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Senate

The Senate met at 2 p.m. and was called to order by the Honorable JOHN W. WARNER, a Senator from the State of Virginia.

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Gracious God, without whom we can do nothing of lasting value, but with whom there is no limit to what we can accomplish, we ask You to infuse us with fresh strength and determination as we press forward to the goal of finishing the work which needs to be done before the upcoming recess. Help the Senators to do all they can, in every way they can, and as best they can to finish well. Inspire us to follow the cadence of Your drumbeat.

Strengthen the Senators in the week ahead. Replace any weariness with the second wind of Your Spirit. Rejuvenate those whose vision is blurred by stress, and deliver those who may be discouraged. In the quiet of this moment, we return to You, recommit our lives to You, and receive Your revitalizing energy.

Dear Father, we thank You for the life of Oliver Powers of the Recording Studio. We pray for his family as they and we grieve his physical death. We accept the psalmist's reorienting admonition, "Wait on the Lord; be of good courage, and He shall strengthen your heart; wait, I say, on the Lord!"—Psalm 27:14. In the name of our Lord and Saviour. Amen.

PLEDGE OF ALLEGIANCE

The Honorable JOHN W. WARNER led the Pledge of Allegiance, as follows:

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. BYRD).

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, June 25, 2001.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JOHN W. WARNER, a Senator from the State of Virginia, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mr. WARNER thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Chair recognizes the distinguished assistant majority leader.

SCHEDULE

Mr. REID. On behalf of Senator DASCHLE, I announce to the Senate that we are going to resume consideration of the Patients' Bill of Rights. We were on it all last week. There will be no rollcall votes today. We have rollcall votes scheduled tomorrow at 11:30 a.m. in relation to the Grassley motion to commit and the Gramm amendment regarding employers. We are still scheduled to finish this bill by the end of this week.

Senator DASCHLE has also indicated he wants to give every consideration to the supplemental appropriations bill. The way Senator STEVENS and Senator BYRD have been working, it should not take too long to do that. We have pending the organizational resolution.

The main item we wish to complete this week, however, is the legislative

matter we are now considering, the Patients' Bill of Rights. The prayer given by our fine Chaplain indicated we should all join together and complete the work that is at hand. The work at hand is the Patients' Bill of Rights.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

BIPARTISAN PATIENT PROTECTION ACT

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now resume consideration of S. 1052, which the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 1052) to amend the Public Health Service Act and the Employee Retirement Income Security Act of 1974 to protect consumers in managed care plans, and other health coverage.

Pending:

Frist (for Grassley) motion to commit to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions with instructions to report back not later than that date that is 14 days after the date on which this motion is adopted.

Gramm amendment No. 810, to exempt employers from certain causes of action.

The ACTING PRESIDENT pro tempore. The Senator from North Carolina.

Mr. EDWARDS. Mr. President, we come back today to resume debate on a very important bill to the people of this country, the Bipartisan Patient Protection Act, which we spent the better part of last week debating. It is an issue about which we have talked a great deal over the course of the last few years in the Senate. Let me discuss what the McCain-Edwards-Kennedy bill does and the reason it is important.

Fundamentally, the reason we need this bill is that the law needs to be taken from being on the side of the

• This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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HMOs and put on the side of patients and doctors so health care decisions in this country are, in fact, being made by people who are trained and have the experience to make them, those being the doctors, the health care providers, for the families who are so dramatically affected by those decisions.

The purpose of this legislation is to provide certain substantive and enforceable rights to families and to children who need quality health care. For example, we provide specifically that if a member of a family or child needs to see a specialist, particularly outside the HMO plan, they can have access to that specialist.

Second, we ensure that patients who need access to clinical trials will have access to those clinical trials. Clinical trials are often the places of last resort, places where the cutting edge of medicine is being researched, and we want to be sure patients who have exhausted alternatives and need access to clinical trials—all federally approved clinical trials, including FDA clinical trials—will have access. We specifically provide that benefit in this bill.

Third, women should have access to an OB/GYN as their primary care provider. Many women rely on OB/GYNs as their primary care providers. We provide that right in our legislation.

Fourth, we want to make sure patients have access to emergency room care. If a family suffers an emergency crisis and needs to go directly to the hospital, the nearest hospital, we don't want people to first have to call the HMO, call the 1-800 number and get permission to go to the nearest emergency room. There have been many horror stories of families that could not go to the nearest emergency room because they couldn't afford it and the HMO would not pay for it. We want to be sure families have that right.

With this group of rights we wish to provide for patients and families across the country, we want to make sure every individual and family who is covered by health insurance, covered by HMO coverage, is in fact covered by this legislation. Our bill does that.

These rights do not mean anything unless they are enforceable, unless they have the force of law behind them. Without the force of law behind them, they are not a Patients' Bill of Rights; they are a patients' bill of suggestions. We want to provide a meaningful way for patients to receive the rights we are giving.

We provide several stages. If the HMO overrules the doctor and says, whatever your doctor says, I don't believe that treatment, that care, is needed, the first step is that the patient can then go through an internal review within the HMO to try to get that decision reversed, hopefully finding a group of people within the HMO who are willing to be more objective and support the decision the doctor has provided. If that is unsuccessful, the second stage is an independent review process, a panel of physicians with ex-

pertise who can look at the medical situation and decide whether or not that care should have been provided in the first instance. Last, if the patient has been injured and if these other areas have been tried, including the appeals process, the patient can take the HMO to court.

There are several stages: First, the HMO hopefully will make the right decision, in which case none of this will be necessary; second, if they don't, an internal review within the HMO to reverse the decision that has already been made; third, if that is unsuccessful, to go to an independent group of doctors who can reverse the decision of the HMO. That is independent, meaning not connected to the patient, not connected to the treating doctor, not connected to the HMO. So you have an impartial group that can reverse the decision. All of that occurs before a case goes to court.

If in fact it becomes necessary for the case to go to court, we simply want the HMOs—that for many years now have been privileged citizens that, like diplomats, get a kind of immunity in this country—we want the HMOs treated just as everybody else.

If they are going to reverse or overrule decisions that are being made by doctors, we want them to be treated exactly the way the doctors are treated; that is, if they make a medical judgment, reverse the decision of a doctor, their case will go to the same court as the doctor's case. Their case would be subject to the same State court limitations on recoveries as is the doctor's. So we leave that issue to State law.

But the bottom line principle is, No. 1, HMOs should not continue to be privileged citizens. They ought to be treated as all the rest of us. There is no reason in the world that they are entitled to be treated better than everybody else.

No. 2, if they are going to be in the business of reversing doctors, overruling doctors, making health care decisions, then they ought to be treated exactly the same way the doctors are treated.

Our legislation providing real and meaningful rights, providing a way to enforce those rights, and as a matter of last resort providing for patients to go to court if in fact they have been hurt and they have no other choice, is supported, we believe, by a majority of this body, we believe a majority of the House of Representatives, and importantly, by the American Medical Association, and virtually every health care group in America.

There is a reason for that. It is because the people who have been fighting for patient protection, the people who have been fighting for HMO reform to change this system we have in this country and to give patients more power to put the law on their side, are supporting our bill because we have real rights that are enforceable. It is a bill where the patient, along with the

patient's doctor, gets to make most health care decisions. They have more control over their health care decisions. If the HMO does not do the right thing in the beginning, they have a way to do something about it to get those decisions overruled or changed.

There has been some discussion over the course of the last 2 days on the pending amendment, the issue of employer liability. We start, I think, in principle, in agreement with the President of the United States. The President said in his written principles that he did not want employers to be held responsible in litigation—I am paraphrasing now—unless they actually made individual health care decisions. That is what our bill does.

