

party lines to avoid the political show-down by having this up-or-down vote at all costs, not trying to search for a common ground, not having an adequate, thorough debate in the committee and on the floor, and a \$400 billion program.

I would like to know, when is the last time the Senate has created a \$400 billion social program that has had no consideration in the Senate Finance Committee, or any committee of the Senate, and has had virtually no consideration on the floor, no amendments, just an up-or-down vote? If you do not get your 60, tough luck: Is that what the Senate is all about, Madam President? Is that what it is all about? It is winning at all costs?

Who is going to pay for those costs? Our Nation's seniors. Our Nation's seniors are going to pay the cost—that is what this is all about—and they are going to pay a high cost because so many will either have minimal coverage or no coverage at all. This is how many people, when one looks at this chart, will be omitted from coverage in the plan offered by the Senator from Florida: 26 million Medicare beneficiaries.

I know we can do better. We worked for more than a year to create a plan that included Democrats, included our Independent, Senator JEFFORDS from Vermont, so that we could avoid this kind of impasse.

I would hope that we would avoid this unnecessary political showdown today or tomorrow. I hope we can put aside our differences and forge solutions to the problems that our Nation's seniors face when it comes to catastrophic costs for our Nation's seniors who have a chronic illness.

In fact, there was an op-ed piece in the New York Times yesterday which indicated that most people face costs of \$1,200 to \$1,500. They are the chronically ill. Guess what. Under the plan offered by the Senator from Florida, many of those individuals will not get any coverage until they spend \$3,300. They will get no coverage whatsoever.

Won't they be surprised when we pass a so-called prescription drug benefit coverage that says the Nation's seniors are now covered and when they find out, no, not exactly. You will pay an annual fee of \$25 and then discover you do not have any coverage because, if you earn \$17,721 as an individual, you get zero coverage until you spend \$3,300. If you are a couple and earn \$23,881 in income, then you have to spend \$3,300 in prescription drugs before you get any coverage. That is a huge gap in coverage.

Last week, in the two votes we did have on the two competing plans, there was a common thread. That common thread was continuing to embrace universal coverage in the Medicare Program, which is a principle that most of us—97 percent, 97 votes—supported continuing in the Medicare Program. If we take the approach of low income and catastrophic coverage solely as the

kind of benefit we decide to enact in the Senate, we are abandoning the principle of universal coverage in the Medicare Program.

I hope we do not plan to move in that direction. That clearly will be the wrong approach. It will be the wrong approach for Medicare and certainly will be the wrong approach for our Nation's seniors. We can do better, and I hope we will do better. We have the ability to do better.

I urge my colleagues to reconsider and I urge the leadership to avoid any votes so we can continue to work on this issue, if it takes August and come back in September, if we cannot do it this week. But let's avoid the kind of confrontation that will manifest itself in the vote that is recommended on the one plan alone.

I thank the Chair, and I yield the floor.

### CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now closed.

### GREATER ACCESS TO AFFORDABLE PHARMACEUTICALS ACT OF 2001

The PRESIDING OFFICER. Under the previous order, the Senate will now resume consideration of S. 812, which the clerk will report.

The legislative clerk read as follows:

A bill (S. 812) to amend the Federal Food, Drug, and Cosmetic Act to provide greater access to affordable pharmaceuticals.

Pending:

Reid (for Dorgan) amendment No. 4299, to permit commercial importation of prescription drugs from Canada.

McConnell amendment No. 4326 (to amendment No. 4299), to provide for health care liability reform.

The PRESIDING OFFICER. The Republican leader.

Mr. LOTT. Madam President, I do wish to speak in behalf of the McConnell amendment. I realize time has expired, but I yield myself time under leader time.

Mr. REID. Will the Senator yield?

Mr. LOTT. Recognizing Members may be interested in what the schedule will be in the next hour and maybe even right after lunch, I will be glad to yield to Senator REID for information.

Mr. REID. Madam President, both leaders are in the Chamber. I ask unanimous consent that whatever time the Republican leader uses for his speech, the remaining time until 5 to 1 be equally divided for Senator KENNEDY and Senator MCCONNELL to speak on the pending amendment.

The PRESIDING OFFICER. Is there objection?

Mr. MCCONNELL. Reserving the right to object, I say to my friend from Nevada, I simply did not hear what he was asking.

Mr. REID. I am sorry. Morning business got a little out of hand this morn-

ing. There was too much morning business. We are now on the bill. The Republican leader wishes to speak for 5 or 10 minutes under leader time. I ask unanimous consent that the remaining time be divided equally between Senator MCCONNELL and Senator KENNEDY to speak on the McConnell amendment.

Mr. MCCONNELL. How much time is remaining?

Mr. REID. It will probably be about 50 minutes.

Mr. MCCONNELL. Fifty?

Mr. LOTT. Fifty.

Mr. MCCONNELL. Equally divided.

Mr. REID. Until 5 to 1.

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

Mr. LOTT. Madam President, I thank Senator REID for that clarification so we can get some further time for debate on this important issue and so that Senator MCCONNELL can talk more about the specifics.

I believe in this country we have a medical malpractice crisis. There is a huge problem with frivolous lawsuits being filed and large verdicts being rendered. Let me read some of what is happening in my own State where within a few days the legislature is going to have a special session to try to deal with this crisis because doctors are getting out of obstetrics; they are getting out of the business of delivering babies. And they are getting out because the doctors cannot get medical malpractice insurance coverage. As they lose their coverage they are also leaving the State. We now have huge areas of the State where there are few, if any, doctors available to deliver babies.

In Mississippi we are expected to lose an estimated 400 doctors this year because they are retiring, getting out of practice, or moving to other States, including Louisiana. Why Louisiana? Because in Louisiana they have some caps on punitive damages that help limit the size of the verdicts against doctors.

Madam President, last year, in Bolivar County, there were six doctors providing obstetrical care. Today there are three. In neighboring Sunflower County, all four doctors who delivered babies quit private practice. So there is a large area where the citizens of my state cannot get medical care for pregnant mothers and for delivering babies because their doctors cannot get or cannot afford malpractice insurance.

Some expectant mothers now have to drive 100 miles just to get to a doctor, let alone a regional hospital. In the northern half of the State last year, there were nine practicing neurosurgeons; now there are just three on emergency call. And it does not appear that the situation is going to get any better soon. The North Mississippi Medical Center, a hospital that serves 22 counties and 600,000 people, is finding it impossible to recruit new doctors.

But not only is the next generation of doctors being scared away from the

State by Mississippi's tort friendly medical malpractice environment, soaring insurance premiums, and word of multi-million dollar jury awards, so are the insurance companies themselves. There used to be 14 companies underwriting liability in my State, now there's one willing to write new policies.

And those companies that are staying in Mississippi are being forced to charge exorbitant rates to cover their liability exposure to frivolous lawsuits and large verdicts. For instance, maternity care used to make up about 30 percent of family practitioner Scott Nelson's practice in his hometown of Cleveland, MS. But Nelson got out of the business October 1 when his annual malpractice premium jumped from \$30,000 to \$105,000.

Had he had continued his practice, Nelson would have had to pay that even more exorbitant premiums in the future, and in these small communities, the amount of money doctors make is not so great that they can afford to pay over \$100,000 in medical malpractice insurance year in and year out.

Madam President, the Clarion Ledger in my home state a couple of days ago quoted a report from the National Law Journal which found that of the 50 firms in America that had the largest verdicts from juries, 9 of them are in my State of Mississippi, with one firm getting 5 verdicts totaling \$177.5 million, the largest of which was against Janssen Pharmaceutica for \$100 million. Another firm got \$171.27 million, \$150 million of which was from a single verdict against AC&S Manufacturing.

I ask unanimous consent that the article I am about to refer to from the Clarion-Ledger on July 28, 2002, be printed in the RECORD.

There being no objection, the article was ordered to be printed to the RECORD, as follows:

[From the Clarion-Ledger, July 28, 2002]

TOP 50 LAW FIRM LIST SHOWS 9 IN MISSISSIPPI  
(By Sid Salter)

Mississippi takes the rap for being last in so many indices of economic and social progress. The list of "worst firsts" is endless.

But there is one index in which Mississippi shines like a new penny. That news comes via the pages of The National Law Journal. It's called the "Litigation 50."

Seems that nine of the nation's "winningest" 50 law firms in 2001 are in Mississippi—a measure based on The Journal's assessment of the gross amount of money awarded by juries during trials concluded between Jan. 1, 2001, and Dec. 31, 2001.

Quoth The Journal: "A firm's rankings is based on the total amount from all cases tried to a verdict before a jury, but does not include any money obtained through settlements or through bench trials. The ranking also does not take into account any post-trial changes in the judgment."

#### MEET THE TOP DOGS

Take a look at Mississippi's players in the "Litigation 50":

No. 11, Shannon Law Firm, Hazlehurst, five verdicts totaling \$177.5 million, the largest a \$100 million verdict against Janssen Pharmaceutica Inc.

No. 12, Blackmon and Blackmon, Canton, six verdicts totaling \$171.27 million, the largest a \$100 million verdict against Janssen Pharmaceutica Inc.

No. 14, Isaac Byrd and Associates, Jackson, seven verdicts totaling \$150 million, the largest a \$150 million verdict against AC&S Manufacturing Inc.

No. 15, Porter and Malouf, Greenwood, two verdicts totaling \$150 million, the largest a \$150 million verdict against AC&S Manufacturing Inc.

No. 24, Grenfell, Sledge and Stevens, Jackson, four verdicts totaling \$100 million, the largest a \$100 million verdict against Janssen Pharmaceutica Inc.

No. 25, Owens Law Firm, Jackson, four verdicts totaling \$100 million, the largest a \$100 million verdict against Janssen Pharmaceutica Inc.

No. 26, Upshaw, Williams, Biggers, Beckham and Riddick, Greenwood, 26 verdicts totaling \$100 million, the largest a \$100 million verdict against Janssen Pharmaceutica Inc.

No. 29, Langston Sweet & Freese, Jackson, 13 verdicts totaling \$94.27 million, the largest a \$71.27 million verdict against Washington Mutual Finance Group.

No. 37, former Gov. Bill Allain, one verdict totaling \$77.5 million against St. Paul Fire Insurance.

#### BLACKMON'S OTHER JOB

Certainly, this ranking speaks volumes about every law firm represented in the "Litigation 50" ranking and of individual litigators employed by those firms.

But it also once again calls into question whether state Rep. Ed Blackmon—whose law firm was ranked by The Journal as the 12th most successful plaintiffs' law firm in the country in 2001—should be made co-chairman of the Mississippi Legislature's special joint committee studying tort reform.

A legislator who is a pharmacist just spent years in the courts defending a conflict of interest charge simply because his pharmacy accepted Medicaid.

But we're told by the legislative leadership that the state's business and medical community shouldn't worry when one of the nation's top trial lawyers is appointed to oversee proposed tort reforms that could take millions out of his own pockets?

Foxes? Hen houses? Bingo.

Mr. LOTT. The ability to have verdicts reach companies—even when companies are not directly involved in the alleged wrongdoing—through the use of joint and several liability is also causing huge problems in the medical malpractice and other fields. Despite the fact that they often have only tangential relationships to alleged wrongdoers, the plaintiffs' lawyers often include companies in lawsuits simply because they have the deep pockets and the companies all too often end up getting stuck having to pay the lion's share of multi-million dollar verdicts even though they actually did very little wrong.

I often wonder what government officials and responsible citizens in my State think is going to happen over the long term to companies that are faced with this kind of threat from juries in my State? What do they think is going to happen as the verdicts against doctors continue to go up and the insurance premiums to cover medical malpractice insurance costs continue to go up. They are finding out very quickly

as many doctors and other medical providers are literally closing up shop and leaving town.

Madam President, this is a very important issue that is affecting health care in America, that is driving up the costs of health care all across America, that is making medical malpractice insurance unaffordable even for doctors, and which is limiting Americans' access to health care. What is the solution?

