified versions of S. 1593 and S. 1608 are included in the bioterrorism bill.

Mr. JEFFORDS. Finally, I want to commend Senators KENNEDY, FRIST, and GREGG and say that I am looking forward to working with them during the conference on these measures.

AMENDMENT NO. 2692

Mr. REID. Mr. President, I understand Senators FRIST, KENNEDY, and GREGG have a substitute amendment at the desk which is the text of S. 1765. I ask unanimous consent that the amendment be considered and agreed to and the motion to reconsider be laid upon the table; that the bill, as amended, be read a third time and passed, the motion to reconsider be laid upon the table; that the Senate insist on its

amendment, request a conference with the House on the disagreeing votes of the two Houses, and that the Chair be authorized to appoint conferees on the part of the Senate, without intervening action or debate.

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

The amendment (No. 2692) was agreed to.

(The text of the amendment is printed in today's RECORD under "Amendments Submitted and Proposed.")

Mr. LOTT. Mr. President, I thank Senator REID for moving this very important Bioterrorism Preparedness Act forward. I commend Senators FRIST, KENNEDY, and GREGG for their work. We intend to work with the House and get this passed quickly when we return. I thank Senator REID.

Mr. REID. I appreciate everyone's cooperation.

The Presiding Officer (Mr. CORZINE) appointed Mr. KENNEDY, Mr. DODD, Mr. HARKIN, Ms. MIKULSKI, Mr. JEFFORDS, Mr. GREGG, Mr. FRIST, Mr. ENZI, and Mr. HUTCHINSON conferees on the part of the Senate.

MORNING BUSINESS

Mr. REID. Mr. President, I ask unanimous consent that the Senate now proceed to a period for morning business, with Senators allowed to speak for up to 10 minutes each.

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

TERRORISM INSURANCE

Mr. DASCHLE. Mr. President, it was regrettable today that we were unable to gain unanimous consent to take up H.R. 3210, the House terrorism insurance bill, and amend it with a substitute offered by the Senator from Connecticut, Mr. DODD. We made a good-faith effort to address a pressing need, but we found that some of our colleagues insisted on the consideration of amendments that would make it impossible to complete work on this issue in the short time this session of Congress had remaining.

In the wake of September 11th, a number of insurance companies are declining to provide coverage from losses that would result from a terrorist attack. Those policies that are available are often priced so high that they are unaffordable. Senator DODD's proposal would have given them the safety net they need to keep insuring against terrorist risks. In turn, that coverage would allow builders to keep building, businesses to keep growing, and, hopefully, prevent against further economic setbacks.

Our amendment was the product of extensive bipartisan negotiations. It was developed with extensive consultation with a number of Senate Democrats and Republicans—including Senator GRAMM—as well as the White House and the Treasury Department. I am especially appreciative of the enor-

mous commitment of time and energy by the Senator from Connecticut, Mr. DODD, the Chairman of the Banking Committee, Mr. SARBANES, the Chairman of the Commerce Committee, Mr. HOLLINGS, the senior Senator from New York, Mr. SCHUMER, the junior Senator from New Jersey, Mr. CORZINE, and many others from both sides of the aisle.

While we were unable to reach agreement on every point, the proposal incorporated line-by-line suggestions by our colleagues from both sides of the aisle and the Administration. It represented a compromise.

It requires substantial payments by insurance companies before the federal government provides a backstop. The proposal would require the insurance industry to retain the responsibility to pay for up to \$10 billion in losses in the first year, and up to \$15 billion in losses in the second year or around 7 percent and 10 percent of their annual premiums for each affected company. This legislation would ensure stability in the insurance market so that businesses can afford to purchase insurance.

As this session of Congress drew to a close, and we were forced to operate in an environment that required unanimous consent agreements to do our business, I regret that we were unable to complete our work on this legislation.

Accordingly, the Senate will keep a watchful eye on the insurance market in the coming weeks, and we will take the appropriate action to respond to any problems that arise from the failure to gain approval for the measure we sought to pass today.

Mr. DODD. Mr. President, 3 months ago, our nation suffered devastating terrorist attacks. We are now confronted with one of the many aftereffects of the terrible events of September 11th on our nation. We are faced with the prospect that insurance protecting America's buildings, businesses, homes and workers from terrorist acts will no longer be available.

It is generally accepted that roughly 70 percent of insurance contracts are scheduled to be renewed by year's end. Already, many insurers have announced their intention to withdraw terrorism coverage from new insurance policies.