The reason for that is very simple. No. 1, we want to protect employers. In principle, we agree about that. No. 2, if an employer, in fact, overrules an HMO and stands in its shoes, or overrules a doctor, then and only then under our bill can they be held responsible, or if they overrule the HMO with respect to how the plan applies. Basically, what we have done is we have put a wall around employers unless they step into the shoes of HMOs and start making health care decisions.

Issues have been raised. They have been raised in this debate by Senator GRAMM with his amendment. Issues have been raised by employers around the country with whom we have been talking and with whom we will continue to talk. As a result of those discussions, consistent with the principle that both the President of the United States and we have established, we have worked and we have had meetings, I will tell my colleagues, over the last few days. On Friday, for example, I met with a number of Senators from both sides of the aisle, Democrat and Republican, to try to address the language, to try to craft language that will deal with concerns that people have about this issue—a bipartisan compromise on this issue. We are continuing to work on that compromise. There are a number of Senators involved. We will continue to work on it.

But the amendment that is pending is at the extreme. It is inconsistent with the principles established by the President of the United States; it is inconsistent with our legislation, which is supported by virtually every health care group and consumer group in America. It is more extreme than the Norwood-Dingell bill that passed the House of Representatives last year. It is out there at an extreme.

We believe there is a better, more reasonable middle-of-the-road approach that will provide maximum protection to employers and at the same time not completely eliminate patients' rights. That is what we are working on. We are working on crafting language.

This is one of the issues on which we agree in principle with the President; that is, we start with the idea we would like to see employers protected unless they are overruling doctors and making individual health care decisions. Of

course, the vast majority of employers in this country never do that. They turn over the handling of the day-to-day operation of their health care plan to the people they are paying and leave it in their hands. When they do that, they will not be exposed to responsibility.

The bottom line is, what we have done in our legislation is consistent with what the President's principle provides. Even with that, since additional concerns have been raised about employers, since it is an issue about which we agree as a matter of principle, we are continuing to work with both Republican and Democratic Senators to craft a compromise which we hope a vast majority of the Members of this Senate will be able to support when we propose it.

That issue, the issue of employer liability, as I indicated, is an issue on which I think we have substantial agreement. It is an issue I think we can resolve to the satisfaction of a majority of the Senate. We believe our bill as presently constructed does that. But in the spirit of trying to have strong bipartisan support for this bill, we have continued to work on it, and we will continue to do so.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Chair recognizes the distinguished Senator from New Hampshire.

Mr. GREGG. Mr. President, the Senator from North Carolina has outlined and characterized the situation. I would like to speak to some of the points he made and then specifically speak to a variety of issues.

To begin with, much of what the Senator said we agree with, I agree with, and I think everybody agrees. There is no issue over access to emergency rooms. There is no issue over access to OB/GYNs. All those issues have been agreed to. They were agreed to last year. They were agreed to this year.

There is no issue about the need to make sure that when someone is injured by their HMO or their provider or their insurer, they have recourse. There is no issue about that. Everybody is in agreement.

The issues come down in the classic way, in the classic line, to "The devil is in the details." The bill as brought forth by Senator McCAIN, Senator EDWARDS, and Senator KENNEDY is essentially a "let's go to court" bill. It is not a Patients' Bill of Rights bill. I have referred to it as a "lawyers who want to be millionaires bill," and I have referred to it in other terms, but essentially it is a lawyers' rights bill. It creates an incredible number of new opportunities to bring lawsuits.

We just happened to go through and outline some of these and this chart shows them. First, you can sue your employer. Under this proposal as it is structured. That should not be our goal. Our goal should not be to create lawsuits against the employers in the country. I noticed my colleague always used the term "health maintenance"

organization, HMO. It is a pejorative—or it has become pejorative. I never heard him use the word "employer." Yet for the 56 million people who are covered by self-insured plans—plans where the employer is the one who gets sued—the fact is, you can sue the employer. What is the practical effect of that? We know the practical effect is a lot of employers are going to drop their insurance so the people who have insurance today will not have it tomorrow if this bill is passed because the employers are going to say: Hey, I am not in the business of being sued for health care problems. If a doctor makes a mistake, I don't want to be sued. If I make a product and make a mistake, I understand I will be sued, but I don't want to be sued if a doctor or nurse or pharmacist or hospital makes a mistake. I don't want to be put out of business for that.

We are talking about mom-and-pop employers. We are talking about employers who have 10, 15, 20 employees.

The average cost of a malpractice suit is \$77,000. So you have a situation where their whole profit for the year may be wiped out. Maybe you are running a small grocery store or a restaurant or a gas station. You will be wiped out because you will have to defend the suit even though you had nothing to do with it as an employer.

This bill as structured has massive liability for employers. They can be sued in the Federal court or in the State court, which is really ironic.

Brand new causes of action: There are almost 200 new causes of action under this bill for ministerial activities under which an employer may make a mistake. The damages are unlimited under those causes of action. It is not \$100 or \$200. It is not a fine from the Labor Department as it is under present law or a fine from HHS as is under present law. There is a new private cause of action that accrues against the employer for not sending the proper forms or for not informing you or for not sending you the right magazine. For anything that is under HIPAA or anything under COBRA or anything that is under ERISA, they are suddenly liable as the employer under this bill. They are brought in under this bill, and they are liable. There are 200 new causes of action.

The damages under this bill are unbelievable. Obviously, it is a bill written by the trial lawyers because there are no limitations on economic, non-economic, or punitive damages. By putting on a new title, they are trying to go around with this classy, misty, "special assessment" In Federal court, there is a limit of \$100 million in punitive damages. Of course, they do not tell you that you can go to State courts, and in most States there is no limit on damages. This new "special assessment" is just window dressing.

Punitive damages are uncapped, economic damages are uncapped, and non-economic damages are uncapped.

This is a lawyer's fantasy world. It is similar to a lawyer walking into Dis-

ney World to pick their forum, their most interesting forum, State or Federal. They can pick hundreds of suits. They can pick unlimited damages—economic, noneconomic.

You are going to see employers dropping their health insurance like hot-cakes as a result of this; you can go straight to court.

I heard the Senator from North Carolina say: Internal appeal process, you have an external appeal process. Then, under very similar certain circumstances you can go to court. Hey, with this bill you can go straight to court.

There isn't a good lawyer in this country who would not skip the external appeals process the way this bill is structured. This is probably the single biggest problem this bill has because it is the external appeals that will settle most of the differences a patient has with their employer—whether it is an employer or an HMO—because, if you have a good external appeals process with medical expertise and independent resources, and if you require the two parties to pursue that external appeal, then at the end of the external appeal the odds are very good that the resolution is going to be fair, the parties are going to accept it, and you won't have a court action. I suspect court actions would be rare with a good external appeals process.

A good external appeals process is one such as in the Nickles bill last year or such as is in the Frist-Jeffords bipartisan bill. It is a bipartisan bill. It is bipartisan because there is an independent, a Republican, and a Democrat on the Frist-Breaux-Jeffords bill, which essentially says you can skip the external appeals and go to court. But all you get when you do that is an opportunity to get your problem taken care of. You don't get awards. You don't get awards for going to court. You essentially get taken care of, which is appropriate if you have a situation where the injury is immediate and the harm is continuing. You should be able to go to court during the external appeals process and get that taken care of, if it is necessary. That is the way the Frist-Breaux bill is written.

The way their bill is structured, you go to court, period. You don't even bother with external appeals. You allege your harm. They claim it is not alleged anymore. But, essentially, it is alleged, and you are in court. You get your damage claim going; you start suing like crazy. You pick the forum that is best, the jury that is the best, the courts that are best, and the best States, and you are off and running in the court system.