Senator MCCONNELL has the solution in his amendment. It would put reasonable limits on punitive damages. It would provide for proportional liability so one company with marginal involvement is not held responsible for the entire costs of a verdict handed down by a jury.

There are also limits on attorney's fees. That provision when you think about it is really about the patients, the people who are hurt, and not about the attorneys who get 40, 50, 60 percent of a judgment in many cases.

Senator MCCONNELL's amendment also has collateral source reform, to stop lawyer's double dipping from both their client's insurance companies and the defendants they drag into court.

The amendment also has alternative dispute resolution. Is that not a better way to go, to find a solution without having to go through the expense of trials, litigation and jackpot verdicts. Would it not be much better to first try to get a quick resolution of the matter outside of the courtroom?

Senator MCCONNELL's amendment should be included as part of this debate we are having about health care accessibility and the cost of prescription drugs. I should note that nearly identical language passed the Senate in 1995 by a vote of 53 to 47, but it was later vetoed by President Clinton.

Senator MCCONNELL's amendment is an important one. I understand that Democrats will perhaps move to try to table it, but this is a critical issue in America that has to be addressed. The American Medical Association announced last month that because of astronomical malpractice premium increases, 12 States are in a health care crisis mode, with 30 other States on the brink of crisis.

I ask unanimous consent that a compendium of news accounts about the medical malpractice crisis affecting the Nation, which was written by the Republican Policy Committee and titled "Overzealous Trial Lawyers Are Denying Medical Care to Expectant Mothers," be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

#### OVERZEALOUS TRIAL LAWYERS ARE DENYING MEDICAL CARE TO EXPECTANT MOTHERS THE NEED FOR MEDICAL LIABILITY REFORM

Mothers and children are being denied medical care because physicians' liability premiums are soaring and forcing many to move to more doctor-friendly states, curtail their practices, or close up shop entirely:

"The malpractice crisis has been building for years but culminating last December

when the country's largest medical malpractice issuers, the St. Paul Companies, dropped tens of thousands of physicians. Other issuers have also cut back on clients or jacked up premiums. A major reason is the increasing number of personal injury lawsuits—and high-priced damage awards. Last week, the American Medical Association announced that because of astronomical malpractice increases, 12 states are in a healthcare crisis mode, with 30 others on the brink of crisis." [Mary Brophy Marcus, "Healthcare's 'Perfect Storm,'" U.S. News & World Report, 7/1/02]

The states identified by the American Medical Association as facing a medical liability crisis are:

Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia.

Recent media accounts demonstrate how this crisis is denying people medical care—particularly expectant mothers. Without medical liability reform, the situation is likely to get worse.

In the border town of Bisbee, Ariz., hospital administrators recently closed the maternity ward because its family practitioners were seeing insurance rate increases of up to 500 percent, to \$88,000 a year. The hospital services 4,000 square miles. Now, hundreds of women must travel at least 60 miles to the closest hospitals, in Sierra Vista or Tucson. Since the ward's closure, four women have delivered babies en route." [Michael Freedman, "The Tort Mess," *Forbes.com*, 5/13/02]

#### Mississippi

"Mississippi . . . is expected to lose 400 doctors this year . . . Last year Bolivar County in western Mississippi had six doctors providing obstetrical care; today it has three. . . . In neighboring Sunflower County, all four doctors who delivered babies have quit private practice. In the northern half of the state last year there were nine practicing neurosurgeons; now there are three on emergency call. There used to be 14 companies underwriting liability in Mississippi; now there's one willing to write new policies." [Editorial, "Lawyers vs. Patients," *The Wall Street Journal*, 5/01/02]

"The North Mississippi Medical Center, a hospital that serves 22 counties and 600,000 people, is now finding it all but impossible to recruit new doctors. They're scared away by the state's tort-friendly medical malpractice environment, soaring insurance premiums and word of the \$5 million award. The hospital . . . may have to cut back on emergency services. There is now no neurosurgeon on call one of every four days. If there's a wreck on the highway that bisects town, or on any of the winding roads in northern Mississippi or Alabama, it will take at least one hour for the victim to be transported to the nearest neurosurgeon in Memphis or Jackson. That hour is crucial; it could cost a life." [Michael Freedman, "The Tort Mess," *Forbes.com*, 5/13/01]

"Maternity care used to make up about 30 percent of family practitioner Scott Nelson's practice in his hometown of Cleveland, Miss. But Nelson got of that business Oct. 1, when his annual malpractice premium would have jumped from \$30,000 to \$105,000 had he continued to deliver babies. "The malpractice insurance environment has literally forced me out of doing it," Nelson says." [Rita Rubin, "You Might Feel a Bit of Pinch," *USA Today*, 12/4/01]

#### Nevada

"Kimberly Mavgaotega of Las Vegas is 13 weeks pregnant and hasn't seen an obstetrician. When she learned she was expecting, the 33-year-old mother of two called the doctor who delivered her second child but was told he wasn't taking any new pregnant pa-

tients. Dr. Shelby Wilbourn plans to leave Nevada because of soaring medical-malpractice insurance rates there. Ms. Mavgaotega says she called 28 obstetricians but couldn't find one who would take her." [Rachel Zimmerman and Christopher Oster, "Insurers' Price Wars Contributed to Doctors Facing Soaring Costs," *The Wall Street Journal*, 6/24/02]

"Half of the 93 OB-GYNs who deliver babies in Las Vegas's Clark County are no longer accepting new obstetrical patients." [Mary Brophy Marcus, "Healthcare's 'Perfect Storm,'" U.S. News & World Report, 7/1/02]

"Twice last month, Las Vegas obstetrician/gynecologist Shelby Wilbourn saw patients who's made an appointment under a false pretense. They said they were having irregular menstrual periods. But when they met Wilbourn face-to-face, they fessed up. The reason they hadn't had a period in a couple of months was because they were pregnant, not because their cycle was out of whack. I had to close the chart and say, 'Ma'am, I can't help you, because I'm not doing OB anymore,' Wilbourn says. 'They just started sobbing in the office.' . . . Last month, Wilbourn announced to tearful patients and office staff that he had accepted an offer in Belfast, a small town on the coast of Maine . . . [T]he decision to close his practice July 31 was not easy. 'I've got a lot of pregnant women I'm not going to be here for,' he says. 'I'm going to be turning them loose halfway through a pregnancy, and I can't find them a doctor.' One of them is Deanna Rood, who is due in October. Wilbourn cared for Rood when she was pregnant with her firstborn, a son who will turn 2 in August. 'I'm in a scary position right now,' Rood says. 'I'm six months pregnant, and I don't have a doctor.'" [Rita Rubin, "Fed-Up Obstetricians Look for a Way Out," *USA Today*, 6/30/02]

"[Las Vegas OB-GYN Shelby] Wilbourn accepted a new job in Maine last week. He wonders who will deliver the 500 babies born each week in Las Vegas and if there will be any OBs to take emergency calls like the one he recently answered. The patient was 34 weeks pregnant, in premature labor and hemorrhaging, and her baby's heartbeat was frighteningly low. Wilbourn arrived in minutes, and both mother and child made it successfully through childbirth. 'If this were next year,' he contends, 'that baby would have died.'" [Mary Brophy Marcus, "Healthcare's 'Perfect Storm,'" U.S. News & World Report, 7/1/02]

"John Nowins, president of the Clark County (Las Vegas) OB-GYN Society, says that 80 percent of his members are phasing out obstetrics because of the jump in malpractice insurance premiums. . . . Nowins, a Chicago native, says he's considering moving to Indiana. 'At least they have good tort reform,' he says." [Rita Rubin, "Fed-Up Obstetricians Look for a Way Out," *USA Today*, 6/30/02]

"In March, doctors at Nellis Air Force Base in Las Vegas sent a 34-year-old woman with colon cancer to Joseph Thornton, a highly experienced colon and rectal surgeon in the area. Because of the war in Afghanistan, most of Nellis's specialized surgeons are now deployed, and the remaining military doctors said they couldn't remove the cancer unless they cut out the woman's entire colon, leaving her with a colostomy bag to drag around and empty the rest of her life. They hoped that Thornton's expertise might offer a better outcome. Just one problem. Thornton, at age 56, retired on March 31 because his malpractice insurance company was closing, and he couldn't afford what the other insurers were charging. . . . The woman showed up in Thornton's office just before his retirement, but she needed chemotherapy

and radiation first, and the surgery couldn't be performed before Thornton's policy expired. 'It broke my heart,' he said. 'I felt like I was planning my own funeral. . . . My broker got quotes for me and told me I should quit. And he makes a commission on insurance purchases.'" [Marilyn Werber Serafini, "Risky Business," *National Journal*, 5/18/02]

"In Nevada, 123 physicians have either closed their practices or are planning to do so soon." [Mary Brophy Marcus, "Healthcare's 'Perfect Storm,'" U.S. News & World Report, 7/1/02]

"A study by a University of Nevada medical school professor says 42 percent of obstetricians are making plans to move their practices out of southern Nevada. If that happens, only 78 obstetricians would be left in an area that includes Las Vegas, a city of 1.5 million with 23,000 births last year. The same study notes that 76 percent of the city's obstetricians have been sued, and 40 percent have been sued three or more times." [Michael Freedman, "The Tort Mess," *Forbes.com*, 5/13/02]

#### New Jersey

"Last week the Garden State's largest malpractice insurer, the MIIX Group, announced it has essentially decided to fold up shop. The decision is notable because MIIX isn't just another insurance company out to make a profit. It began as an association of doctors that got into the business of insuring themselves and other doctors. The company has lost more than \$200 million in the past 15 months, and its decision means that about 9,000 New Jersey doctors, 37 percent of the state total, may soon lose their insurance. . . . In 2001, three malpractice insurers stopped doing business in the state." [Editorial, "Born to Sue," *The Wall Street Journal*, 5/17/02]

#### Pennsylvania

"Kelly Biesecker, 35, spent many extra hours on the highway this spring, driving from her home in Villanova, Pa., to Delran, N.J., so she could continue to use her obstetrician. Dr. Richard Krauss says he moved the obstetrics part of his practice from Philadelphia because malpractice rates had skyrocketed in Pennsylvania. Ms. Biesecker, who gave birth to a healthy boy on June 5, says Dr. Krauss was the doctor she trusted to guard her health and the health of her baby: 'You stick with that guy no matter what the distance.' . . . New Jersey hasn't been a panacea, however. His policy there expires July 1, and the carrier refuses to renew it." [Rachel Zimmerman and Christopher Oster, "Insurers' Price Wars Contributed To Doctors Facing Soaring Costs," *The Wall Street Journal*, 6/24/02]

"Lauren Kline, 6½ months pregnant, changed obstetricians when her long-time Philadelphia doctor moved out of state because of rate increases. Now, her new doctor, Robert Friedman, may have to give up delivering babies at his suburban Philadelphia practice. His insurance expires at the end of the month, and he says he is having difficulty finding a carrier that will sell him a policy at any price." [Rachel Zimmerman and Christopher Oster, "Insurers' Price Wars Contributed To Doctors Facing Soaring Costs," *The Wall Street Journal*, 6/24/02]

"High insurance rates are also plaguing hospitals, some of which are closing their riskiest services. Grand View Hospital, located in Sellersville, Pa., between Philadelphia and Allentown, is having trouble securing insurance at any price." [Marilyn Werber Serafini, "Risky Business," *National Journal*, 5/18/02]

"In Philadelphia, the Methodist Hospital Division of Thomas Jefferson University Hospital will cease to deliver babies effective

June 30 . . . More than 90 full- and part-time staff positions at Methodist will disappear." [Marilyn Werber Serafini, "Risky Business," National Journal, 5/18/02]