This is simply because primary insurers, who deal directly with policyholders, have been unable to, in the short term, purchase reinsurance from an unstable reinsurance market. Reinsurers are currently unwilling to write coverage in the face of future catastrophic losses equal in magnitude to those suffered at the World Trade Center.

Without the ability to purchase reinsurance, primary insurers cannot actuarially price policies that incorporate the assumption of catastrophic terrorist losses.

They are faced with two choices. They can seek permission from state

regulators to exclude terrorist acts from all of their policies. Or they can charge incredibly high premiums—rates are nearly certain to go up 500 to 1000 percent of what is presently required. No shareholder could be reasonably expected to allow their insurance company to underwrite the seemingly immeasurable exposure of a terrorist act without drastically raising rates.

Without federal action, we risk either the possibility that our Nation's economy will remain defenseless from a terrorist attack or the possibility that insurance companies will charge unaffordable rates to every American insurance consumer.

Several of us endeavored to draft legislation to provide a short-term remedy aimed to bring stability to the insurance market, to protect taxpayers, and to ensure that bank lending, construction, and other activities vital to our economic health would not be jeopardized.

It is deeply regrettable that this legislation will not be considered by the Senate prior to the end of this session. It is particularly regrettable because the reason that this legislation was not considered had nothing to do with the core issue of terrorism insurance; it had to do with liability reform. Deep-seated differences on the issue created an impasse. That is most unfortunate.

The legislation that Senator SARBANES, Senator SCHUMER and I offered was a modest proposal. It is based on three principles that must be included in any bill on this subject matter.

First, it makes the American taxpayer the insurer of last resort. The insurance industry maintains front-line responsibility to do what it does best: calculate risk, assess premiums, and pay claims to policyholders.

Second, it promotes competition in the current insurance marketplace. Competition is the best way to ensure that the private market assumes the entire responsibility for insuring against the risk of terrorism, without any direct government role, as soon as possible. This bill is a temporary measure only, lasting for 24 months at most.

Third, it ensures that all consumers and businesses can continue to purchase affordable coverage for terrorist acts. Without action, consumers may be unable to get insurance or the insurance available will be unaffordable.

I intend to watch the markets and the economy closely in the coming days and I am prepared to revisit this issue early next year if the need arises.

Mr. LIEBERMAN. Mr. President, I have one simple message regarding the terror insurance legislation. We need to act now, before we adjourn, and we need to get this right. I fear that if we don't act, or don't get this right, we will need to return early in January to address this problem. Unfortunately, it is now obvious that we won't enact this critical legislation. This is irresponsible.

Let me say clearly, my colleague from Connecticut, Senator DODD,

should be commended for his valiant effort to secure an agreement. It is not his fault that this did not get done. He has had his eyes focused clearly on the goal line every day on this bill. He has been practical, energetic, tough, and patient. We are not able to act before we leave, but I want to congratulate Senator DODD for his valiant effort.

Let me explain why this issue is so important.

As part of their property and casualty insurance, many businesses have insurance against the costs that arise if their business is interrupted.

If we don't pass an effective terrorism insurance bill, the government will, in effect, cause massive interruption in the business community. We will create the interruption.

We could have avoided this result by passing this legislation.

Property and casualty insurance is not optional for most businesses.

Not every business owner buys life insurance, but nearly every business buys property and casualty insurance, to protect its property, to protect it against being sued, and to protect its employees under the state workers compensation laws.

Property and casualty insurance is required by investors and shareholders.

It is required by banks that lend for construction and other projects. We all know that home mortgage companies require the homeowners to maintain homeowners property insurance, and it's the same with business lending.

Maintaining property and casualty insurance is mandated as part of the fiduciary obligation to the business.

And if property and casualty insurance for major causes of loss is not available, businesses face a difficult choice about going forward with construction projects, and other ventures.

If no insurance is available, banks won't lend and the business activity that is depending on the loans will stop.

The impact on the real estate, energy, construction, and transportation sectors will be severe.

Insurance companies must be able to "underwrite" their policies. This means that they need to be able to assess their exposure or risk of a claim. They need to know if their exposure to claims is acceptable, excessive, or indeterminate.

In the case of claims for damages caused by terrorist strikes, there is no way to assess their risk and no way to underwrite the policy. There are too many uncertainties.

There is only one experience and the experience could not be more troubling.

One thing that is certain, as it was not before September 11, is that losses from terrorist acts can cost tens of billions of dollars. In fact, under worst-case scenarios, losses could easily reach hundreds of billions of dollars.

I recently introduced legislation focusing on the need to develop medicines to treat the victims of a bioterror

attack. The Dark Winter exercise simulated a smallpox bioterror attack and it found that 15,000 Americans could die and 80 million could die worldwide. This is why it is so important to develop medicines we can use to contain the infections and deaths. My point here is that we could well have claims much larger than we had with the World Trade Center attack.