That is the way this bill is intentionally structured. It is not an unintentional event. This bill is intentionally structured in order to get more lawsuits, and in order to get more opportunities to create lawsuits. It couldn't be done for any other reason.

When you look at this list, "statute of limitation"—what statute of limitation? For all intents and purposes, they

have no statute of limitation under this bill because you can essentially bring a cause of action after 180 days. The external appeals process is eliminated. All you have to do is claim that you have just found the injury and you are off and running again. Ten years after the event, the statute of limitation is almost irrelevant under this bill.

As I mentioned, forum shopping, picking your forum, is a classic lovefest for plaintiff's lawyers.

The first thing you are taught in the trial practice courses when you go to law school is forum shopping. That is black letter education in law school. I was there. I know. I even passed that course. I think I put down "forum shopping" on every answer.

This bill puts it right at the top of the list, as you might expect. Two bites at the apple: You can sue in both courts. They are not happy enough with forum shopping.

The avarice of the trial bar in designing this bill is almost humorous it is so aggressive. They weren't happy to just put in forum shopping, which doesn't exist today. They had to go with simultaneous forums. You can bring the lawsuit in both courts. You can go to State and Federal at the same time. It is lawsuit Disney World.

Of course, you can bring multiple lawsuits. I sue, you sue, and everybody sues under this bill.

You can have class action suits, which is something you can't have under present law. There is a very good reason for that under federal law.

What is the practical effect? This is the bottom line. With all of these lawsuits, you end up with a bill that, if it were to pass, according to OMB's estimates, would cause 4 million to 5 million people to become uninsured. According to the CBO estimate, it is 1.3 million. Either way, it is a huge number of people.

They don't get patients' rights under this bill. They get no insurance under this bill because their employers are not going to be able to afford or justify giving that benefit in exchange for all the lawsuits to which they would be subjected.

What is going to happen in the real world? The bigger employers will say: All right, I know you need health insurance, but we can't manage it anymore because we just can't take the adverse risk of all of these lawsuits. So we are going to give you some money as one of your compensation functions, and you can take that money and go into the market and buy your insurance.

The only problem is that the employer's insurance plan is inevitably going to have been much better—much better for the employees than what they can go out and buy with the dollars or the voucher they are given by the employer because the employees will be out there with one voucher trying to buy their insurance in an open market, and they won't have a whole lot of

market force behind them. But an employer that maybe employs 50, 100, or even 15,000, 20,000, or maybe even 50,000 people, has huge market clout. They can get better rates, and therefore they can get better options. They can maybe get eyeglass options or drug options or a variety of other options that the employees can't get with the voucher they are going to be given by large employers.

A lot of people may not lose their insurance altogether, but the quality of their insurance under this bill is going to drop radically.

Then there are the other people who do not use employers. They are self-insurers who do not have a lot of employees. There are 100, 50, 35, or 20 people. These employers are going to say to their employees: We are sorry; we can't afford it at all. We can't afford it at all.

You are going to have a lot of people without any insurance, period.

That is the practical effect of this. There are negotiations going on. There are ways to fix this. They are not radical. They are not reactionary. They are reasonable. In fact, they are so reasonable that they have been put forward by Senators FRIST, BREAUX, and JEFFORDS. As I said, it is a tripartisan bill. They have a liability section which makes sense. It is not just limited to designated decisionmakers. It is a much broader term than that. It goes to this whole issue of external appeal. It goes to the issue of punitive damages and to the issue of forum shopping. It goes to the issue of bringing in all these causative causes of actions under COBRA, ERISA, and HIPAA which are not appropriate in this bill.

So if you want to fix this bill—I hear the other side saying that on occasion; I am not sure if they really mean it. But if they want to really fix the bill, just take the Frist-Breaux-Jeffords language en bloc in the area of liability and put it in the bill. The bill would be fixed in the area of liability and external appeals. Do we see them doing that? No.

There was some discussion in this Chamber earlier about this pending amendment by the Senator from Texas, who I see is in the Chamber. The discussion from the other side essentially was: OK, you say you don't want employers to be liable. Texas law does not allow employers to be liable, so let's adopt the Texas law.

Why was that amendment offered? Because the other side of the aisle specifically said they wanted to have a bill that was almost identical to Texas law. In fact, the Senator from North Carolina used those terms. He said: This bill, as structured, is almost identical to the Texas law. So the Senator from Texas said: If it is almost identical to Texas law, let's just put the Texas law language in, which is what his amendment does; it puts the Texas law language in. And it is pretty reasonable. It is the Texas language. So now the bill would not be almost identical; it would be identical.

Since a number of the Members on the other side of the aisle said: We want the Texas law, we want what President Bush had in Texas, the Texas law is acceptable and what President Bush had in Texas, the Senator from Texas said: OK, we will put the Texas law in as an amendment. If the two are the same—and the two are the same—everybody will vote for this. We will not have to have a rollcall vote on it; we can have a voice vote.

I think you will find it is opposed by Senators on the other side of the aisle. The simple fact is, their law does not exempt employers, as does the Texas law. Their law does not exempt the lawyers. Theirs makes the employers, carte blanche, liable and opens up all kinds of opportunities to sue them, without caps, with punitive damages, and in whatever form they want to choose. The Texas law does not allow that to happen. The Texas law does protect the employer and does limit damages.

So I look forward to the vote on this amendment. I think it will test whether or not the statements coming from the other side of the aisle—that they want the Texas law—are backed up by a vote.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. THOMAS). The distinguished Senator from North Carolina.

Mr. EDWARDS. Let me respond briefly to some of the comments made by my colleague from New Hampshire.

This is the same tired old rhetoric the HMOs have been trotting out for years now to keep any kind of reform from occurring. They are now, by the way, spending many millions of dollars on lobbyists and public relations campaigns, and on television, to try to defeat any kind of reform.

These are the same arguments we have heard before. We need to get past that. We need to get to talking about providing real protections and real rights for patients. That is what Senator MCCAIN and I did. We worked for many months on this legislation to address many of the issues about which my colleague has just talked but nothing ever changes. No matter what we bring to this Chamber by way of patient protection, we hear these same arguments made. Let me speak to just a couple of those arguments briefly.

First, on the issue of forum shopping, cases going to State court, I say to my colleague from New Hampshire, he should see what the Chief Justice of the U.S. Supreme Court, by way of the Judicial Conference of the United States, which the Chief Justice heads, said about this issue. He specifically said in a written letter dated March 3, 2000:

The Judicial Conference urges Congress to provide that, in any managed care legislation agreed upon, the state courts be the primary forum for the resolution of personal injury claims arising from the denial of health care benefits. . . .

What we have done in our bill is exactly what the Judicial Conference of

the United States has said should be done. We have done what the American Bar Association says should be done; we have done what the Attorneys General of the United States say should be done; and we have done what the U.S. Supreme Court said, in the Pegram decision, should be done.

I know it is a wild idea that Senator McCAIN and I have decided to adopt the consensus of every objective group in America on this subject, including the U.S. Supreme Court. I am telling you, they would complain no matter what we did, because this is the rhetoric of antireform. That is what this argument is about.

Ultimately, this debate evolves into a very simple question: Are we going to do something about this problem or are we going to continue to kill reform legislation? We have to make a decision about whether we are going to make progress or whether we are going to obstruct progress.

Another issue my colleague raises is the issue of caps and whether there are limitations on recovery. He had his chart, which is not here anymore, that had lots of information about unlimited lawsuits and that there were no limitations. I say to my colleague, what we have done, that he does not like, is we have treated HMOs exactly the same way as every doctor, every hospital, and everybody else in America is treated.