"Dr. John Angstadt, 44, started looking to move out of suburban Philadelphia when his insurance increased from \$14,000 in 1994 to \$66,000 last November. In December he joined a large practice in Savannah, Ga., where he pays just \$16,000 for insurance. Now, instead of worrying about rising costs and lawsuits, he can practice medicine. 'That was missing in Philadelphia,' he says. 'I go up in the morning and the idea of facing another day was onerous.'" [Michael Freedman, "The Tort Mess," Forbes.com, 5/13/02]

#### Texas

"C. Dale Eubank practices in Texas. . . . 'I have been named in suits, and none of them ever went anywhere,' says Eubank, who has delivered 3,000 babies since 1983. Disgusted with what he calls the 'litigious environment' in Corpus Christi, Eubank this year decided to stop delivering babies." [Rita Rubin, "Fed-Up Obstetricians Look for a Way Out," USA Today, 6/30/02]

"Texas used to have 17 [medical liability insurance] carriers; now it has four." [Editorial, "Lawyers vs. Patients," The Wall Street Journal, 5/1/02]

#### Washington

"Jen Fleming of Friday Harbor says she keeps hoping she can persuade Robert and Barbara Pringle, a husband-wife OB-GYN team, to care for her during her next pregnancy. In January 1999, Fleming delivered a stillborn daughter. A few months later, she became pregnant with her son, who is now 2. 'Now they'll have to refer me to someone else' when she gets pregnant, Fleming says. 'It's a shame, because they're the ones who got us through our second pregnancy.' The Pringles, who practice in Mount Vernon, Wash., stopped taking new OB patients a few weeks ago." [Rita Rubin, "Fed-Up Obstetricians Look for a Way Out," USA Today, 6/30/02]

#### West Virginia

"The state of West Virginia, no stranger to problems, has a severe one on its hands now: a 'doctors crisis.' That's what many are calling it, and with good reason. West Virginia is losing doctors every day; communities are going without care; no doctors are coming in—it is almost impossible to recruit. The problem is the legal atmosphere: The state has earned the designation 'Tort Hell,' or, if you are a plaintiff's attorney, 'Tort Heaven.' In probably no other state is it as hard to be a doctor, or to remain one. Doctors are becoming desperate; the public, slowly—and in some areas, not so slowly—is waking up. The need for reform is crying. Of course, this need is felt all across the country; but nowhere is it felt more acutely than in West Virginia." [Jay Nordlinger, "Welcome to 'Tort Hell,'" National Review, 8/20/01]

"Jane Kurucz, a general surgeon who specializes in breast diseases . . . is a typical case, but with an unusual twist: On Sunday afternoon, July 29, a rally was staged in support of her, in a downtown park. The event was organized by a patient, unhappy at losing her doctor, and, more than unhappy, angry. Dr. Kurucz has been practicing for 13 years. In that time, she has had one lawsuit against her (amazingly low for West Virginia), now pending. On May 1, she received a letter informing her that her insurance would not be renewed. . . . Jane Kurucz had to close up shop on August 1." [Jay Nordlinger, "Welcome to 'Tort Hell,'" National Review, 8/20/01]

"Huntington is now essentially without breast surgery. It may soon be without neurosurgery. The local neurosurgeons pay over

\$160,000 a year in insurance, if they manage to qualify for it. And as they leave, a chain reaction occurs: The city's residency program collapses; the medical school is in jeopardy. 'The cascade effect is tremendous,' as Dr. Kurucz says." [Jay Nordlinger, "Welcome to 'Tort Hell,'" National Review, 8/20/01]

"Wheeling, W. Va.'s last emergency-room neurosurgeon recently left the state, which means that people with severed hands and other traumatic injuries must be helicoptered out of state for treatment." [Mary Brophy Marcus, "Healthcare's 'Perfect Storm,'" U.S. News & World Report, 7/1/02]

"In Wheeling, one of West Virginia's largest cities, all of the neurosurgeons have left. Corder says it's common for trauma patients who need a neurosurgeon to be airlifted to Pittsburgh. On one such occasion, he said, a patient was flown to Pittsburgh only to be examined and discharged 15 minutes after being seen. The cost for the helicopter ride was \$4,000." [Marilyn Werber Serafini, "Risky Business," National Journal, 5/18/02]

"In West Virginia, the sole community hospitals in Putnam and Jackson counties have closed their obstetrics units because obstetricians are facing enormous premium increases and are choosing to leave the area, according to Thomas J. Corder, chairman of the West Virginia Hospital Association and president of Camden-Clark Memorial Hospital in Parkersburg." [Marilyn Werber Serafini, "Risky Business," National Journal, 5/18/02]

"West Virginia was good for Joe Prud'homme. The Texas native never expected to put down roots in Beckley, W. Va., where he got a temporary job after touring the world for a year. In the ensuing 6½ years, though, Prud'homme set up his own orthopedic surgery practice and married a local woman with a large extended family nearby. But last week, Prud'homme and his wife, who are expecting their first baby any day, packed up and left the state. If Prud'homme had continued practicing in Beckley, his annual premium would have doubled Nov. 1, to more than \$80,000. In Blacksburg, Va., 80 miles to the southeast, he's paying \$18,000. . . . Despite the inconvenience, Fran Pemberton, 50, and her mother-in-law, Betty Pemberton, 70, will make the three-hour round trip to see Prud'homme in Blacksburg. 'I have to miss a shift's work every time we go down there,' says Fran Pemberton, a high school cook. Prud'homme performed carpal-tunnel surgery on her wrists. Her mother-in-law needs knee-replacement surgery. 'We have a lot of general practitioners who are pretty good doctors,' Fran Pemberton says. 'But to have a specialist anymore, you have to go somewhere.'" [Rita Rubin, "You Might Feel a Bit of a Pinch," USA Today, 12/4/01]

"Ronn Grandia, M.D., [Bruce Hoak, M.D.], and Michael Hall, M.D., saw no option but to close after liability insurance priced their three-man surgical practice out of existence. 'We just don't have the resources to pay the premium,' Dr. Hall said. . . . After practicing in Ohio for five years, Ronn Grandia, M.D., returned to West Virginia in 1996. . . . But this month he starts to practice across the state line at Holzer Clinic in Gallipolis, Ohio. He'll be able to live in the same house in West Virginia and even treat some of the same patients. But by practicing in Ohio, he can afford his professional liability insurance. . . . Bruce Hoak, M.D., the third physician at Southern Surgical Associates, is headed to his native Texas and also will pay about half the rate he would have paid in West Virginia. . . . With these three general surgeons leaving Charleston, Thomas Memorial Hospital will be left with just four gen-

eral surgeons. That's down from eight. Another surgeon left earlier, also citing high insurance rates. 'Nobody has been willing to consider it a crisis until thousands of patients started losing their physicians,' Dr. Hall said. 'We are only the first wave.'" [Tanya Albert, "Soaring Premiums Force Doctors to Close Practice," American Medical News, 9/10/01]

"Dr. R. Todd De Pond misses the howling new infants but not the costly insurance protection required for presiding at their births. 'I've decided not to do obstetrics at all,' Dr. De Pond said of his retreat to the gynecology half of his practice in what West Virginia medical officials warn is a statewide crisis in skyrocketing malpractice insurance rates. Scores of doctors are curtailing services by dropping high-risk obstetrical and neurosurgical procedures rather than pay premium increases of 30 percent and more, the State Medical Association says. At the same time, about 100 doctors, one in 20, have in the last two years retired early or moved from West Virginia, one of the costliest areas in the nation for malpractice coverage. . . . 'It has gotten worse every year,' said Dr. De Pond, who used to handle 15 maternity cases a month." [Francis X. Clines, "Insurance-Squeezed Doctors Fold Their Tents," The New York Times, 6/13/02]

"Bluefield Regional Center, a major hospital in the state's hardscrabble south, lost 12 doctors in the last two years and has been able to replace only 2." [Francis X. Clines, "Insurance-Squeezed Doctors Fold Their Tents," The New York Times, 6/13/02]

#### AN UNTENABLE SITUATION

How bad has the medical liability environment become? As one article states [Michael Freedman, "The Tort Mess," Forbes.com, 5/13/02]:

"In some parts of the country, doctors say, it is almost better to let a patient die than to attempt heroic surgery, fail and risk a lawsuit."

If the medical liability system is making doctors think twice about saving lives, that system needs to be reformed.

Mr. LOTT. Madam President, if we do not get some control of these outlandish lawsuits and the verdicts that are being handed down both in the field of medical malpractice and in the broader area of tort reform, the never-ending stream of lawsuits that are being filed in this country is going to continue putting good men and women out of the practice of medicine, good companies out of business, and good men and women out of work.

I yield the floor.

The PRESIDING OFFICER (Mr. JOHNSON). Under the previous order, the time until 12:55 will be equally divided and controlled by the Senator from Massachusetts and the Senator from Kentucky or their designees.

The Senator from Massachusetts.

Mr. KENNEDY. So we have how much time, Mr. President?

The PRESIDING OFFICER. Twenty-six minutes.

Mr. KENNEDY. I yield myself 7 minutes.

Mr. President, we have heard some discussion earlier today about the state of the debate on the prescription drug program. To remind all of our colleagues, that legislation would have been tied up in the Finance Committee for over 5 years. It was only because of the leadership of Senator DASCHLE that

we were able to ensure that we had some debate on the floor of the Senate on a matter of central importance to families all over this country. With the leadership of Senator GRAHAM, Senator MILLER, and others, we have had a good debate.

We had some votes in the Senate on some very important comprehensive measures. There was the vote, which I was proud to support, on Senator GRAHAM's amendment, which received 52 votes. If we had had 8 votes from that side of the aisle, this legislation would be on its way now to a conference and there would be a real possibility of gaining comprehensive coverage. That program provided a \$25 premium, no deductible, and limited copays at \$10 for generic drugs, \$40 for brand name drugs. It also had a catastrophic program. That was the way to go. But it was defeated. No one supported it.

Now, 10 days later, can we make a difference and provide some relief to the seniors in our country? Senator GRAHAM will have the opportunity, after the disposal of this amendment, to make his case, which I intend to support for reasons I will outline during the course of that debate. But none of us should be under any illusion of where the responsibility lies in terms of our failure to get a comprehensive program. We were able to gather the support of virtually every Member on this side of the aisle for a very comprehensive program with low premiums and no deductibles, and a very reasonable copay that had the support of all of the senior groups.

When I listen to those who were opposed to it talk about their alternative, they clearly did not have the support of a single senior group.

Now let us get back to what is at hand, and that is the medical malpractice amendment introduced by my friend from the State of Kentucky.

On Friday, the sponsor of this amendment, Mr. MCCONNELL—which has also been characterized by the Senator from Tennessee—described it as “pro-victim and pro-consumer.” He claimed that since his amendment did not contain a cap on non-economic damages, it would not “adversely affect” an injured patient’s ability to recover compensation for injuries caused by a health care provider. In fact, the McConnell amendment is pro-HMO, pro-drug manufacturer, and pro-insurance company, at the expense of patients.

Make no mistake about it. There is a great deal in this amendment which would deprive serious injured patients of fair compensation. At virtually every stage of the legal process, the amendment systematically rewrites the rules of civil law to tip the balance in favor of defendants. It would arbitrarily shield health care providers and their insurance companies from basic responsibility for the harm they cause.

At a time when the American people are calling for greater corporate ac-

countability, it is unbelievable that our Republican colleagues would bring to the floor an amendment which would do just the opposite. The McConnell amendment would allow the entire health care industry to avoid accountability for the care they provide and that is not acceptable.

While those across the aisle like to talk about doctors, the real beneficiaries will be insurance companies. This amendment would enrich the insurance industry at the expense of the most seriously injured patients; men, women, and children whose entire lives have been devastated by medical neglect and corporate abuse.

This proposal would also shield HMOs that fail to provide needed care, nursing homes that neglect elderly patients, drug companies whose medicine has toxic side effects, and manufacturers of defective medical equipment.