There are hundreds of insurers in any given market. It is a highly competitive industry.

But when reinsurers are not renewing their contracts without terrorism exclusions, many if not most of these companies will not be able to provide terrorism coverage—at any cost.

At the business decision level, each individual insurance company considering whether to issue policies that cover terrorism must assess the costs that might result if the terrorists succeeded in massive and horrific attacks, perhaps in many areas at which the insurance company may insure various businesses.

Because no one knows where the terrorists might strike, insurers must ask questions like:

How much insured property value are we covering in a given location?

How many workers are we covering under workers' compensation laws, keeping in mind that workers' compensation death claims vary by state but are as high as \$1 to 2 million dollars per claim in some jurisdictions, including here in the District.

What would we lose on business interruption claims if damage in a metropolitan area causes a large number of businesses to be shut down by the civil authorities?

What about multiple attacks in different locations?—keeping in mind the coordinated events on September 11.

Unfortunately, at the individual insurer level, capital is finite, and the companies that insure commercial businesses have already taken a major hit due to the September 11 losses, as well as having lost their reinsurance for terrorist acts.

Even a hypothetical good-sized company, one that would be in the top half dozen or so commercial insurers in the U.S., with perhaps 5 percent of the commercial lines market and capital of \$7 or \$8 billion, would have to ask, do we want to roll the dice on our very survival by writing terrorism coverage?

Because that is what they would be doing absent this legislation, particularly if they incurred a disproportionate share of the losses.

For example, if one or more events caused even \$100 billion in insured losses, not that much more than the WTC, and they were lucky enough to have only 3-5 percent of the losses, they'd be severely crippled but might survive. But if their share of the losses was 8-9 percent, they'd be out of business.

That is not a risk that an insurance company can reasonably take. If we do

not pass this legislation, therefore, insurers will be forced to take whatever steps they consider necessary to ensure they do not drive themselves into bankruptcy.

Make no mistake about it. The insurance industry can protect itself by reducing its exposure to terrorism going forward.

There is nothing we can do in the Congress, within the limits of our Constitution, to require insurance companies to write policies.

They don't have to write policies.

If they don't write policies, the companies may not be as profitable in the short run, but they will at least be protecting themselves against insolvency, as any business has to do.

State regulators are already considering terrorism exclusions, as they must do, consistent with their responsibilities to oversee the solvency of the insurance industry.

And absent exclusions, in states where they might not be approved for one reason or another, the insurers will have no choice but to limit their business.

If insurance companies are permitted to write policies with no coverage for claims connected to terrorism, then businesses will have to decide if they will self-insure against these losses. Many of them will conclude that they cannot accept this exposure.

It is clear, therefore, that when we fail to pass this legislation, it will be both the insurance industry and everyone they insure that loses. Insurance companies can protect themselves by not writing policies, or writing only policies without any coverage for acts of terror. But companies that need insurance coverage may have even harsher options.

What will be the effect on individual businesses and ultimately the economic recovery if we do not pass this legislation?

At the individual company level, if a business in what appears to be a potential target area can only buy insurance with a terrorism exclusion, the owners would have to consider whether they want to commit new capital or even sell their current equity interests.

Banks would have to ask whether they could make new loans or perhaps even default existing loans and mortgages, based on their determinations that insurance without coverage for terrorism was unsatisfactory.

If insurers could not exclude terrorism and were forced to reduce their writing generally, the problem could be even worse, at least in whatever areas or for whatever types of business were considered most at risk.

Companies would find that they could not get coverage for their properties or their liability exposure or their workers' compensation liabilities, because insurers were no longer able to provide it.

This is why the real estate industry and a cross section of the business community have been pushing for this legislation.

So, the issue is how we enable insurance companies to determine that the risk of terrorist claims is a risk that they can assume.

That is what this legislation is all about, defining the risk so that insurers can assess and put a price on it.

This legislation is about facilitating insurance companies' ability to continue to write property and casualty insurance policies.

It is about providing business owners with the opportunity to buy insurance against terror claims and doing so in the private market to the extent that is possible.

This is, of course, not the first time we have faced this kind of an issue. The Federal Government has a history of partnering with the insurance industry to provide coverages for risks that are too big, too uninsurable, for the industry alone.

Current examples are the flood, crop, and nuclear liability programs, and in the past we've seen partnerships on vaccine liability and riot reinsurance. From an insurability standpoint, it is beyond dispute that these risks are far more insurable than terrorism, yet we continue to struggle on this bill.