All of the rest of us, everyone listening to this debate, whether on television or in person, is treated exactly the way we treat HMOs in this bill. They do not like that. HMOs, I am sure, would like to maintain their privileged status. That is why they are spending millions of dollars to try to defeat our legislation with respect to the specific issue of employers.

I say to my colleague, the President of the United States—the Republican President of the United States—and I am reading from his written principle—says:

Only employers who retain responsibility for and make final medical decisions should be subject to suit.

Mr. WARNER. Mr. President, will the Senator entertain a question on that point?

Mr. EDWARDS. I will, yes.

Mr. WARNER. Having had some modest comparison to my distinguished colleague in the trial courtroom, I know that is a key phrase. I am not sure just how it is going to end up, or not end up, in the legislation, depending on the amendments, but I think it would be helpful to have some legislative history on what the meaning is of an employer participating in the medical decisions of an employee.

Let's take the example of a small employer. Most often, that employer has a great deal of personal contact with his employees, has a great deal of empathy for the employee or his family stricken with some type of problem.

Suppose I were an employer, and my longtime secretary appears to be ill,

and I say: I think we had better go to the hospital. So I drive her to the hospital. Maybe some other employee in the firm drives her. Then, while in the hospital, I went to call on her, and somehow I am involved in the discussion as to whether or not an operation should be performed.

What are the circumstances by which the employer could be drawn into this type of litigation? Depending on how the bill is finally written and the law is enacted, it could well be that an employer henceforth just almost has to sever all personal relationships with employees for fear of getting drawn into a legal case.

I say to the Senator, it would be helpful, based on his experience, if he would elaborate on that issue and, indeed, point to other references in the debate or elsewhere so that we might have a legislative history to guide those who are going to follow this law in the future.

Mr. EDWARDS. I thank the Senator for his question. I think the Senator is concerned about some of the same issues others have raised and on which we have been working. I think it is a legitimate question.

I say to the Senator, what we did in our bill is have language that was intended to protect employers unless they stepped into the shoes of the HMO and actually made a medical decision essentially overruling the HMO. That was conceptually what we did in our bill, and that is conceptually what the President says in his principle.

But the practical question which the Senator asked is a legitimate question. That is the reason, I say to the Senator, we are working with our colleagues across the aisle—Republicans and Democrats—to try to craft appropriate language, because we do not want to create a disincentive. We want to protect employers, particularly the small business employers about which the Senator is talking. But I say to the Senator, it is not just the small employers.

Although they are a very small part of the population of employers in this country, we also have self-insured, self-administered plans where basically the employer is the only entity managing the health care of its employees.

What we want to do is try to find a way to provide some protection also for those employers. Those are the kinds of issues—the question the Senator asked, which is a very fair question, and the issue I just raised of the self-employed, self-administered plan—those are the kinds of issues we are trying to address without leaving the patient or the employee completely out in the cold.

I do believe there is a way to do that. It requires some work and creativity, but it can be done. Our goal in this process is the same. We want employers to be protected; we want to provide maximum protection actually for the employers without completely leaving the employee out, for example.

The problem with completely carving out the employer, as this amendment does, is that in some cases you may have an employer, a large employer, where they are a self-insured and a self-administered plan. Let's say a bookkeeper says, we are not paying for the test for the child of an employee; that child suffers some serious consequence from that. Under this carve-out, there is nowhere that child could go because there is no HMO. It is a self-insured, self-administered plan. Under the President's language, which says "only employers who retain responsibility for and make final medical decisions should be subject to suit," there would be somewhere for that child of that employee to go.

What we are trying to do—and I think it can be done—is to fashion language that provides maximum protection for the employer but at the same time doesn't leave that small group of employees that would be impacted by it completely out in the cold.

Mr. WARNER. Mr. President, I thank my colleague.

Let's talk about a large employer. I am simply the manager of a section with maybe seven or eight employees, but they are good friends. They have worked with me for a very long time. One suddenly becomes ill. Were I to drive that person to the hospital and in any other way participate in trying to alleviate the pain and suffering of the moment, would that then subject my overall firm to liability by virtue of my actions, say, as a good Samaritan?

Mr. EDWARDS. That kind of unintended consequence is exactly what we want to avoid. The issues the Senator from Virginia is discussing in this colloquy are the same kinds of issues that have been addressed by employers to us and my colleagues who are working to try to fashion language to solve the problem the Senator raises and the problem raised in the earlier example and to make sure, for an employer that has improperly been brought into a case—if they have been brought into a case and they don't belong in the case, we provide a mechanism, a procedural mechanism that they can get out of the case so they don't get dragged through a court proceeding when they don't belong there.

Those are the kinds of issues that need to be addressed, that we are attempting to address, and I believe we will find a solution to, consistent with the principle the President has laid out and the principle in which we believe.

Mr. WARNER. I thank my colleague.

Mr. EDWARDS. Mr. President, what we have done in the McCain-Edwards-Kennedy bill is structured a system that, unlike my colleague describes, is actually intended to avoid cases going to court. If we didn't want to avoid cases going to court, we would not first have an internal appeal and then have an independent external appeal. What we have learned from experience is the majority of cases get resolved. In Texas, California, and in Georgia, for

the three examples, when that system is in place, most cases get decided by that system. I think in Georgia and California there actually hasn't been a single lawsuit filed. That is good because the purpose is to get treatment to patients.

But there will be rare cases where the HMO does something inappropriate, wrongful, and, as a result, somebody gets hurt. It is not right, under our system of justice, for a family to be responsible for the rest of their lives to pay for that. If the HMO is responsible, they should be held accountable, just as all the rest of us. That is the reason we have set up this system the way it is.

What we have ultimately is real rights that are enforceable through an internal review, then an external review, and then, if necessary, if someone gets hurt, the case can go to court. And the cases that go to State court, where the HMO is treated just as everybody else, are subject to whatever State laws and caps apply to those kinds of cases. So there are, in fact, limitations. The rhetoric that there are no limitations is, in fact, not true.

The majority of States in this country have limitations on recoveries. And as the judicial conference suggested, as the American Bar Association suggested, as the State attorneys general suggested, we have sent those cases to State court, to a place where there are limitations on recovery but where we treat the HMOs not as privileged citizens anymore but just as all the rest of us. To Senator McCAIN and me, as we worked on this, it seemed the fair, right, and just thing to do—that HMOs get treated the same as everybody else. If they are going to make medical decisions, they ought to be treated as the doctors whom they are overruling. That is exactly what the structure of this bill is.

My colleague said something that was incorrect a few minutes ago. He said that all you had to do to avoid the appeals process and go straight to court was to allege that you had irreparable harm. That is not the case. That word does not appear in our legislation. But if, in fact, someone has died as a result of what an HMO has done to them, we thought it was a little unreasonable to make the family of someone who has already died go through an appeal before they could go to court. There is not much reason for them to be exhausting administrative remedies. We think we have a commonsense approach, one that works.

The model of California, Georgia, and Texas, and other States shows that these laws work. They give patients rights. They don't result in a lot of litigation. In fact, in those three States, in spite of the rhetorical arguments being made that people will lose their health insurance, in those three States, while those laws have been in place with real patient protection, the number of uninsured has gone down, not up. So at least the evidence, according to

the three models we have used, is that people think this system works. Lawsuits are not created by it. In fact, they are avoided.

Third, the number of uninsured, at least in those three jurisdictions, has not gone up. In fact, it has gone down.

I yield the floor.