It would drastically limit the financial responsibility of the entire health care industry to compensate injured patients for the harm they have suffered. When will the Republican Party start worrying about injured patients and stop trying to shield big business from the consequences of its wrongdoing? Less accountability will never lead to better health care.

There is no real question about the effect of their amendment. It would, in fact, place major new restrictions on the right of seriously injured patients to recover fair compensation for their injuries. Let’s look at what the amendment actually does.

It abolishes joint and several liability for non-economic damages. This means the most seriously injured people may never receive all of the compensation that the court has awarded to them. Under the amendment, health care providers whose misconduct contributed to the patient’s injuries will be able to escape responsibility for paying full compensation to that patient. The patient’s injuries would not have happened if not for the misconduct of both defendants, so each defendant should be responsible for making sure the victim is fully compensated.

The bias in the McConnell amendment could not be clearer. It would preempt State laws that allow fair treatment for injured patients, but would allow State laws to be enacted which had greater restrictions on patients’ rights than the proposed federal law. This one-way preemption shows how result-oriented the amendment really is. It is not about fairness or balance. It is about protecting defendants.

The amendment preempts state statutes of limitation, cutting back the time allowed by many states for a patient to file suit against the health care provider who injured him.

It mandates that providers and insurance companies be permitted to pay a judgment in installments rather than all at once. Allowing health care providers, including HMO’s, large drug manufacturers and their insurance

companies to pay on the installment plan transfers compensatory dollars that rightfully belong to an injured patient back to the wrongdoer. If the patient does not receive the money for years, he in reality is getting less money than the court concluded that he deserves for his injuries.

The amendment makes it much harder to sue a physician for injuring a baby or its mother during the delivery process if the doctor had not previously treated the mother. It requires a much higher burden of proof, clear and convincing evidence, than is normally provided for in a civil case. There is no reason why a practicing physician should not be held to the normal standard of medical care merely because he had not previously treated the patient. Such a provision is grossly unfair to pregnant women. In essence, their doctors are held to a lower standard of care than all other medical professionals.

The places extremely restrictive limitations on when an injured patient can receive punitive damages, and how much punitive damages the victim can recover. It would cap punitive damages at twice the amount of compensatory damages, no matter how egregious the defendant’s conduct and no matter how large its assets. This would destroy the deterrent effect of punitive damages in the very few cases where punitives would still be allowed.

Even more outrageous is the language on page 23 which appears to say that the government would take half of any punitive damages which the injured patient did receive. This amounts to a confiscatory tax on punitive recoveries, which is extremely unfair to the victims. It is the victims who have been harmed by the malevolent conduct. The government should not arbitrarily take half of the jury award.

It imposes unprecedented limits on the amount of the contingent fee which a client and his or her attorney can agree to. This will make it more difficult for injured patients to retain the attorney of their choice in cases that involve complex legal issues. It can have the effect of denying them their day in court. Again the provision is one-sided, because it places no limit on how much the health care provider can spend defending the case.

If we were to enact all of these arbitrary restrictions on the compensation which seriously injured patients can receive, what benefits would result in our health care system? Certainly less accountability for health care providers will never improve the quality of health care. Substandard medical care is a growing problem.

The Agency for Healthcare Research and Quality at HHS found that the number of adverse effects from medical treatment has more than doubled in recent years. These disturbing statistics make clear that we need more accountability in the health care system, not less. In this era of managed care and cost controls, it is ludicrous to suggest

that the major problem facing American health care is "defensive medicine." The problem is not "too much health care," it is "too little" quality health care.

In the time remaining, I will cover two or three other points. This chart asks, Do malpractice premiums drive up medical costs? It shows health care and malpractice inflation. Look at health care costs they have gone up 74 percent since 1988; medical malpractice costs, 5.7 percent.

For States without caps on damages, the average cost of medical malpractice insurance is \$7,715 for internal medicine; in States with caps on damages, it is \$7,887. For general surgery, it is \$26,144 for States without and \$26,746 for States with caps on damages; for OB/GYN, it is \$43,000 for States without caps versus \$44,000 for States with caps.

The impact on general health care issues has been considerably less. The fact remains that the number of doctors per 100,000 people in States which do have the caps versus those that do not are virtually identical. The costs of the premiums are exactly the same.

Let's get focused on where the needs are and the beneficiaries and the losers of this amendment. The beneficiaries will be the insurance companies; the losers will be the patients who are going to suffer because of negligence. That is wrong. That proposal should not be accepted.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. How much time do I have?

The PRESIDING OFFICER. Twenty-six minutes.

Mr. MCCONNELL. Mr. President, this amendment is related to the crisis of medical malpractice that we have across our country due to the failure to impose accountability and responsibility on big, powerful trial lawyers who are running roughshod over doctors and taking advantage of their clients. That is what this debate is about.

Senator HATCH is here and I yield him 2 minutes. After Senator HATCH, Senator FRIST would like 3 minutes.

Mr. KERRY. Mr. President, just to inquire, are we going to go back and forth? I didn't know the Senator had the right to yield successive periods of time.

The PRESIDING OFFICER. There is no order at this point.

Mr. MCCONNELL. Mr. President, Senator FRIST had to go to a meeting. He is only asking for 3 minutes, and Senator HATCH is only taking 2 minutes.

Mr. KERRY. I understand.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I listened to the impassioned speech of the Senator from Massachusetts. The fact is, there will not be any medical liability insurance companies. One major company has gone out of business because of what amounts to unreasonable litigation all over the country.

It used to be that all you had to do was show that you met the standard of practice in the community and that was enough to alleviate doctors from medical liability. When the doctor of informed consent came into being, then every case from that point went to a jury. The reason is because they could make any claim they wanted, and ingenious lawyers can write the claims so they go to the jury.

We have a crisis in this country. I estimated 15 years ago that at least \$300 billion a year was being wasted in unnecessary defensive medicine. If anything, that number has gone up. Mr. President, 50.5 percent of family practitioners in Utah have given up obstetrical services or never practiced obstetrics. Of the remaining 49.5 percent still delivering babies, 32.7 percent plan to stop providing OB/GYN services within the next decade. Most plan to stop within the next 5 years.

The people who are really going to be hurt will be the most vulnerable people in our society, the children.

Frankly, we have to stop letting this medical liability situation go stock wild. It is way out of control. This is an amendment that does make intelligent approaches to trying to resolve the problems.

This is an important issue about which I have spoken on previous occasions. I am pleased to see that on July 25, President Bush announced his desire to address the medical malpractice problem. We welcome his support in this effort.

As many of you will recall, we debated, and passed, the exact provisions that are contained in the McConnell amendment during the Commonsense Product Liability and Legal Reform Act debate back in 1995. Unfortunately, the language was stripped from the bill in conference. I will say many of the same things now that I said back then, because, regrettably, they still apply and need to be said. I am sorely disappointed that in the ensuing seven years we have still not acted to address the fact that medical malpractice costs have spiraled out of control and are forcing many doctors and hospitals out of the profession. The situation has gotten worse, not better. We must act now if we are at all serious about fixing the crisis in healthcare delivery this has caused in many parts of this country.

Make no mistake, we have a healthcare crisis in this country, one that is due in large part to litigation that is out of control. Many may not be aware of just how serious the ramifications of the crisis are.

I will ask unanimous consent to have printed in the RECORD a July 18 Associated Press article, "Soaring Malpractice Insurance Squeezes out Doctors, Clinics," which highlights these problems. The article points to the "national problem that doctors say is obliging many of them to flee certain states or give up certain specialties—or the entire profession—because of sky-

rocketing insurance premiums linked to soaring jury awards."

The article goes on to note that, as I am sure my colleagues from Nevada are acutely aware and Senators MCCONNELL and FRIST already mentioned—the University Medical Center trauma clinic in Las Vegas—the only Level 1 trauma center in Nevada—closed down on July 3 of this year. The 58 doctors who were associated with the trauma center had insisted on much-needed relief from the soaring cost of medical malpractice insurance. Consequently, the day after the center closed, a victim of a serious traffic accident had to be transported to the next nearest emergency room which was an hour away. The trauma center was hurriedly reopened on July 13, but with only 10–15 doctors working on a temporary basis, with limited liability, while the Governor tries to enact legislation limiting awards in medical malpractice cases. We don't know if that trauma center will be forced to close again. Commenting on the trauma center's closure, its Director, Dr. John Fildes, stated that "the standard of care in our community was set back 25 years."

No one knows whether the life of that tragic accident victim in Las Vegas could have been saved had he been treated at the nearby hospital. Would any of us want that to happen to our loved ones—traveling an hour to receive emergency care? I certainly wouldn't, and the Senate should take the necessary steps to ensure that it does not happen to anyone else.

The problem of providing necessary healthcare in the face of rising insurance costs and the threat of excessive litigation cuts across multiple specialties, not just emergency services.

Ensuring the availability of adequate obstetric care continues to be a rising problem. According to the same article, one Arizona hospital, a clinic in Oregon, and two Pennsylvania hospitals recently have closed their obstetrics units. Several counties in upstate New York have no obstetricians covering night shifts. There is an increasing shortage in my home state of Utah as well. Studies by both the Utah Medical Association and the Utah Chapter of the American College of Obstetricians and Gynecologists underscore the problem in my state:

50.5 percent of Family Practitioners in Utah have already given up obstetrical services or never practiced obstetrics. Of the remaining 49.5 percent who still deliver babies, 32.7 percent say they plan to stop providing OB services within the next decade. Most plan to stop within the next five years.

According to this Utah Medical Association study:

Professional liability concerns [was] given as the chief contributing factor in the decision to discontinue obstetrical services. Such concerns include the cost of liability insurance premiums, the hassles and costs involved in defending against obstetrical lawsuits and a general fear of being sued in today's litigious environment.

Mr. President, ensuring the availability of quality prenatal and delivery



care for the most vulnerable members of our society is imperative for obvious reasons.

The newly-released Department of Health and Human Services report "Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Cost by Fixing our Medical Liability System" released by HHS Secretary Tommy Thompson includes a detailed review of recent studies on the consequences of out-of-control medical liability crisis that is threatening healthcare in many parts of America. Even volunteer medical services are threatened. According to the report, "[m]any doctors cannot volunteer their services for a patient who cannot pay, and the proportion of the physicians who provide charity care at all has declined, because doctors cannot afford the required liability coverage." It further details the rising costs of insurance premiums:

Doctors alone had to pay over \$6 billion in medical liability premiums last year, and premiums this year in many states have increased by more than 20 percent on average and more than 75 percent for specialties in some states. . . . Excessive liability also adds \$30 billion to \$60 billion annually to Federal government payments for Medicare, Medicaid, the State Children's Health Insurance Program, Veterans' Administration health care, health care for Federal Employees, and other government programs.

The HHS study further details how reasonable medical malpractice reforms in some states have been working to reduce healthcare costs and improve access and quality of care. I urge my colleagues to read this report.

Our entire medical system—which everyone knows is heralded as the best in the world—is based on a total reliance on the abilities of the health care professionals who treat us, professionals who have sacrificed immeasurably to get the requisite training and credentialing. These are professionals who spend long and hard hours in school and at work to make our system the best in the world.

Will there be mistakes? Of course there will be; we are only human. And while we must strive for perfection, that by definition cannot be. My heart goes out to each and every person who has suffered an adverse medical event, whether it was caused by the medical delivery system or not.

I was a trial attorney before I came to Congress. I saw heart-wrenching cases in which mistakes were made. But I also saw heart-wrenching cases in which mistakes were not made and doctors were forced to expend valuable time and resources defending themselves against frivolous lawsuits. I have litigated these cases, both as an attorney for the plaintiff and as an attorney for the defendant.