First, the existing programs cover fortuitous or accidental events, unlike terrorism, in which the risk is man-made, with the perpetrators measuring success by how much damage they can cause and how many people they can kill. Second, the dollar exposures are far less under the existing programs. Average annual losses on these programs, flood, crop, and nuclear liability, are probably only about \$5 billion combined, a full order of magnitude lower than the losses on September 11 alone.

Some might debate whether we should have passed the existing programs, or whether they are operated efficiently. But there should be no debate about the need for a terrorism program, and we have structured this one the right way, with retentions and loss sharing by the industry so the incentives are there for efficient operations.

This legislative effort has failed in part because there are some who would use this legislation as an opportunity to enact wide-ranging reform of the tort claims system. While I have supported tort reform in the past, it is clear that these reforms are not possible now. If these reforms are attached to the bill, as was the case in the House-passed bill and as proposed in the Senate, the bill will die. This is what has happened.

This legislative effort has failed in part because there are some who would use this legislation as an excuse to enact a wide-ranging and unprecedented venture in Federal regulation of the insurance industry. Some would, for example, seek to impose Federal Government price controls on the property and casualty insurance policies.

If such controls are added to this bill, it is clear that the bill will die. Price

controls are obviously unacceptable to many in the Senate and clearly unacceptable to the other body.

A vote for price controls is a vote to collapse the property and casualty insurance market.

Price controls in this sector would distort markets, create incentives to vacate the marketplace, and stifle competition.

We do know that the cost of property and casualty insurance will rise.

The current rates do not contemplate claims for acts of terror. Like it or not, there will have to be price increases to cover the risk of terrorism. The World Trade Center attack was the biggest manmade casualty loss in history. It was the biggest by a multiple of 40 or 50.

The previous biggest manmade loss was the LA riots, which cost less than a billion dollars. The current estimates are that WTC will cost \$40 to \$50 billion or more.

The WTC losses exceeded the insurance industry's total losses for commercial property & liability coverage, general liability, and workers' compensation combined for the entire 2000 year.

Insurance companies cannot now cover this loss, and restore reserves, without price increases.

Insurance industry is one of the most competitive industries in the U.S.

If rates are rising too high, companies will be falling all over themselves to enter or re-enter the market.

But so far, all signs point in the opposite direction, with insurers and reinsurers running as fast as they can from this—hardly an indication that they're gouging and planning on realizing egregious profits.

There's a state regulatory system in place that can clamp down on rates if insurers overreach—and the bill leaves the state regulators with the full authority to disapprove rates that are excessive.

I can't think of a better way to do the opposite of what we want to do, to prevent the return of a terrorism insurance marketplace, than to impose price controls.

It is clear that the price of terror insurance will be less because of the Federal guarantee. If insurance companies were forced to write terror insurance without this guarantee, they would have to set a worst-case-scenario price. They would have to protect the company from insolvency. It is clear that these rates would make the insurance unaffordable.

Again, however, the problem is that companies would not be able to set a price because of the indeterminate nature of the risk.

This legislative effort has failed in part because there are some who would use this legislation as an opportunity to require the insurance companies to repay the government for its expenditures. This is the case in the House-passed bill.

While requiring payment is intuitively attractive, the financial assistance and payback mechanism in their

bill would discourage the return of a healthy private marketplace.

One of our most important objectives is to encourage the return to the marketplace of insurers and reinsurers. The problem with the House bill's financial assistance and payback approach is that it mutualizes the losses within the program itself, reducing incentives for private innovation in the development of pooling and reinsurance mechanisms. If we're going to sunset this program, we can't provide for mutualization of losses throughout its duration and then expect that there will be a healthy reinsurance market to the day after it terminates.

Even if we did not adopt the other body's first dollar mutualization concept, our objective of building a healthy marketplace, real work practicality considerations, and public policy all argue for not requiring industry payback.

First, a payback requirement would be contrary to our objective of developing a healthy marketplace. A payback requirement would, from day one, raise the specter that in the event of substantial terrorism losses, insurers would not only have to pay their share of the losses but would also have to go to their regulators for substantial rate increases to repay the government—with no guarantees that such rate increases would be allowed. That is not the way to facilitate a healthy marketplace.

Second, from a practical standpoint, let's also recognize that under our bill any government payments would not really go to insurers, that any repayments would not really come from insurers, and that it is the public in either event that will bear the cost of this program.

The government payments are all keyed to amounts paid to claimants, and any repayments would or at least should be funded by policyholders, either indirectly through subsequent rate increases or directly through policyholder surcharges.