THE PRESIDING OFFICER. The Senator from Texas.

Mr. GRAMM. Mr. President, I have to say that when I listen to the Senator from North Carolina, I almost always agree with what he says, but when I read his bill, A, I never find it does what he says, and, B, I never agree with it.

First of all, when the Senator chastised some for saying his bill simply required that there be an allegation in order to escape the external review process, that was not a figment of the imagination of critics or paid lobbyists or special interest groups, as if special interest groups and the trial lawyers don't also support the Senator's bill, as if only special interests oppose it and none supports it. But no one made that up. That is a word on page 149 of the previous version of their bill.

In fact, I raised this very issue over and over again, and the Senator and his cosponsors changed their bill to drop the word. This was not a word made up by anybody. This was a word that appeared in the original bill.

Now as for treating HMOs like everybody else, I find it a strange assertion that they are treated like doctors and hospitals. Let me explain why. First of all, I refer to the bill that is before us, the McCain-Edwards-Kennedy bill, and specifically to the section related to suing employers: "Cause of action against employers."

I begin with the assertion that this bill treats doctors and hospitals exactly the way it does HMOs.

In fact, the Senator says, by putting these cases back in State court, they are treated the same. Surely, the Senator must be aware that under State law, for example, in Texas and in California there are limits on liability for doctors and for hospitals, but there are no limited liabilities for health plans or employers under State law either in Texas or in California.

So to assert that by putting these cases that arise under Federal law—ERISA is a Federal law—by putting them back into the States they are being treated exactly the same as doctors and hospitals is factually inaccurate, because State laws often do impose liability limits on doctors and hospitals, but almost never do they impose liability limits on employers, or insurance companies, or HMOs.

Finally, so I can get on to my point, let me say that when the Senator says his bill treats doctors and hospitals exactly the same as it treats HMOs, I find that an interesting assertion. I turn to page 148 of his bill and I see an exclusion. In fact, on line 12, 148, it says: "Exclusion of Physicians and Other Health Care Professionals." This is in

the section on liability for employers. I will go into that in some detail.

I want to make this point. At the end of this section on liability for employers, it has two specific carve-outs where entities are treated very differently from employers. The first entity on line 12 is physicians: "No treating physician or other treating health care professional of the participant or beneficiary, and no person acting under the direction of such a physician or health care professional, shall be liable under paragraph (1)," which is the paragraph related to employer liability.

And then on page 149, there is an exclusion for hospitals. It says: "No treating hospital of the participant or beneficiary shall be liable under paragraph (1)."

So on page 148 it exempts the treating physician. On page 149, it exempts the hospital from the same liability section for the employer. But then, to just be absolutely certain that no one is confused, let's come down to the bottom of page 149 and see if employers are treated the same and HMOs are treated the same as doctors and hospitals. It says: "Nothing in paragraph (6)," which is the exclusion for physicians, "or (7)," which is the exclusion for hospitals, "shall be construed to limit the liability . . . of the plan, the plan sponsor, or any health insurance issuer," and the plan sponsor, of course, is the employer.

So to say that this bill treats doctors and hospitals the same way it does insurance companies, HMOs, and employers, sounds very good and reassuring. The problem is that it is not true.

Now let me begin and make the point I want to make. First of all, I send three letters to the desk and ask they be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

NATIONAL FEDERATION
OF INDEPENDENT BUSINESS,
Washington, DC, June 22, 2001.

Hon. PHIL GRAMM,
U.S. Senate,
Washington, DC.

DEAR SENATOR GRAMM: On behalf of the 600,000 small-business owners who are members of the National Federation of Independent Business (NFIB), I am writing to express our strong support for your amendment to provide an employer liability exemption modeled after the Texas managed care legislation. As you are well aware, groups on both sides of the issue agree that under Texas law, employers are explicitly exempt from liability. We will work diligently to ensure that members on both sides of the aisle support your amendment—especially those who specifically stated that they do not want employers to be held liable for voluntarily offering health care to their employees.

Small-business owners are already being forced to drop health-care as a result of the high cost of premiums: of the 43 million uninsured Americans, 26 million (61%) are small business owners and their employees. The most recent Kennedy/McCain/Edwards proposal actually increases the likelihood that more small employers and their families will join the ranks of the uninsured. For

the first time, it would authorize several new bases for lawsuits that could be initiated under federal law for unlimited damages. Employers could be sued in both state and federal courts. Their proposal does not preclude any employer from being named as a defendant in the growing number of cases that are now being filed as class action lawsuits.

If Congress enacts any legislation that exposes employers to unfair lawsuits, many small-business owners would stop offering health insurance altogether for fear that one lawsuit could wipe out their business. Even if employers are shielded from lawsuits, imposing liability on health plans would lead to higher premiums, which would then be passed on to employers and their families. Small-business owners and their employees simply cannot afford to supplement the income of wealthy trial attorneys. Fifty-seven percent of small businesses said in a recent poll that they would drop coverage rather than risk a suit that will undoubtedly threaten the livelihood of their business. It's easy to see why, given the fact that the average cost for a business to defend itself from a lawsuit is \$100,000.

Again, I commend you for your continued support on behalf of small-business owners and their employees. We look forward to working with you to ensure that employers are not penalized for voluntarily offering health-care benefits to their employees.

Sincerely,

DAN DANNER,
Senior Vice President.

U.S. CHAMBER OF COMMERCE,
CONGRESSIONAL & PUBLIC AFFAIRS,
Washington, DC, June 22, 2001.

To the Members of the U.S. Senate:

As the world's largest business federation representing more than three million employers and organizations of every size, sector and region, the U.S. Chamber of Commerce is greatly concerned about the liability provisions of S. 1052, the Kennedy-McCain "Patient Protection Act of 2001", that expose employers to lawsuits and unlimited damage awards.

The U.S. Chamber of Commerce strongly supports the amendment offered by Senators Phil Gramm and Kay Bailey Hutchison to S. 1052 that would exclude employers from lawsuits for the actions of the health plans they sponsor. It should be noted, however, that this amendment, on its own, does not address other fundamental flaws in the underlying legislation, nor will it protect employers from the huge liability costs imposed on health plans by this proposal.

Employers voluntarily provide health coverage to 172 million Americans, at an average cost of \$6,351 per working family. While this amendment exempts employers from being party to a lawsuit, the cost of opened-ended liability on health plans will ultimately be borne by businesses and working families. Furthermore, self-insured health plans directly pay the cost of damages and litigation out of their bottom line, even if they use a third-party administrator to make claims decisions.

Given our sluggish economy, employers will not be able to bear the passed-on costs of litigation and unlimited damage awards. Much of those costs will also be borne by employees, who, studies show, are increasingly turning down their employers' offer of coverage because they cannot afford the higher monthly premiums and out-of-pocket deductibles, coinsurance and copayments. Our health care system does not need any more litigation. In addition to supporting the Gramm-Hutchison amendment, we urge you to remedy the onerous liability provisions of S. 1052 so that employers can fully

benefit from the protection offered them by the Gramm-Hutchison amendment.

Because of the importance of this issue to working families, the small business community and the American economy, we urge you to support the Gramm-Hutchison amendment to S. 1052. The Chamber will consider using votes on or in relation to Gramm-Hutchison for inclusion in our annual "How They Voted" ratings.

Sincerely,

R. BRUCE JOSTEN

AMERICAN BENEFITS COUNCIL,
Washington, DC, June 22, 2001.

Hon. PHIL GRAMM,
U.S. Senate,
Washington, DC.

DEAR SENATOR GRAMM: The Senate will soon vote on your amendment to limit the liability of employers under the Kennedy-McCain version of the Patients' Bill of Rights.