No one in this body knows better than I—perhaps with the exception of our colleague from Tennessee, Senator FRIST—what the defects are in this system. Mr. President, I wish we could design a system which would protect each and everyone from harm, but that

is not possible. Our job is to design the best system we can. But in a country as large and diverse as this one, problems are inevitable. The task before us is to make sure the system minimizes those problems. Thus the question before us is: how to design a system which protects both the patient and the provider? I do not believe that a protracted war between trial attorneys and health care professionals is the way to accomplish that goal.

Why do we need to pass this amendment dealing with medical malpractice liability? Medical liability costs are out of control, as I have already stated. President Bush's Council of Economic Advisers published a paper in April estimating that the U.S. tort system, costing \$180 billion, of which medical torts comprise a large part, is the most expensive in the world as a percentage of gross domestic product, equivalent to a three percent tax on wages. Professional liability rates are rising in response to our runaway tort system. And liability costs are having a direct impact on healthcare spending.

It is often the case that doctors feel compelled to run diagnostic tests that are costly and unnecessary, in order to cover themselves—it is defensive medicine. It is wasteful, but unfortunately has become necessary. The only way to stop this is to get some reason into the system.

Senator MCCONNELL's amendment attempts to address many of the problems in this area by instilling a much needed measure of stability into our legal lottery that will benefit both patient and provider.

How? This amendment would take the following, necessary, steps: To start, the amendment sets standards for punitive damages. In order for a claimant to receive such damages, he or she must prove by clear and convincing evidence that either:

The defendant intended to injure the claimant for a reason unrelated to health care;

The defendant understood the claimant was substantially certain to suffer unnecessary injury and yet still deliberately failed to avoid such injury; or

The defendant acted with a conscious, flagrant disregard of a substantial and unjustifiable risk of unnecessary injury, which the defendant failed to avoid in a manner which constituted a gross deviation from the normal standard of conduct.

Furthermore, punitive damages would be limited to two times the sum of compensatory damages, which includes both economic and non-economic damages.

With our current system, defendants who are only one percent at fault could be held responsible for 100 percent of the award—which certainly does nothing to encourage doctors to continue to provide care. Under this amendment, there would be proportionate liability for non-economic and punitive damages, so that doctors are only liable for their actual share of damages if culpa-

bility is established. However, joint liability would remain for economic damages.

In addition, courts would be allowed to require periodic payments for large awards rather than lump sums, which makes it easier for insurers to judge their appropriate reserves. I would note that under Utah law, periodic payments for awards of over \$100,000 are mandatory. This does not reduce the claimant's award. Past and current expenses will continue to be paid at the time of judgment, while future damages can be funded over time with less risk of bankrupting the defendant. Awards in malpractice cases also would be reduced by the amount of compensation received from collateral sources, in order to prevent the practice of "double dipping."

This amendment also limits attorneys' fees, but I think, in a reasonable manner. Attorneys' fees that could be paid out of an award would be limited to 33 percent of the first \$150,000 and 25 percent of any amount awarded above that. I have to say, I am concerned about any limitation on attorneys' fees, but there have been some colossal rip-offs in this area and this appears to be a reasonable approach in the McConnell amendment. Lawyers should be compensated, and they should be fairly and reasonably compensated. But studies have shown that a surprisingly low proportion of every dollar spent on liability litigation ever reaches patients. That is a strong indication that our liability system has been turned squarely on its head. Despite all the tremendous litigation costs, the beneficiaries seem to be lawyers, not patients. This important provision ensures that the injured party will receive more of the award, and the attorney less.

The amendment would further require that a medical malpractice complaint must be filed within two years after the claimant discovered, or in the exercise of reasonable care should have discovered the injury and its cause. This is similar to the law in Utah, which provides for a 2-year statute of limitations, with a 4-year maximum.

And with regard to obstetric care, to address the rising number of lawsuits filed against emergency room doctors who deliver babies of women they have not previously treated, this amendment incorporates an amendment offered by Senator THOMPSON back in 1995 which passed overwhelmingly. Under this provision, for obstetric services, if a health care provider had not previously treated the pregnancy, the provider shall not be found to have committed malpractice unless proof of the malpractice meets the standard of clear and convincing evidence.

This amendment also encourages states to develop a state-based alternative dispute resolution mechanism to avoid the necessity of going to court. I have long felt that our fault-based liability system may not be the most equitable or the most efficient. It is expensive, time consuming, and unpredictable.

The McConnell amendment also requires that a portion of all punitive damage awards be set aside to: No. 1, improve state licensing, investigating, and disciplining of medical professionals; and, No. 2, reduce medical malpractice expenses for physicians who volunteer to provide care in medically underserved areas.

Finally, the scope of this amendment applies to all federal and state medical malpractice cases, except in those states that already have stronger medical malpractice reforms.

Mr. President, it is clear that we need to do something to deal with this crisis, and I believe the McConnell amendment is a step in the right direction. What is important is that we take steps to benefit both the patient and the health care provider, not the trial lawyers—otherwise we are in danger of losing access to necessary healthcare. I urge my colleagues to support this amendment.

Mr. MCCONNELL. I yield 3 minutes to the Senator from Tennessee.

Mr. FRIST. First, I want to go back to the theme that I introduced last Friday: This is not about insurance companies or injured patients but about patients broadly. The debate boils down to patients broadly; to the American people versus a broken system of runaway, skyrocketing premiums secondary to the trial lawyers.

As I paint the picture, look at the skyrocketing medical premiums which we know are out there. They have an impact that is directly translated to access of health care. This is important to everyone listening to me today because they want access to health care, and affordable access to health care.

What is happening is that the skyrocketing costs, coupled with these runaway jury awards, have an impact on physicians in the following way. As the Senator from Mississippi said a few minutes ago, physicians are leaving parts of the country. They are relocating. They are stopping certain riskier procedures, such as delivering babies. Because of these skyrocketing premiums, obstetricians are having to stop delivering babies and neurosurgeons are beginning to limit their practices. We will hear shortly about trauma centers closing in Nevada and elsewhere. Trauma centers provide highly specialized care, and they are actually closing because of these skyrocketing premiums.

We also talked a little yesterday about defensive medicine. It increases costs the system overall, but these costs also translate down to how much you pay every time you go see a doctor or pay an insurance premium.

Ask your physician about defensive medicine. Eighty percent of physicians practice defensive medicine to the tune of billions of dollars. Patients are hurt in terms of poor access to health care and in terms of greater costs to them.

Let me just close, by asking the following: Who do you believe? Is it the insurance companies? Is it the trial

lawyers? I will simply say, go back and ask somebody you trust for your health care. Ask your doctor who is telling the truth about the impact of skyrocketing medical malpractice costs; ask your doctors why physicians are leaving States to practice in other States where there is some sort of control on these runaway costs. Ask your doctor why physicians are retiring early or refusing to see certain patients. Ask your doctor why obstetricians are refusing to take new patients, or adjusting their practice just to practice gynecology and not obstetrics. Ask your doctor why trauma centers are closing today because of these skyrocketing premiums. Ask your doctor whether legal reform in the area of medical malpractice is good for patients.

I do not care about the insurance companies. They can come or go; they can deny business. The people I care about are the patients, who need access to better care. To better understand this debate ask your doctor, somebody you trust. Call them on the phone today, and I guarantee the answer they will give you is that the judicial system today is out of control and must be reformed. That is what the McConnell amendment does.

To summarize, States across the country are experiencing a health care liability crisis. Medical liability insurance premiums are skyrocketing as medical liability claims and damage awards are exploding. This problem is not limited to just a few States or a few areas of the country. It is nationwide, and it is getting worse.

The end result of this national crisis is simple: patients suffer. Patients suffer because in many areas because their access to care is in grave danger due to rising medical liability insurance premiums. Doctors are being forced to leave their practices, to stop performing high risks procedures and to drop vital services. Specialists are leaving certain areas or simply retiring. Women suffer the most. One out of 10 OB/GYNs no longer delivers babies because of the high cost of liability insurance. In addition, emergency departments are losing staff and scaling back certain services. This can literally be a life or death problem.

The problem is so severe that, according to the AMA, there is a crisis in 12 States where patient access to care is now seriously threatened. And there are 30 more States that are near crisis, including my home State of Tennessee.

Patients also suffer because of the large costs of defensive medicine. To avoid situations in which a contingency fee attorney can claim injury occurred because certain tests were not performed, doctors engage in "defensive medicine" by performing tests and prescribing medicines that are not necessary for health reasons. This costs our economy billions.

As a doctor I know this problem is real. I don't need to know all the facts and figures because I have heard from

many of my colleagues from across the country who are concerned about their liability insurance. I have heard from many who are seriously considering leaving an area or dropping a service because of the liability problem. They don't want to leave or change their practice, but they are being forced to do so.

My colleagues are demanding action by Congress to address this crisis in order to help their patients and to continue to provide quality health care.

So we are in this crisis? Why are malpractice premiums skyrocketing? Why is patient access in jeopardy? Why are trauma centers closing? Why are OB/GYNs refusing to deliver babies? Why are maternity wards shutting down?

The answer is simple—medical malpractice suits are out of control. Between 1995 and 2000 the average jury award jumped more than 70 percent to \$3.5 million, and more than half of all jury awards today top \$1 million. However, payouts aren't the only problem. Simply Defending a malpractice claim costs on average over \$20,000, whether or not a doctor or hospital is at fault.

Of course, this litigation is having a major impact on medical liability premiums. In 2001, physicians in many states saw rates raised by 30 percent or more and in some areas in some specialties, malpractice insurance is rising by as much as 300 percent per year. In New York and Florida obstetricians, gynecologists and surgeons pay more than \$100,000 for \$1 million in coverage. Soon, the annual premium which these doctors pay could reach \$200,000. In my home State of Tennessee—a State that is not considered in crisis by the AMA—premiums rose 17.3 percent last year and are rising 15–17 percent this year.

It should be no surprise that these premium increases are causing this serious health care access problems across the country.

We know what must be done—intelligent and reasonable tort reform. Such reform will help solve this problem and, most importantly, help patients. Sensible reform will provide for fair and equitable compensation for those negligently injured and stabilize the insurance marketplace which will help maintain patients' access to quality health care.

Experience at the state level clearly shows the dramatic benefit of tort reform. California tort reform, the Medical Injury and Compensation Reform Act, or MICRA, which became law in the mid 1970s, is the most obvious example of what works. California doctors and patients have been spared the medical liability crisis that other States are facing. In fact, California currently has some of the lowest medical malpractice insurance premiums in the country.

This is why I strongly support this amendment offered by Senator McConnell. Though this amendment does not include all the measures that I think are necessary to address this problem,



it is a good step in the right direction. We know that sensible tort reform works. It holds down rising health care costs and helps maintain access to quality health care. We must act now to protect patients and their accessibility to quality health care before the problem gets worse.

I encourage my colleagues to vote for this important amendment.

I reserve the balance of my time.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, I yield 4 minutes to the Senator from Massachusetts.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, I thank my colleague for the time.

I listened to the Senator from Tennessee, who is also a physician, speaking a moment ago. All of us have heard the complaints of doctors, of individuals, with respect to premiums. One wishes we were fashioning a remedy to some of the problems within the medical system that fits. This is not a remedy that fits. This is, in fact, an excuse for people who have always tried to liberate malefactors of one kind or another from responsibility to the legal system through the normal court process that is part of our Constitution.

People don't like being sued—of course not—so they try to find a way, statutorily, to limit their liability for things that they do wrong. The fact is, this particular remedy is not going to deal with the problem, No. 1, and, No. 2, it unfairly double victimizes American citizens who are the victims of some kind of incident of malpractice or of medical error from being able to seek the appropriate redress for that and being able to keep the level of accountability in our system which only, today, is provided by that capacity to be able to bring suit.

In fact, in our Patients' Bill of Rights, we directly passed the right to sue nursing homes and HMOs, which Americans want, when they are unfairly treated. This amendment even reaches to undo that right which the Senate granted but which we have not yet, obviously, put into law.