Therefore, as long as an insurer's rates for terrorism coverage are based only on its deductible and quota share, government payments would not give a windfall to the insurers. That is of course how rates should be determined, since the state insurance commissioners will have the authority to disapprove excessive or unfairly discriminatory rates.

It is of course the public that will also bear the cost of this program whether or not we require insurers to pay back the government. The costs of any such repayments would ultimately be paid by commercial businesses, which would in turn pass the costs back to the customers, employees, and shareholders, which is to say back to the public.

Finally, from a public policy standpoint, I would refer you to the very simple fact that it is losses caused by terrorist attacks on our country that we are talking about here. It is the re-

sponsibility of the government to protect the people against attacks from without and within, and to the extent that terrorists succeed in causing losses that exceed our bill's insurance industry retentions, it is because the government has failed in this most fundamental responsibility. Of all the various programs through which the government and the insurance partner together to provide coverage for risks thought to be uninsurable, this one stands out as presenting the best case for a taxpayer role.

In terms of price, we know that every cent of any funds the Federal government contributes to pay claims will go to the insured, not to the insurance companies.

There is no Federal payment to any insurance company that does not go through to the victims.

This makes it very hard to understand the arguments some have made in the other body about the insurance companies repaying the amounts that the Federal government might contribute.

If the government contributions are passed through to the victims, what is the benefit to the insurance companies that needs to be paid?

Do the companies then increase their rates to cover the cost of the repayment?

If repayment is required, it would have to come, directly or indirectly, from the victims, not the insurance companies.

There are some who would seek to add provisions to the legislation focused on "cherry-picking," that is seeking to reduce the risk of the portfolio of clients and load it with lower risk clients.

Insurance, like other financial services, is a very competitive business—and there are a variety of opportunities for large and small businesses to get coverage, with hundreds of insurers operating in any given market.

For the largest businesses, which are probably most at risk due to the staggering workers' compensation exposures they present, in addition to traditional insurers, there are sophisticated offshore, excess and non-admitted markets they can tap into, as well as other risk-spreading devices.

For the smaller companies, if coverage isn't available from standard private market insurers, most states have legislatively mandated market plans to provide workers' compensation and property insurance.

The insurance industry also has a long history of working together to form pools and reinsurance arrangements so risks that are too difficult for one company can be handled as they've done for aircraft, including those that were hijacked on September 11.

They can do this if we pass this bill to provide them the financial backstop they need.

The fact is that we do not have the expertise to step into this complex arena and set the controls to determine

how coverage should be provided and to whom.

Since insurance regulation began, it's been the states that have done the job, and until such time as we're ready to change that and enact a federal regulatory scheme, we should be very careful about our involvement.

At the state level, insurance departments in each state are much closer to their markets, and they have the expertise and the leverage to assess the availability of insurance and to take appropriate steps if there are problems.

I am very disappointed in the failure to enact this legislation. I have supported my Connecticut colleague, Senator DODD, and will continue to work with him to enact this legislation as soon as possible in January. That we have failed to act in this session and may well see unfortunate consequences.

NEXTWAVE SETTLEMENT

Mr. HATCH. Mr. President, I rise to address the issue of wireless spectrum and the importance of its availability and utilization in a struggling economy. On November 28, 2001, the Administration forwarded proposed legislation to Congress to codify a proposed settlement in the NextWave wireless spectrum bankruptcy litigation. We needed to pass this legislation before December 31st in order to avoid nullifying the agreement. Unfortunately, it appears we will not be able to address this settlement before the end of the year because members of this body have expressed their intention to block its consideration on the floor. It is not certain that a similar settlement can be arranged next year—which leaves a significant financial return to the U.S. Treasury in doubt and denies viable industry actors access to essential wireless spectrum which could be a vital tool in jumpstarting the economy.

This is not the first time I have voiced my concerns about the NextWave spectrum controversy. In a letter to then Chairman Kennard of the Federal Communications Commission in October of 2000, I warned him that a premature re-auction of the NextWave licenses would be imprudent while litigation was still pending in the D.C. Circuit. The legal questions went directly to the possessory interests of the spectrum and the validity of the FCC's action to automatically cancel NextWave's licenses upon filing for bankruptcy. The FCC ignored my warning and, in so doing, created untold practical problems and a myriad of legal liability issues.

On June 22 of this year, the D.C. Circuit ruled in favor of NextWave, holding that the FCC violated Section 525 of the Bankruptcy Code. This order essentially nullified Auction 35 in which the FCC preemptively re-auctioned the spectrum licensed to NextWave. Presently, both sides have filed for certiorari with the Supreme Court to ask for