We strongly share your view that the Kennedy-McCain bill is fundamentally flawed and should not be enacted. It is certain to drive up health costs well beyond the double-digit increases that employers are already facing, increase the numbers of uninsured Americans and place all employer-sponsored group health plans under the constant threat of unlimited liability and inconsistent decisions made by separate state courts.

The Gramm amendment responds directly to one of the primary concerns raised by both large and small employers throughout the long debate over this legislation. There can be no doubt that many employers who voluntarily offer this highly valuable benefits to employees will be unwilling or unable to do so in the future if the Kennedy-McCain bill is enacted. There is no subtle way to express how profound and destructive the threat of constant litigation and unlimited damages would be to our nation's employer-sponsored health benefits systems.

Support for the Gramm amendment would be a vote in favor of preserving health benefits sponsored today by employers and a vote in favor of the millions of Americans who rely on health benefits through their employer today. However, it should also be clear that even if an amendment is approved to shield employers from direct liability, our position on the bill itself remains firm and unchanged. The Kennedy-McCain bill is an extreme measure that should not be enacted and the bill would still impose unacceptable high burdens on the health plans and others involved in administering employer-sponsored health benefits for which employers themselves would ultimately shoulder the higher costs.

We commend you and your supporters for offering this amendment to protect employers from the excessive liability that would result from the Kennedy-McCain bill. We urge the Senate to move next to comprehensively cure the problem that this bill poses by rejecting the Kennedy-McCain proposal and enacting a sound Patients' Bill of Rights that meets the President's principles and can be signed into law.

Sincerely,

JAMES A. KLEIN,
President.

Mr. GRAMM. The first letter is from the National Federation of Independent Business on behalf of 600,000 small businessowners in America. They have endorsed the amendment I have offered that will be voted on tomorrow, which exempts employers from being sued under this bill.

The second letter is from the Chamber of Commerce of the United States,

the world's largest business federation, representing over 3 million employers, making this vote a key vote for the Chamber of Commerce.

Finally, the third letter is from the American Benefits Council, which is in support of this amendment.

Let me try to explain briefly what this is all about. These are complicated issues and they are very easy issues to get confused. Let me start with the Federal bill, since there has been so much talk about it. Let me be sure that everybody knows exactly what we are talking about. This is S. 1052, which is the pending bill that was originally authored by Senator McCRAIN, for himself, Senator EDWARDS, Senator KENNEDY, and others.

I will start on page 144 of the bill. A lot has been said about suing employers. Almost everything that has been said has been that you can't sue employers. I want to just go through the bill very briefly, lest there be any doubt about the fact of whether or not you can sue employers, and try to explain the concern that I have that the National Federation of Independent Business has, and that the U.S. Chamber of Commerce has about this bill, and the fact that it would expose employers to liability.

Let me remind my colleagues that employers are not required by law to provide health insurance to their employees. There is no Federal or State statute anywhere that requires that employer benefits be provided. Employers provide benefits because they choose to, because they care about their employees, or if they believe that in order to be competitive in getting good employees and holding them they have to provide benefits, they decide to do it on a voluntary basis. So the cause of not just concern, but alarm, in the business community is that under this bill it will be possible to sue not the insurance company, not the HMO, not the people who are practicing, such as doctors and hospitals, but you will be able to sue the employers.

Let me start with the language of the bill. This bill has in this section, as it does in many other sections, language that is very confusing and misleading. I want to give a simple example. Look on page 144, on line 5, it says: "Exclusion of Employers and Other Plan Sponsors," which implies that they are excluded, that you can't sue employers. And then in section (A), line 7, it says: "Causes of Action Against Employers and Plan Sponsors Precluded." Read that sentence. You say you can't have a cause of action against employers and plan sponsors; they are specifically precluded. That is exactly what the headline says.

And then it says: "Subject to subparagraph (B)," and that is where you become concerned because up here it says you can't sue them. The next line is "Subject to subparagraph (B)"—I will come back to that—"paragraph (1)(A) does not authorize a cause of action against an employer"—just as

clear as the rising Sun. You can't sue employers. But when you get down to subparagraph (B), it says: "Certain Causes of Action Permitted," and then it says: "Notwithstanding subparagraph (A)," which is what I just read, "a cause of action may arise against an employer or other plan sponsor."

In other words, paragraph (A) says you can't sue them and paragraph (B) says you can sue them. And then you have seven pages of ifs, ands, and buts about whether you can or cannot sue employers, and under what circumstances you can sue them.

And then, obviously, it gets pretty complicated. The question comes down to, what would a judge say? What would a jury say? What would some very smart plaintiff's attorney be able to do with this language?

Then the problem gets even greater because you get down to the use of terms that don't jump out at you as triggering other things. But when you understand how they fit into Federal law, they say you can sue employers. I will give you an example. On line 18 of page 145, it says you can't sue the employer except when the employer directly participates—and let me read the whole paragraph:

Direct Participation in Decisions.—For purposes of subparagraph (B), the term "direct participation" means, in connection with a decision described in clause (i) of paragraph (1)(A) or a failure described in clause (ii) of such paragraph. The actual making of such decision or the actual exercise of control . . .

It does not jump out at you that "exercise of control" means anything. It does not unless you know that under ERISA, which governs all employer benefits under Federal law, the employer is always deemed to exercise control over employee benefits.

There are 7½ pages of ifs, ands, and buts, but there is a lot of language that when it is brought into the context of existing Federal law it creates the strong potential that employers could be sued and could be sued for nothing other than simply having tried to join with their employees in buying health insurance and conducting activity that had to do with operating their business, appointing employees to interface with their health plan, their insurance company, their HMO.

Then, as if anybody would doubt the intention of this bill, it has this extraordinary section on page 148 and 149, having created this liability for employers, and then in 7½ pages talking about when you can sue them and when you cannot sue them, it then comes down and excludes physicians, excludes hospitals, and then it says:

But nothing in excluding physicians or excluding hospitals can be construed as excluding employers.

If our colleagues on the other side of the aisle wonder why it is that employers are alarmed, all they have to do is to look at the language of their bill in the context of ERISA to understand that we have a very real potential for employers to be sued.

The Texas Legislature, which has been held out to be a standard for patients' rights—in fact, if I am not wrong, Senator EDWARDS said on ABC "This Week":

The President, during his campaign, looked the American people in the eye in the third debate and said: "I will fight for Patients' Bill of Rights," referencing the Texas law. Our bill is almost identical.

Identical to what? The Texas law. Let me make it clear it is not identical. Under the bill before us, it clearly says employers can be sued. It has 7½ pages of circumstances under which they can be sued. It uses language that ties in to ERISA that suggests they might be sued, and then it excludes doctors and hospitals but specifically does not exclude employers from being sued.

That is what the bill before us does. What does the Texas law do? The Texas Legislature, when it debated and passed the Patients' Bill of Rights, did not believe that all employers were good people. It did not believe there would never be an incident where employers would do the wrong thing. It did not believe that. They debated this extensively, but they did believe they had put together a system of checks and balances.

In fact, this bill, the Republican alternative, the Breaux-Frist bill, every HMO bill, every Patients' Bill of Rights bill that has been introduced, is really modeled after State plans. One of the most prominent of those plans is the Texas plan.

In Texas they concluded there was no way they could write it that would not guarantee that employers would not be subject to being sued other than to simply exempt employers from being sued.

What they said was, in very simple terms:

This chapter—

Which relates to liability in their bill—
does not create any liability on the part of an employer.

There are no 7½ pages of ifs, ands, or buts after this clause. There is no paragraph below it that says notwithstanding this provision they can be sued. This is the language of the Texas law. It does not create any liability on the part of an employer.