The fact is, this is not a serious approach to the problem that our physician, Senator, fellow Member, has articulated. Yes, there are some high premiums, but the president of the American Tort Reform Association has been quoted as saying:

We wouldn't tell you that the reason to pass tort reform would be to reduce insurance rates.

So the McConnell amendment will not result in lower premiums, which is what they are screaming about. In fact, California, which enacted medical malpractice tort reform in 1974, has malpractice premiums 19 percent higher than the national average. So why are medical malpractice insurance premiums rising? Let's look to what the Wall Street Journal tells us—not known for its liberal stance on tort reform. In a June article, they stated:

Even doctors are beginning to acknowledge that the conventional focus on jury awards deflects attention from the insurance industry's behavior.

According to the International Risk Management Institute, the reason premiums are rising is because throughout the 1990s insurance companies cross-subsidized low premiums with profits from investments. This enabled them to lower the premiums to attract more policyholders. Now the economy has slowed and investment profits have dried up, and investing decisions, not tort claims, bear the responsibility for rising premiums.

Moreover, medical malpractice insurance costs, as a proportion of national health insurance care spending, amounts to less than 60 cents per \$100 spent.

We should ask any American whether they are prepared to pay 60 cents of the cost of medical care of all the hundred dollars that are spent in order to know that, if something is done wrong to them, they have the right of redress.

Moreover, it is false to state that claims have "exploded" in the last decade. Closed claims, which include claims where no payout has been made, have remained constant, while paid claims have averaged just over \$110,000. Meanwhile, this is the most important point—

The PRESIDING OFFICER. The time of the Senator has expired.

Mr. KENNEDY. I yield an additional minute.

Mr. KERRY. Mr. President, incidents of medical errors are growing. Countless Americans risk serious injury because of mistakes made in hospitals and in other places. Medical errors occur all over the system. In hospitals alone, the Institute of Medicine has reported that between 44,000 and 98,000 Americans are killed by medical errors annually. Using the 44,000 figure, medical errors are the eighth leading cause of death in the United States, more than breast cancer and more than AIDS. So I think to take away from Americans the single available tool they have to try to make the system be accountable, in the absence of any other responsible effort, is wrong.

Using the 98,000 figure, medical errors would be the fifth-leading cause of death in this country.

As the IOM report puts it,

These stunningly high rates of medical errors—resulting in deaths, permanent disability and unnecessary suffering—are unacceptable in a medical system that promises first to do no harm.

Now, clearly, some medical errors are the direct result of physician negligence and many are not. But it is clear that we ought to think long and hard before placing an arbitrary cap on the financial value of human life.

Knowing that the McConnell amendment would have virtually no impact on insurance premiums, let's look at the merits of the legislation: The amendment before us is not simply about preventing excessive malpractice actions.

When the Senate flipped to Democratic control a little more than a year ago, the Senate finally passed a real Patients Bill of Rights. For the first time, the Senate sought to hold HMOs truly accountable for their actions. But this amendment would severely limit suits not only against standard medical malpractice actions, but also actions against HMOs and nursing homes. This amendment is extremely broad in scope and is directly opposite of the Senate's position on the Patients' Bill of Rights.

The amendment's restrictive statute of limitations are similarly misguided. The amendment reduces the amount of time a patient has to file a lawsuit to 2 years from the date the injury was discovered. So if someone contracts HIV through a negligent transfusion but learned of the disease 5 years after the transfusion, he or she would be barred from filing a claim. This statute of limitations would cut off claims for diseases with long incubation periods. Even shareholders, investors and others have 5 years under the just-enacted accounting reform bill.

This amendment would also punish injured patients who have prudently purchased insurance policies to protect themselves and their families. Senator MCCONNELL would require a judge to reduce the amount of damage award by all collateral sources, such as life or disability insurance payments. So if you are thoughtful enough to purchase health care—a growing difficulty for too many Americans—you will be less likely to be compensated for someone else's negligence. This just does not make sense.

I know how difficult is for hospitals to find specialized doctors and nurses today. The Nation's shortage of nurses has reached crisis stage, and we do need to keep experienced health care professionals on the job. But this amendment will not help control malpractice premiums.

I am prepared to talk about reasonable ways to do this. In Massachusetts years ago we put in a screening system. There are many ways to approach this, but this is an arbitrary limit, which will be unfair to the average American and will not result in lowering premiums.

The PRESIDING OFFICER. The time of the Senator has expired. Who yields time?

The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, the pending amendment should be called a clients' bill of rights because it is designed not to in any way handicap the recovery of the victim, but to rearrange the relationship between the lawyer and the victim so the victim can get more of the money he or she justly deserves and to deal with the problem of runaway punitive damages—which are not for the purpose of rewarding the plaintiff anyway; they are for the purpose of punishing the defendant.

I was in Henderson, KY, which is right on the Ohio River, Friday night.

There were four doctors at the meeting I attended. Every single one of them was on the verge of moving over to Indiana—it is very easy for them; they just go across the Ohio River—in order to escape this malpractice crisis which has afflicted, of course, my State of Kentucky. It hasn't afflicted Indiana because they have reasonable caps on recovery and have had for years.

The next day, on Saturday, I was in Morganfield, KY, and there were some people there who have a son who lives in Mississippi. The distinguished Republican leader was talking about the crisis in Mississippi. The son of one of the people in Morganfield is an obstetrician in Mississippi, getting ready to pack his bags and move to a State where they have dealt this issue.

Speaking of a State that has a crisis, there is no State that has a greater crisis than the State of Nevada, and our colleague from Nevada is here to discuss the crisis in Nevada. It is my understanding that there is a special session going on this very week.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. Seventeen and one-half minutes.

Mr. McCONNELL. I yield 10 minutes to the Senator from Nevada.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, I thank the senior Senator from Kentucky for yielding time.

There is a serious crisis going on in the State of Nevada. We have heard here today that insurance rates are not going up. Let me tell you that they are dramatically going up in Nevada, and it is because jury awards are out of control.

About one-half of the doctors in southern Nevada have their homes up for sale because they cannot afford increased medical liability premiums. Whether these are OB/GYNs or neurosurgeons or orthopedic surgeons, many of the specialists are taking their practices and moving them to States that have enacted tort reform and/or medical liability reform measures that are similar to the McConnell amendment we are considering here today.

In my State right now, obstetricians are telling pregnant mothers in late stages of pregnancy they will not deliver their babies. We are the fastest growing county—Clark County—in America. Yet these obstetricians are saying they are not taking any new patients. OBs are saying they will not take any new patients because they cannot afford to, and those are the ones who are staying in town. Unfortunately, many of them are leaving.

Let me give you an example. There is a couple who are both OB/GYNs who practice together. In fact, they delivered my wife's and my three children. They have already been in several meetings to move their practice to either northern or southern California where their medical liability insurance rates would be about one-fifth of what they would pay in the State of Nevada.

On July 3, our only level 1 trauma center closed for 10 days. This trauma center services four States. If someone has a serious accident and has severe trauma, this is where they would get the kind of care necessary for saving their life. The reason it is closed was, once again, was because doctors were afraid they would not be able to get the kind of insurance coverage they needed and they would lose everything they worked for their whole life if they were sued. The only reason it was reopened was because they were afforded insurance coverage that included a \$50,000 cap on damages. They were told—If you practice here, and there happens to be some kind of a malpractice, we will cap the jury award at \$50,000.

Now, there are no such caps in the McConnell amendment we are discussing. However, I believe very strongly in caps on non-economic damages. I wish they were part of this amendment.

As a matter of fact, yesterday Nevada's Governor proposed and laid out a compromise with Republican and Democrat legislators in which there would be a \$350,000 cap on jury awards for non-economic damages. You would be able to recover, through economic damages, everything you would have ever earned and expenses you incurred for medical bills. But on non-economic damages there would be a \$350,000 cap, except in cases where treatment was received at the trauma center—that would be kept it at a \$50,000 cap. They did this because they know that it is the only way they can keep the trauma center open.

In any case, there are several other provisions in the McConnell amendment that are very important. This idea of joint and several liability was mentioned. The Senator from Massachusetts talked about this; that it is important to keep joint liability so the patient would be able to get the whole award.

Now let me tell you what this really means. If you are practicing in a trauma center, and if you are responsible for 1 percent of the medical malpractice that happened in a particular case, you can be held responsible for 100 percent of the jury award.

Is that fair? That isn't fair.

That is also one of the reasons rates continue to go up across the country.

Neurosurgeons are leaving our State. This isn't about trial lawyers versus doctors. This is about availability of doctors. This is about whether we are going to have people such as Senator BILL FRIST—a very talented heart surgeon—continue to go into the practice of medicine and who want to save lives. We have people who are not only leaving our State, but who are just retiring their practices early because of this crisis.

One of the best surgeons in Las Vegas—a gastrointestinal surgeon—was planning on retiring in 1 year. He actually retired this year because had he stayed in the practice an additional

year, he would not have only had to pay \$200,000 for insurance this year, but he would have faced what is called "tail coverage". Tail coverage is what a doctor pays when they quit practicing or change insurance companies in order to cover any claims which might arise from when they were covered under the previous company or while they were still practicing. He would have had to pay another \$400,000 just for tail insurance. He makes about \$200,000 a year. So, it would have cost him \$600,000 to practice while he would have only earned \$200,000 for the year. It was obviously ridiculous to stay in business, so he quit practicing.

Las Vegas and southern Nevada lost one of their best surgeons because of early retirement, leaving even more patients without the services of a highly-trained, highly respected physician. That kind of situation is indicative of how badly broken the system is.

Let me briefly mention just one of the abuses in our civil justice system and how that contributes to the overall problem we are having in runaway jury verdicts. If you are accused of medical malpractice you are brought into the courtroom, at which time the case is laid out. At some point during the case, "expert" witnesses are called to testify. I put "expert" in quotations because many physicians can be brought in as an expert. Unfortunately, there are physicians who are now working in concert with trial lawyers, and it is really their business to become expert witnesses even though they are not experts. Not to impugn their motives, but certainly this happens, and many times the abuse is blatantly outrageous. Yet the jury hears from the supposed "experts," and in main part of that testimony, medical malpractice is found by the jury.

This illustrates what is happening in States and cities all across the United States. It is a system that is prejudiced toward finding malpractice. While the McConnell amendment does not specifically address this issue, it does help bring some accountability and feasibility back to our civil justice system.

I am a veterinarian, and I have worked in the health care profession for some time. Anybody who has worked in health care understands human error. Do you know why? It is because we are humans who practice. And anytime you have human beings practicing a profession, you are going to have errors—sometimes errors that can't be helped. There are some very sad cases, and we want to ensure those people continue to be able to have a remedy. But, outside of providing appropriate compensation, our system of secondary recovery it is out of control. The system needs to be brought back into balance.

The bottom line is when you have human beings, there are errors. However, we must remember that often times those errors are not malpractice. The physician did not intend to hurt his or her patient. But more often than

not, it can appear as malpractice to a jury. We need to make sure that we have a system in place that most justly adjudicates each and every case on its merits, and fairly places culpability where it should be placed.

Under the current system, juries are out of control with awards that we are all paying for. Medicare costs and private insurance premiums are higher, and they keep going up every year. There are several factors that contribute to this rise in costs, but none more than the excessive, unfounded awards given out by juries on a seemingly regular basis.

Mr. KENNEDY. Mr. President, will the Senator yield for a question?

Mr. ENSIGN. Mr. President, let me finish my statement, and then I would be happy to yield.

In the State of Nevada last year, the average OB/GYN made about \$200,000. Now, taking into consideration that figure, their insurance rates went from about \$35,000 a year to about \$130,000 a year. We can't pass that cost on anymore. That means basically every OB/GYN in southern Nevada is going to have to either see double the number of patients they are seeing now or just quit practicing altogether.

There is a huge incentive for these doctors to go to California where their rates will not only not go up, but they will actually go down from what they were the previous year.