Let me review some of the points that have been made where people say you need to be able to sue the employer. Let me remind my colleagues that the Texas Legislature did not believe that for a minute that there would not be some employers who would be bad actors, but they concluded that the benefits of letting people sue the employer were much smaller than the potential cost because of the fear that employers might drop health insurance. In fact, I think the success of the Texas law bears out their belief that, under the Texas law, they would be better off not to allow the suits to be filed against the employer.

Some people have said: What if somebody showed up at the emergency room and the employer called up and said don't let them in? Under the bill before us and every bill that has been introduced, we have a prudent layperson standard. The emergency room is going to get paid if the person, as a prudent layperson, believes they were in danger of being harmed or dying.

What would the attending physician in an emergency room in Omaha, NE, do if some employer called up and said, my employee, Joe Brown, is coming in there, he thinks he is sick, I don't want him treated? The physician would say: Thank you, and hang up because he has no control over who is admitted to the emergency room and the HMO is required to pay.

What about the case where the employer actually tries to intervene in the decision being made by the HMO? It has been suggested that perhaps you could have it so the employer is not the final decisionmaker and would be exempt. I remind my colleagues, who is the final decisionmaker under S. 1052? Who is the final decisionmaker under Breaux-Frist? Who is the final decisionmaker under the Nickles bill? Who is the final decisionmaker under the original Kennedy bill? The final decisionmaker is an independent review panel made up of health care professionals who are independent of the health plan. How is the employer supposed to affect them? The employer can have no effect over them. By definition, under every one of these bills, the employer is not, cannot be the final decisionmaker.

I am not saying, and the Texas Legislature did not say, there were no bad employers, but what they said is what little benefit you might get by discouraging an employer from trying to interfere in a health care plan for which they are at least partially paying; whatever benefits you might get from that, you already have protections with internal and external review, but the cost of making the employer liable is so high that it is not worth it.

Let me conclude because I see my dear colleague from West Virginia is here. I know a lot of other people want to speak. I want to make this point. It is not hard for me to envision—I hope it is not hard for my colleagues to envision—that there are a lot of little businesses all over America that scrimp and sacrifice to cover their employees with health insurance.

I often talk about a printer from Mexia, Dicky Flatt, a friend of mine, an old supporter of mine from a little town in Mexia, TX. He is an old-fashioned printer. He never quite gets that blue ink off the end of his fingers.

He has about 10 employees, including his wife, including his baby son, and he probably has 8 or so other employees at any one time.

They work hard to try to provide health insurance. But there is no way, shape, form, or fashion, Dicky Flatt is

going to hire a lawyer to go through this bill. Once he hears from NFIB that he might be sued, he is going to be forced to call his 10 employees together and say: Look, I love you guys. You helped me build this business. But my father and my mother worked a lifetime to build this business. I have worked in it. My wife has worked in it. My brother worked in it. His brother's wife worked in it. My son works in it. And I am not going to put it all at risk in some courtroom because I might be sued because I helped you buy health insurance.

Our colleagues assure us, we are not after Dicky Flatt. But the problem is, they have 7½ pages of language under which Dicky Flatt could be sued. A lot of this language is pretty confusing. I am not a plaintiff's attorney, but it is pretty confusing to me and I have to figure it is very confusing to Dicky Flatt, a printer in Mexia.

Everybody talks about how good the Texas law is and how similar this bill is. I thought with all of the imperfections, I would offer an amendment that does exactly what the Texas law did. One of our colleagues pointed out that under Texas law health insurance coverage has gone up, not down. In Texas they did not believe that all 1 million employers were good, well intending people. They decided, whatever you get by allowing a person to try to sue the few who are bad, when people already have checks and balances against bad employers with internal and external review—an external review where the employer could have no impact, that whatever the benefits are of suing the employer, the cost in terms of inducing good employers to drop health coverage was more.

I am sure everybody understands unintended consequences. I don't believe for a minute the authors of this bill are trying to sue Dicky Flatt. I don't believe it. I don't believe they have evil intent. I have never thought that, never said it, and I don't believe it.

The point is, could the law produce the unintended consequence? It is complicated enough, it is contradictory enough, that I believe it might force good people such as Dicky Flatt, who might call the emergency room if one of his employees were taken to the emergency room, but it would be to say: He is coming; do everything you can to help him. Would that be intervening? If he called up and said: "I want to tell you that Sarah Brown got her finger caught in this machine and it pulled her hand in, and, my God, she is on the way there and she is bleeding something awful. Get ready. And I want you to do everything you can. Don't worry about cost, I will do whatever I can to help," is that intervening? I don't know. And he won't know. Therefore, he might cancel his health insurance.

I believe this is the safe way to do it. I am not saying I will not look at alternatives or we might not be able to work something out, but I am asking

my colleagues, don't believe that perfection has been achieved, that there is no way the current bill can be improved. If we could change 5 or 6 things in this bill, we would get 80 Members, maybe 90 Members to vote for it. This is something that needs to be changed. This is something that needs to be fixed.

I know there are a lot of clever people who think we can still do it and still sue and protect Dicky Flatt. I am not sure. All I know is the Texas Legislature, after debating this, decided they were not sure and the safest thing to do was to not allow him to be sued.

I yield the floor.

The PRESIDING OFFICER (Mr. NELSON of Nebraska). The Senator from West Virginia.

Mr. BYRD. Mr. President, has the Pastore rule run its course for the day?

The PRESIDING OFFICER. No, it has not. It will expire at 5:04.

Mr. BYRD. I ask unanimous consent to speak out of order, notwithstanding the Pastore rule.

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

Mr. BYRD. Mr. President, I understand the Senator from Michigan wishes to speak. If I may be recognized, I would like to speak for not to exceed 20 minutes, but I yield to the Senator from Michigan for not to exceed 5 minutes, and not have that 5 minutes charged against my time.

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

Ms. STABENOW. Mr. President, I thank my friend and colleague for yielding to me for a moment to bring this discussion back to what this is really all about.

First, I say to my friend from Texas, I am happy to share with his constituent of whom he spoke, on page 146 of the legislation, specifically what is meant by employers being exempted from lawsuit. It is very specific. I think we could satisfy his concerns if he were to read the bill and have an opportunity to discuss it with us. I welcome an opportunity to do that.

I will take a moment and share what happened in Michigan a few hours ago. I went back to the great State of Michigan to be with a large number of constituents who were very concerned about this legislation, people who have been involved in the health care system, doctors and nurses, and family members who have had situations occur in their own family with themselves or their children or their parents that have caused them to support this legislation, the underlying bill that is before the Senate. They believe this is critically needed because of the need to guarantee the health insurance is paying for results in health care for their families.

I will comment as I did on Friday about a situation about which my colleagues on the other side of the aisle talked, small business owners. There is a small business owner with whom I have worked very closely, a man

named Sam Yamin, who, in fact, had a situation where he had to go to an emergency room himself.

He owned a tree trimming business and had a severe accident with a chain saw and was rushed to an emergency room. The physicians were ready to operate, to save his leg, to save the nerves in his leg. They called the HMO and the HMO said, we are sorry; you are at the wrong emergency room. They packed him up, him and his wife, and moved him across town. He spent 9 hours on a gurney in the other emergency room and did not receive treatment until he literally pulled a telephone out of the wall because he was in such great pain. He ended up getting the most limited treatment. They simply sewed up his leg.

Why do I mention that? I mention that because Sam Yamin lost his business. He is a business owner who lost his business. He is a business owner who is now not only permanently disabled but, I found out today, is terminally ill. Sam Yamin did not deserve that. He paid for insurance. He was a business owner who had insurance and assumed in an emergency he could go to the nearest emergency room.

Now what happens? He and his wife Susan are flooded with bills. Does he have any recourse to go back to the HMO to hold them accountable for what happened for him and his family? No, he does not.

That is not right. That is what this bill is about. We want better medical decisions. Sam Yamin does not want the right to sue just to sue. He wanted emergency health care. He wanted an operation on his leg. He wanted to be able to go back to work in his business. That is what he wanted. I truly believe that unless we hold HMOs and insurance companies accountable for the decisions they are making, we will not get that kind of guarantee of health care. We want better medical decisions. That is what we want. We know the States that have enacted these kinds of protections don't have the lawsuits being talked about. They have better medical decisions. That is what we are looking for. We want to make sure decisionmakers know they better pay attention; they better get it right; they better give people the health care they are paying for; otherwise, they will be held accountable.

That is what this is about. That is why it is so important and that is why I am going to come to the floor every day and speak on behalf of Susan and Sam Yamin and all the other families in Michigan who are counting on us to get this right.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from West Virginia is recognized.

Mr. BYRD. Mr. President, I thank the Presiding Officer. I also thank the majority whip for his courtesy.

Mr. President, I am speaking on a subject that is not germane to the debate this afternoon.

The PRESIDING OFFICER. The Senator from West Virginia.

NATIONAL MISSILE DEFENSE

Mr. BYRD. Mr. President, the President has recently concluded his trip to Europe, where he attempted to convince European leaders of the need for the United States to deploy a national missile defense system. It seems that our friends in Europe still have the same reservations about this apparent rush to a missile shield, and I can understand why. While I support the deployment of an effective missile defense system, there are a number of reasons why I believe it is not as easy to build such a system as it is to declare the intent to build it.

One cannot underestimate the scientific challenge of deploying an effective national missile defense system. The last two anti-missile tests, performed in January and July of 2000, were failures. In response to these failures, the Department of Defense did the right thing. The Department of Defense took a time-out to assess what went wrong, and to explore how it can be fixed. The next test, scheduled for July of this year of our Lord 2001, will be a crucial milestone for the national missile defense program. All eyes will be watching to see if the technological and engineering problems can be addressed, or if we have to go back to the drawing board once more.

It must also be recognized that no matter how robust missile defense technology might become, it will always—now and forever—be of limited use. I fear that in the minds of some, a national missile defense system is the *sine qua non* of a safe and secure United States. But the most sophisticated radars or space-based sensors will never be able to detect the sabotage of our drinking water supplies by the use of a few vials—just a few vials—of a biological weapon, and no amount of anti-missile missiles will prevent the use of a nuclear bomb neatly packaged in a suitcase and carried to one of our major cities. We should not let the flashy idea of missile defense distract us from other, and perhaps more serious, threats to our national security.

If deployment of a missile defense system were to be expedited, there is the question of how effective it could possibly be. Military officers involved in the project have called a 2004 deployment date “high risk.” That means that if we were to station a handful of interceptors in Alaska in 2004, there is no guarantee—none, no guarantee that they would provide any useful defense at all. Secretary of Defense Donald Rumsfeld has downplayed this problem, saying that an early system does not have to be 100 percent effective. I believe that if we are going to pursue a robust missile shield, that is what we should pursue. I do not support the deployment of a multi-billion dollar scarecrow that will not be an effective defense if a missile is actually launched at the United States.

The New York Times has printed an article that drives this point home. The newspaper reports on a study by the Pentagon’s Office of Operational Test and Evaluation that details some of the problems that a National Missile Defense system must overcome before it can be considered effective. According to the New York Times, the authors of this internal Department of Defense report believe that the missile defense program has “suffered too many failures to justify deploying the system in 2005, a year after the Bush administration is considering deploying one.”

The article goes on to state that system now being tested has benefitted from unrealistic tests, and that the computer system could attempt to shoot down inbound missiles that don’t even exist. If the Department of Defense’s own scientists and engineers don’t trust the system that could be deployed in the next few years, this system might not even be a very good scarecrow. Let the scientists and engineers find the most effective system possible, and then go forward with its deployment.

Let us also consider our international obligations under the Anti-Ballistic Missile (ABM) Treaty of 1972. The President has begun discussions with Russia, China, our European allies, and others on revising the ABM Treaty, but so far the responses have been mixed. I suggest that it is because our message is mixed. On one hand, there is the stated intent to consult with our allies before doing away with the ABM Treaty. On the other, the Administration has made clear its position that a missile defense system will be deployed as soon as possible.

It is no wonder that Russia and our European allies are confused as to whether we are consulting with them on the future of the ABM Treaty, or we are simply informing them as to what the future of the ABM Treaty will be. We must listen to our allies, and take their comments seriously. The end result of the discussions with Russia, China, and our European allies should be an understanding of how to preserve our national security, not a scheme to gain acceptance from those countries of our plan to rush forward with the deployment of an anti-missile system at the earliest possible date.

What’s more, Secretary of State Colin Powell said this past weekend that the President may unilaterally abandon the ABM Treaty as soon as it conflicts with our testing activities. According to the recently released Pentagon report on missile defense, however, the currently scheduled tests on anti-missile systems will not conflict with the ABM Treaty in 2002, and there is no conflict anticipated in 2003. Why, therefore, is there a rush to amend or do away with the ABM Treaty? Who is to say that there will not be additional test failures in the next two and a half years that will further push back the test schedule, as well as potential conflicts with the ABM Treaty?

There is also the issue of the high cost of building a national missile defense system. This year, the United States will spend \$4.3 billion on all the various programs related to missile defense. From 1962 to today, the Brookings Institution estimated that we have spent \$99 billion, and I do not believe that for all that money, our national security has been increased one bit.

The Congressional Budget Office in an April 2000 report concluded that the most limited national missile defense system would cost \$30 billion. This system could only hope to defend against a small number of unsophisticated missiles, such as a single missile launched from a rogue nation. If we hope to defend against the accidental launch of numerous, highly sophisticated missiles of the type that are now in Russia’s arsenal, the Congressional Budget Office estimated that the cost will almost double, to \$60 billion.

We have seen how these estimates work. They have only one way to go. That is always up.

However, that number may even be too low. This is what the Congressional Budget Office had to say in March 2001: “Those estimates from April 2000 may now be too low, however. A combination of delays in testing and efforts by the Clinton administration to reduce the program’s technical risk (including a more challenging testing program) may have increased the funding requirements well beyond the levels included in this option [for national missile defense systems].” Is it any wonder that some critics believe that a workable national missile defense system will cost more than \$120 billion?

Tell me. How does the Administration expect to finance this missile defense system? The \$1.35 trillion tax cut that the President signed into law last month is projected to consume 72 percent of the non-Social Security, non-Medicare surpluses over the next five years. In fact, under the budget resolution that was passed earlier this year, the Senate Budget Committee shows that the Federal Government is already projected to dip into the Medicare trust fund in fiscal years 2003 and 2004. The missile defense system envisioned by the Administration would likely have us dipping into the Social Security trust funds as well—further jeopardizing the long-term solvency of both Federal retirement programs. This is no way to provide for our nation’s defense.

I must admit that I am also leery about committing additional vast sums to the Pentagon. I was the last man out of Vietnam—the last one. I mean to tell you, I supported President Johnson. I supported President Nixon to the hilt.

I have spoken before about the serious management problems in the Department of Defense. I am a strong supporter of the Department of Defense. When it came to Vietnam, I was a hawk—not just a Byrd but a hawk. I