I keep mentioning California because California enacted the Medical Injury Compensation Recovery Act (MICRA). MICRA has all the reforms that are in Senator MCCONNELL's amendment—plus they have the \$250,000 cap on non-economic damages.

MICRA has been challenged in the courts four times. It has been upheld four times. It is not that people in the State of California do not receive injury awards. It isn't that the people in California are disadvantaged in some way so the patients don't get what they need.

There was a situation in 1975 that California recognized as a crisis. Because of court challenges, the bill didn't actually take effect until 1985. But since that time, they have had a stable situation where insurance companies know approximately what is going to happen and know how much their costs are going to be. Consequently, their rates have stabilized.

There are about 12 States right now, according to the American Medical Association, that are in crisis, Nevada being the worst of all.

Because of this crisis, Nevada's Governor had to call a special legislative session. Now, we only meet every 2 years in our legislature. Therefore, he had to call a special session just to deal with this severe crisis that is going on right now.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. ENSIGN. Let's enact this amendment to bring about some reasonable reforms to our medical liability system in the United States.

There is a crisis happening right now in my home State of Nevada. Obstetricians are telling pregnant mothers in late stages of their pregnancy that they can't deliver their babies.

On July 3, our only Level One trauma center closed for ten days, leaving victims of car accidents and gun shot wounds without appropriate care. Officials are saying it will probably have to close again.

Neurosurgeons are canceling operations with patients who have spinal cord injuries that adversely affect every second of their daily lives.

In fact, as I talk to you right now, the Nevada Legislature has been forced to meet in a special session with Governor Kenny Guinn to address this crisis.

What is the common thread between these events? It lies in the fact that all of these health care providers are unable to afford the skyrocketing cost of their medical malpractice insurance.

So, if this is a Nevada problem, then why would I bring this issue to the floor of the United States Senate?

Because it is no longer just a Nevada problem; it is now a nationwide problem. President Bush recognized this fact last week when he called our medical liability system "badly broken," and emphasized the immediate need for Federal medical liability reform.

In order to illustrate this urgent need, let me give you some examples of what I am talking about:

In Bisbee, AZ, the only maternity ward has closed. Expectant mothers must now drive more than a half hour to the nearest town to deliver;

In Broward County, FL, 14 of the 16 practicing neurosurgeons are uninsured;

In Mississippi, 324 doctors have stopped delivering babies in the last decade. Today, only 10 percent of family doctors will deliver babies;

In Wheeling, WV, all of the neurosurgeons have stopped practicing. I could go on and on about a number of different States.

We have to examine why this current crisis is happening. What it boils down to is two factors: affordability and availability.

On affordability, let me give you a statistic from the American Medical Association. In 2000, medical liability insurance rates increased by at least 30 percent in 8 States, and by at least 25 percent in more than 12 States. I don't know too many physicians that can afford such rates. These rates are forcing more physicians, hospitals, and other health care providers to limit their practices or leave the profession altogether.

On availability, thousands of doctors nationwide have been left with no liability insurance as major liability insurers are either leaving the market or raising rates to astronomical levels.

Now, why are insurers raising rates and/or leaving the market? Because there is no stability in the marketplace for providing medical liability insurance.

Why is there no stability in the marketplace? Because our healthcare system is being overrun by frivolous lawsuits and outrageous jury awards.

Let me give you some statistics to illustrate these points. This information is according to the Physician Insurers Association of America's Data Sharing Project:

Since 1998, the average claim payment value has risen from approximately \$130,000 in 1988 to \$330,000 in 2001. Likewise, since 1988, the median claim payment values have risen from approximately \$50,000 in 1988 to \$175,000 in 2001.

In 1985, less than 1 percent of the claims that were paid were equal or greater than \$1 million. Contrast that to 2001 when 7.9 percent of the claims paid were equal or greater than \$1 million.

This excessive litigation is leading to higher health care costs for every American and an unstable piece of mind for our health care providers. To fend off litigation, healthcare professionals are forced to practice defensive medicine by ordering unnecessary tests just so that they will not be sued for "under-diagnosing" their patients.

A recent study by the Department of Health and Human Services found defensive medicine is costing the Federal Government an estimated \$28 billion to \$47 billion in unnecessary healthcare costs.

And who else pays for those unnecessary costs? Every American with health insurance, in the form of higher premiums. Gone are the days when our civil justice system was used to help protect patients. Now we are left with a system that is used to primarily fatten the wallets of personal injury attorneys.

More often than not, medical liability claims are more financially beneficial to the lawyers than they are to the injured and sick patients.

According to the Physician Insurers Association of America's Data Sharing Project, only fifty cents of every dollar paid in medical liability awards go to the patients. Only 50 cents.

Additionally, nearly 70 percent of all medical liability claims result in no payment to the plaintiff.

So what does all this mean? It means that we need to bring some accountability back to the civil justice system by way of medical liability reform.

Not only would this allow physicians to continue to concentrate fully on providing superior care to their patients, it would help tremendously in curbing the skyrocketing costs of healthcare for consumers.

In addition, and probably even more staggering, is the success rate of most medical liability claims. Consider this information:

In 2001, only 1.3 percent of all claims filed ended in a verdict for the plaintiff. In contrast, 61.1 percent were dropped or dismissed for various reasons.

These numbers highlight the significant amount of frivolous lawsuits that

are filed, costing healthcare professionals valuable patient time, and ultimately costing every insured American millions in increased health care costs.

Medical liability reform is not something that is new to the Senate. During debate on the 1995 Product Liability Bill, the Senate considered and voted on medical liability reform proposals. In fact, one of those proposals is the exact amendment that we are considering here today.

This amendment takes a sincere and aggressive approach toward helping reign in our out of control civil justice system. It does so in the following ways: sensible limits on punitive damages; elimination of joint liability on most damages, making sure that defendants are only liable for their fair share; modest limits on attorney's fees in medical malpractice cases to maximize patient recovery; collateral source reform to prevent plaintiffs and attorneys from "double dipping" for compensation; alternative dispute resolution to encourage states to develop mechanisms to help resolve disputes before they go to court; and periodic payments for large awards.

Although I am strongly in favor of this proposal, I must mention that the one significant provision it is missing is a cap on non-economic damages. I believe this cap could only strengthen the proposal we are considering today. However, every other reform in this amendment has proven to be effective in bringing accountability back to the civil justice system.

This amendment was passed in 1995 on a vote of 53-47. Therefore, with the number of Senators who supported this proposal before, coupled with the number of senators whose States are facing a medical liability crisis, I think we have an excellent chance to pass this amendment. Just to highlight that point, a recent study conducted by Wirthlin Worldwide found that 78 percent of Americans express concern that skyrocketing medical liability costs resulting from the current system could limit their access to care. Clearly, the American public sees the crisis we care facing and are calling for nationwide reform. Americans are afraid they will not have anyone to deliver their babies or perform life-saving procedures on their loved ones in emergencies, and they should not have to be. If there are senators here today that are still not convinced about the need and overall effectiveness of medical liability reform, let me briefly explain how to put your doubts to rest.

Let's take a look at the wildly successful Medical Injury Compensation Reform Act (MICRA) of 1975 that California has in place. Now, I will concede that the amendment before us is not identical to MICRA, but it does incorporate all but one of the major provisions that MICRA contains.

To further explore the impact of MICRA, just look at the difference between how medical liability premiums have risen in California versus the rest

of the United States. According to the National Association of Insurance Commissioners, from 1976 through 1999, California's insurance premiums has risen 167 percent, while the other 49 States' premiums have risen 505 percent.

Obviously, MICRA has brought about real reform in California's professional liability system, while still protecting the rights of injured patients. Studies have shown the following. The number of frivolous lawsuits going to trial has declined dramatically; injured patients receive a larger share of their awards; the number of disciplinary actions against incompetent health care providers has increased.

The bottom line is that California's medical liability system works. Shouldn't these types of outcomes be shared by every state, and ultimately every patient, in America?

Again, the amendment before us contains all but one of the major provisions that MICRA entails, so each senator has something to substantiate their vote. And let us remember one important point we are NOT limiting the amount of economic and non-economic damages that can be recovered by the patient.

All we are doing is bringing some accountability and reasonability back to our civil justice system in the form of common-sense reforms which I know will lead to lower health care costs for every American.

I know it is possible to pass these types of reform measures through the Houses of Congress, because while I was a member of the House of Representatives we passed some type of medical liability reform measure six times. Unfortunately, each time it was stalled in the Senate and real reform was never enacted.

But the next time around I am hopeful that it will be different. And there is no better time than now for the Senate to make a strong statement on behalf of American patients.

Let's make sure there are no more expectant mothers turned away at the door and refused pre-natal care.

Let's make sure trauma patients receive immediate and appropriate medical services.

And, let's make sure that we continue to provide patients everywhere the opportunity to receive affordable, accessible, and quality health care for years to come.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. I yield 6 minutes to the Senator from Tennessee.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, let me address what I consider to be the real issue, really the only issue, as far as I am concerned. It is not who the bad guys are and who the good guys are. I have seen excesses on both sides of this issue. It is not a matter of what is best for the trial lawyers or best for the insurance companies or even what

is best for the patients. It is a question of whether we have a limited form of government, whether we have a Federal Government with enumerated powers. That is the underlying issue. It is amazing to me that we can have a debate on something such as this without it even being brought up.

What we have is an amendment which will take things that have been under the purview of the State governments for 200 years and federalize them. This is getting to be such a common occurrence that nobody pays much attention to it anymore. I pay attention to it. I think it is a bad trend. I think it goes against the system of government that our Founding Fathers set up and has worked in our favor for 200 years.

Mr. REID. Will the Senator yield for a brief question?

Mr. THOMPSON. Yes.

Mr. REID. Is the Senator aware that the State of Nevada is in a special session to work out malpractice problems, and does the Senator believe that is the way we should go?

Mr. THOMPSON. The answer to that question is yes. I am amazed to hear that we have a problem in a particular State and that the solution is for the citizens of the small town in that State maybe to drive past the courthouse and drive through the capital, past the statehouse, and get on an airplane and fly to Washington, DC, to talk about a Federal solution against their own State.

Tennessee just had a discussion about a State income tax and a State sales tax. One of the points made against a higher State sales tax was that the State of Kentucky and the State of Mississippi and the State of Arkansas, all these other surrounding States, had a lower sales tax and people would go to those States to buy their goods, just as apparently people are going from one State to another to take advantage of a better medical malpractice case.

The answer to that is, that is the way it is supposed to work. That is our system of government. That is the reason we have States, to have competition among States. If we extend the commerce clause to this, after having been told by the Supreme Court in the Lopez case that the commerce clause does not extend to guns in the local school, after having been told in the Morrison case by the Supreme Court that the commerce clause does not extend to a sex-based crime at a local level—if we extend the commerce clause to the delivery of a baby in Lawrenceburg, TN, there is nothing to which we cannot extend the commerce clause. I regret to say, it is some of us who talk about limited government and enumerated powers who are doing this. I do not think it is sound policy.

It does not matter whether or not there are excesses on one side or another. States are supposed to address these matters. I would not come here

and say the State of Tennessee is inadequate in this regard unless I was willing to go back to the State of Tennessee and fight for a change in the laws. Senator KENNEDY and I, are we supposed to write the laws for the State of Tennessee with regard to something that has been under their purview for 200 years? I don't think so.

We can disagree on what those laws should be, but we cannot disagree, surely, on the principle that underlies this debate. The proposed amendment goes so far as to require that each State require 50 percent of all punitive damage awards be used for licensing, investigating, disciplining, and certifying health care professionals and the reduction of malpractice costs for the health care professional volunteers.

This requirement would get us into the management of the licensing and regulation of health care professionals in every State in this country. This is just one step away from national standards and national regulation, not just in the health care area but potentially in any other area.

Regardless of whether you think medical malpractice premiums are too high or lawyers are terrible people, or whatever, if we walk away at this time from this principle, when we want to assert this principle, we are not going to have any principles to stand on because we will have ignored them so often for the particular causes we want at the moment that they will be totally eroded. I submit to the Chamber that is too high a price to pay.

I yield back whatever time remains.

The PRESIDING OFFICER. The Senator from Kentucky.

Mr. MCCONNELL. Mr. President, I listened carefully to the Senator from Tennessee. I commend him for being very consistent in his concern about federalism and States rights. He has raised that issue not just on the occasion of today's amendment but across the board. He has certainly been consistent. I do find it somewhat amusing to hear it invoked from time to time by those on the other side of the aisle for whom States rights are rarely a concern.

Let me say to my good friend from Tennessee, he raises exactly the point I wanted to address in my remaining time this morning. This is a national crisis, a national crisis in the delivery of medical services. This is a national problem, and it demands a national solution. States all across the country—in the West, the South, the Midwest, and the East—are in crisis. Many more States are experiencing serious problems, including my own State of Kentucky. Because it is a national problem, it demands a national solution. Furthermore, it is necessary and appropriate for the Federal Government to be involved in fixing this problem.

Let me give you my first reason. As the single largest purchaser of health care, the Federal Government has a compelling interest in health care liability reform. In 2002, the Federal

Government will spend \$223 billion on Medicare, \$145 billion more on Medicaid, and \$11.3 billion more on Federal employee health benefits. That is a total of \$400 billion by the Federal Government on health care.

Furthermore, a 1996 study by Stanford economists projected that commonsense medical malpractice reforms, many of which are included in my amendment, could reduce health care costs by 5 to 9 percent without jeopardizing the quality of care. Using this study, the Department of Health and Human Services projects that reducing the practice of defensive medicine could save the Federal taxpayers between \$23 and \$42 billion.

Finally, Federal legislation is necessary because of the increasingly interstate character of health care. I just mentioned, a few moments ago, the four physicians I saw Friday night in Henderson, KY, on the verge of moving to Indiana. That is fine for them. It doesn't do much for their patients who are left without care on the Kentucky side. Patients in the Washington, DC, area receive care not only here but in Maryland and Virginia. Many of the Nation's finest health care facilities—the Mayo Clinic and M.D. Anderson—treat patients from across the country.

While a Federal solution is necessary and appropriate, my amendment does not wholly preempt State medical malpractice reforms. The amendment would not preempt those States that have already developed strong medical malpractice laws.

This crisis has been created by the failure of the National Government to act. That has caused a problem. This crisis is due to the failure to impose accountability and responsibility—the same things we have been talking about around here the last few weeks with regard to corporate America—on big, powerful trial lawyers who are running roughshod over doctors and in many instances taking advantage of their own clients.

As a result of our failure to act, there has been an explosion in medical malpractice awards. Let us take a look at this chart which shows the explosion in medical malpractice awards from roughly \$500,000 in 1995, up to \$1 million in 2000.

Now, I gather my friends on the other side apparently think doctors have become twice as incompetent in the last few years or that medical schools are now turning out graduates who are inept. But I am inclined to believe that the medical professionals at the AMA and other health care organizations don't agree with that. The standard of care of physicians has not radically deteriorated in just the last few years. Rather, from looking at the problem, I believe the AMA and other health groups when they say it is our medical malpractice liability system, not our delivery system, that is badly broken.

The amendment I offer is a modest one. As I have said repeatedly, it doesn't in any way cap compensatory

damages to the victim. It simply seeks to cap lawyer's fees so more money will go to the injured victim, and caps punitive damages, which are not designed to compensate the injured party in any event but to punish the defendant—cap that at twice the balance of the compensatory damages. So this doesn't take any funds that are needed to put the injured victim back on his or her feet. It simply addresses the issue of lawyer abuse and of excessive punitive damages, which are not designed to enrich the injured party in any event.

It is a very modest amendment. The AMA supports this amendment. They would have liked it to be much stronger, but I crafted this amendment in a very modest way in order to make it more palatable to more Senators. We have had a vote on this amendment before, back in 1995. At that point, it got 53 votes, including Senators FEINSTEIN, LIEBERMAN, and JEFFORDS, who are still in the Senate.

As I said, this is a pro-victim amendment. There is no cap on noneconomic pain and suffering damages, no cap on compensatory damages. There is simply a reasonable cap on lawyer's fees and a cap on punitive damages at twice the balance of the other damages.

So I think this is clearly a national problem requiring a national solution. I hope the amendment will be approved.

Mr. KENNEDY. Mr. President, I yield 1 minute to the Senator from Tennessee.

Mr. THOMPSON. Mr. President, just a very brief response. I think the logical extension of this amendment would mean if we could pass any large Federal program—as we have—such as Medicare, Social Security, and I guess our defense appropriations bills, and so forth, then we could take any activity, even noncommercial activity in the smallest hamlet of the smallest town in America, anything they would do that might arguably impact on the cost of those programs would be fair game under the spending clause.

If that is the case, that is not a direction in which we need to go. I would contrast what we are doing here with regard to delivery of a baby, let's say, in Lawrenceburg, TN, and the rules the State of Tennessee imposed upon that we would abrogate—I contrast that with a product liability debate we had. I voted for that bill. That is an inherently interstate commerce, commercial activity. I have concluded that there was a legitimate reason to have some national standards with regard to that. I think our Founding Fathers would have approved of that. I think it is a far cry from where we are with regard to this.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. KENNEDY. Mr. President, how much time do I have?

The PRESIDING OFFICER. The Senator has 1 minute 50 seconds.

Mr. KENNEDY. Mr. President, as I understand it, we will have a very brief

time after the break. I point out that the National Association of Insurance Commissioners study shows that in 2000—the latest year for which data is available—the total insurance industry profits, as a per average premium for medical malpractice insurance, were twice as high as overall casualty and property insurance profits. In fact, malpractice insurance was a very lucrative area for the industry, averaging a 12 percent profit. Over a 10-year period, their premiums went up 1.9 percent, and they are making 12 percent on that.

This is about the insurance industry; it is not about the doctors. We will have more to say about this. This is a lucrative aspect of the insurance industry—everyone knows it—and they just want to cash in on this opportunity at the present time.

Mr. President, I see our leader on his feet at this time in anticipation of a consent agreement, so I withhold further comments.

Mr. REID. Mr. President, I ask unanimous consent that the time from 2:15 p.m. this afternoon until 2:45 p.m. be equally divided between Senators KENNEDY and MCCONNELL or their designees and that at 2:45 p.m. Senator REID of Nevada or his designee be recognized to move to table Senator MCCONNELL's amendment.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

#### RECESS

The PRESIDING OFFICER. The hour of 12:55 p.m. having arrived, the Senate stands in recess until the hour of 2:15 p.m. today.

Thereupon, the Senate, at 12:55 p.m., recessed until 2:15 p.m. and reassembled when called to order by the Presiding Officer (Mrs. CARNAHAN).

#### GREATER ACCESS TO AFFORDABLE PHARMACEUTICALS ACT OF 2001—Continued

AMENDMENT NO. 4326

The PRESIDING OFFICER. Who yields time?

The Senator from Kentucky.

Mr. MCCONNELL. Madam President, it is my understanding that I have 15 minutes remaining.

The PRESIDING OFFICER. The Senator is correct.

Mr. MCCONNELL. Madam President, I yield 5 minutes to the Senator from Tennessee who, as we all know, is the only physician in the Senate.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. FRIST. I thank the Chair.

Madam President, I rise in support of the McConnell amendment on medical malpractice to the Greater Access to Affordable Pharmaceuticals Act. It goes to the heart, I believe, of an issue that has reached crisis proportions in the United States.

Much of the argument and debate on Friday and a little bit yesterday and today centered on how best to frame this debate. Our opponents to the McConnell amendment have tried to frame this as a debate focused on corrupt insurance companies and HMOs.

What is absolutely critical for my colleagues and the American people to understand is that this debate is not about insurance companies. This debate is about patients, patients who are suffering today and, even more important, unless we act on this crisis, will be hurt in the future.

It is about patients versus skyrocketing medical liability insurance premiums that, in large part, are driven by the current medical liability system. This amendment strikes right at the heart of that problem.

Why is this debate important? I go back to patients. How do patients suffer because of these skyrocketing insurance premiums? They suffer in two ways: No. 1, lack of access to health care. If in the future you are a patient, you will see a decrease in access when you want to go to a physician, such as an obstetrician or a neurosurgeon or an orthopedic surgeon. They have all seen these skyrocketing premiums, and these doctors are not going to be there. Why? Because they happen to live in Mississippi where their premiums are \$50,000 or \$100,000 or in Florida where an obstetrician premium might be \$150,000 or \$200,000. They might decide, A, to pack it up and leave and go to another State or, B, to stop practicing or, C—and this is what we see happening all over the country—to stop delivering babies. If your doctor delivered your first baby and you want him to deliver your second baby, you had better call far in advance. Because of these skyrocketing premiums, many physicians are leaving that specialty.

In addition we saw what happened in Nevada where the trauma surgeons basically said, we cannot stay in business, we cannot keep delivering these services, because malpractice premiums are too high. They were actually forced to close down shop for a period of time. Thank goodness it was just for a few days.

I mention the impact on doctors because this is important. For example, if one is an obstetrician and he pays \$200,000 a year for his insurance premiums, as in Florida, and he delivers 100 babies, which is the average for an obstetrician in Florida delivers, that means for every baby the doctor delivers there is a \$2,000 tax or premium.

Now, one might say that this is the worry of the doctor. Well, the doctor can leave. He can switch specialties. He can relocate or retire, early retirement, none of which is very satisfactory. But if a doctor is going to stay in practice, ultimately the doctor is going to pass the cost on to the patient. Who else will pay it? It has to be passed on to the patient.

Americans are watching this debate and they hear the ranting and raving

against the bad insurance companies. Let's go back to the effect of the problem, which is on that individual patient. Then let's look at the root cause, which is this runaway tort liability system, which this amendment takes the first step at fixing.

Patients are hurting in two ways. First, they suffer from a lack of access to care. Specialist are leaving areas, and doctors are refusing to deliver babies.

The second way patients suffer is the overall cost of defensive medicine. Ask your physician right now: Do you practice defensive medicine? According to a recent Harris poll, 76 percent, or three-fourths, of physicians believe concern for medical liability litigation has hurt their ability to provide quality care in recent years. Eighty percent of physicians say they ordered more tests than they thought were medically necessary because they worried about malpractice liability. It is called defensive medicine. It is something the consumer does not see, the patient does not see, but America pays for it. How much? Fifteen, 20, 30, 40, 50—about \$50 billion.

I close by stating my strong support for the McConnell amendment and look forward to continued debate during the course of this afternoon.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. I yield 7 minutes to the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I thank the Senator from Massachusetts for yielding the time.

I readily acknowledge the expertise of Senator FRIST. He is a widely respected heart surgeon. He certainly is a man who understands the practice of medicine, unlike anyone else in the Senate. I do not come as an expert on the practice of medicine. If I have any expertise, it is in trial practice because before I was elected to Congress, I was a trial attorney. I made my living defending doctors and hospitals, and suing doctors and hospitals. I understood medical malpractice then, but as I read this amendment I am troubled.

Let me acknowledge first, yes, there is a national problem with medical malpractice insurance across America. It costs too much in many areas, and we are finding that in many parts of the country doctors cannot afford to continue to practice because of the cost of premiums. But the answer from Senator MCCONNELL on the Republican side is to suggest that the reason the premiums are so high is because of jury verdicts.

They overlook the obvious. Let me point to a source of information not considered liberal in nature, the Wall Street Journal, which on June 24 of this year published an article. I ask unanimous consent that this article be printed in the RECORD.

There being no objection, the article was ordered to be printed in the Record, as follows: