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Senate

The Senate met at 9:30 a.m. and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER

The Chaplain, ADM Barry C. Black, offered the following prayer:

Lord God almighty, You have made all the people of this Earth for Your glory. Yet, too often we choose our own destructive paths. Deliver our own world from hatred, cruelty, and revenge. Save us from violence, discord, confusion, and sin. Guide and bless our Senators that their labors will please You and be a blessing to the nations of the Earth. May we be a people at peace among ourselves and determined to be Your instruments of reconciliation. Amen.

PLEDGE OF ALLEGIANCE

The Honorable TED STEVENS led the Pledge of Allegiance, as follows:

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

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDING OFFICER (Mr. BROWNBACK). The Senator from Kentucky is recognized.

SCHEDULE

Mr. MCCONNELL. Mr. President, this morning the Senate will resume consideration of the motion to proceed to S. 11, the Patients First Act. Between now and 11:30, the time will be equally divided between the majority leader or his designee, and the Democratic leader or his designee.

At 11:30, there will be two consecutive rollcall votes. The first vote will be on the motion to invoke cloture on the motion to proceed to the Patients First Act of 2003. Immediately fol-

lowing that vote, the Senate will proceed to executive session and vote on the nomination of Victor Wolski to be a judge on the U.S. Federal Claims Court.

Following those two votes, at 11:30, the Senate will begin consideration of S. 925, the State Department reauthorization bill. Amendments are expected to be offered to the bill. However, it is our hope, and the hope of Chairman LUGAR, to complete this bill expeditiously. To accomplish this, Members who intend to offer and debate amendments should notify their respective chairman or ranking member so that the amendments can be scheduled for consideration.

Rollcall votes will occur throughout the day as the Senate considers the State Department authorization bill.

Again, it is our hope that we will be able to complete this bill early this week so we can begin the appropriations process prior to the end of this week. I encourage everyone to help make that possible.

RECOGNITION OF THE ACTING MINORITY LEADER

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. REID. Mr. President, if I may direct a question through the Chair to the distinguished majority whip, what is the pleasure of the majority leader as to what we are going to do on Friday? Is there a determination yet as to whether we are going to have votes on Friday?

Mr. MCCONNELL. It is my understanding that the leader does expect there will be votes on Friday. We anticipate being on one of the appropriations bills.

Mr. REID. I certainly have no prior knowledge about amendments being offered on the very important State Department authorization bill. But I think it will be difficult to finish the bill by tomorrow evening. If that is

what the leader wants to do, we will certainly try.

As I indicated, I don't know what amendments will be offered. We will have a better idea before we get on the bill, and we will inform Senator BIDEN and let him know what amendments there are, so the leader can have an idea as to what the week holds for us in that regard.

Mr. MCCONNELL. Mr. President, I think the plan of Senator FRIST is to get started and see how it goes and to hope that we can move that bill rapidly.

Mr. REID. Mr. President, if it would be OK, the time, as the Senator from Kentucky has indicated, is evenly divided—the Chair will announce it shortly—until about 11:10; is that true?

The PRESIDING OFFICER. That is correct.

Mr. REID. One-half hour of the time we are allotted I will yield to the Senator from New York, Mr. SCHUMER, to speak on Judge Wolski.

I have been advised by staff that 25 minutes would be adequate because he has 5 minutes prior to the vote. So I will yield 25 minutes to the Senator from New York.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, leadership time is reserved.

PATIENTS FIRST ACT OF 2003—MOTION TO PROCEED

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration on the motion to proceed to the consideration of S. 11. Under the previous order, the time until 11:30 a.m. will be equally divided between the majority leader and the minority leader or their designees.

Mr. MCCONNELL. Mr. President, the measure we are hoping to proceed to, the Patients First Act of 2003, seeks to

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



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address a major national crisis that confronts us in health care. Two weeks ago, or right before the recess, the Senate and the House acted on a major new health care proposal to modernize and preserve Medicare and to add a prescription drug benefit for our seniors. Now the Senate seeks to address another part of America's health care crisis—one the House of Representatives has already dealt with—which is the question of the rising cost of medical liability premiums, forcing physicians out of certain specialties or, in the case of young physicians, choosing not to go into such high-risk specialties as obstetrics because they know they won't be able to afford the medical malpractice premiums and still perform the service for which they have been trained.

Last year, when we dealt with this issue, there were about 11 or 12 States that were in crisis. Now there are 19. There are only 6 of our 50 States that have no problem at all. All the rest are on the way to having a major national crisis.

The underlying bill that we are seeking to get permission to go to—the principal sponsor is Senator ENSIGN of Nevada, who is here to my right and has been an active and major player in the legislation—is very similar to the measure that passed the House. It is also supported by the President of the United States. So we know that if we were to go forward with a bill similar to this, it could get a Presidential signature and we would be well on our way to dealing with this enormous problem that is beginning to deny patients care all across our country.

So when the Senate has an opportunity to vote, I hope Members will vote to invoke cloture on the motion to proceed so we can go to the bill and begin to address this incredibly serious national problem.

I commend Senator ENSIGN for his leadership on this issue. His State has certainly been one of those that has had an enormous crisis and they are trying to deal with it at the State level. He can address that. But the point is that this is a national problem that needs to be dealt with by the National Government.

That is what we are seeking to do today: to get an opportunity to get on to the bill and deal with this extraordinary health care crisis that we have in the country.

I will have more to say later in the morning and particularly just prior to the vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, I appreciate the words of the majority whip. I rise today to speak on behalf of the bill that I have introduced, the Patients First Act. The reason we call it the Patients First Act is because it really does put patients first.

In our health care system today, we have too many patients who are either

close to being denied care or have been denied care simply because physicians cannot afford the medical liability premiums they are facing today.

My State, as the Senator from Kentucky mentioned, is one of those States that is in crisis. Our State has a level I trauma center which serves a four-State region, and last year that trauma center closed for 10 days. The closure of that trauma center was the only event in my state of Nevada that brought the people who were against reforming our medical liability system and our overall tort system and the proponents of that reform together. This crisis allowed a special session of the legislature to be called so they could try to deal with this situation. I commend our Governor and State legislators for their efforts to deal with the situation.

The problem in Nevada, as with other States that have enacted reform, is it will take 6 to 10 years, depending on the length of the appeals and the challenges to the law, before we know whether the bill will actually take effect and have the result of lowering the costs for medical liability insurance.

In the meantime, Nevada and many other States are losing doctors in droves. Nevada is the fastest growing State in the country, and we cannot afford the migration of doctors from our state to continue.

Specialty fields are the most severely affected by this crisis, and of those, obstetrics and gynecology are of the most severely affected. In southern Nevada, we have 5,000 to 6,000 new people a month moving in. This increase in our population during this time of crisis has resulted in three things happening.

One is we are losing doctors; two is new doctors are not coming to replace them; and three is, the few ob/gyns who actually are staying, when they were delivering 250 to 300 babies a year previously, they have cut that number down to 125; 125 babies from 250 to 300. One can do the math. It does not add up.

Additionally, many doctors who previously delivered babies in high-risk pregnancies no longer can deliver them because their insurance company will not cover them for that procedure. We are in a situation where some of our best doctors are not able to give the care they are capable of giving.

I see my friend from Wyoming just arrived in the Chamber. Mr. President, I say to him, I am going to take a couple more minutes and then I will yield the floor.

This is not just a Nevada issue. As the Senator from Kentucky mentioned, 19 other States are in crisis, and all but 6 States are showing signs of heading into a crisis. In every State that is in crisis or heading into a crisis, we hear the same kind of stories from patients. It is a real problem, a problem the Senate must address. The House has already dealt with it. Now the Senate must deal with it.

This crisis is a national problem. For Medicare, Medicaid, veterans, 60 percent of all the medical bills are paid through the Congress. Because of that, it is a national issue and it requires the House of Representatives and the United States Senate to act in concert to send a bill to the President. The House has done its job. Now it is up to the Senate.

I will share one or two quick anecdotes to illustrate real people who have been touched by this issue.

During the closure of the level I trauma center in my home State of Nevada, a woman and her father, Mr. Lawson, were in Las Vegas visiting when this level I trauma center closed. The father had to be transferred to a different emergency room, and on his way there, unfortunately, this gentleman passed away.

Level I trauma centers are staffed with the most talented, specialized people in the medical profession. We have trauma centers specifically staffed by the best because they must save lives that are in jeopardy every day. That trauma center closed because the specialists could not afford the insurance, and they could not afford the liability from the exposure of potential high-risk surgeries to save lives.

The only way the legislature was able to open that trauma center again is they covered the people who worked there under the umbrella of the State.

By the way, when we talk about caps, my home state of Nevada has a cap of \$50,000 total for economic, non-economic and medical. It is a total \$50,000 cap, obviously much more severe than we would even think to consider in this body. In the bill before the Senate today we have a \$250,000 cap on pain and suffering, but an unlimited amount on economic damages and medical expenses, and if there is gross negligence, there are punitive damages in this bill as well.

We think we have taken a balanced approach so that patients throughout this country are not denied care, such as when the trauma center in Nevada was forced to close, do not have to go through that experience again. We have to ask the fundamental questions: How many more people have to be denied care who really need it? How many more people have to die in this country before this body will take action? That is really the bottom line today. People are being denied care, and more and more people will be denied the care they really need. That is why this institution needs to act.

Mr. President, I yield the floor so the Senator from Wyoming may speak.

The PRESIDING OFFICER. The Senator from Wyoming is recognized.

Mr. ENZI. Mr. President, I thank the Senator from Nevada. I always appreciate his comments. He has one of the fastest growing States in the Nation. I come from the most sparsely populated State in the Nation. We have some very common problems.

In the last couple of days, we have heard a lot of discussion about insurance companies. We have heard that medical liability insurers are the source of the problem; that they are gouging doctors to make up for investment losses.

Well, the Nasdaq index yesterday closed at its highest level since April 2002. The Nasdaq is up more than 30 percent since the beginning of the year. For that matter, the Dow Jones Industrial Average is up more than 10 percent in 2003. Under the logic we have heard this week, the stock market rebound ought to be leading to a sharp reduction in medical liability premiums. So why aren't we seeing any relief?

We are not seeing any relief because insurance companies are paying out more in losses than they are receiving in premiums. It is that simple. It does not take an accountant to figure that out. For every premium dollar collected in 2001, medical liability insurers experienced \$1.53 in losses. Ten years earlier, for every premium dollar collected, insurers lost \$1.03.

Regardless of investment gains or losses, the fact is that payments for medical litigation judgments and settlements are rising much faster than the incoming premium payments, even though premiums are escalating dramatically. Insurance companies cannot make up the gap between the \$1 they take in and the \$1.53 they pay out without raising premiums. That is why we are not seeing reductions in medical liability premiums, despite the stock market's advance in 2003.

It all comes back to our legal system. It is simply out of control. People who are truly injured by health care errors ought to receive fair compensation. The problem is that our medical justice system is completely out of whack. Doctors and hospitals live in constant fear of litigation. They order unnecessary tests out of legal fear.

Doctors look at their patients as potential lawsuits, not people in need of their help, because of this legal fear. They are forced to move their practices to States that have reformed their legal systems. All of this because of legal fear.

Some of my colleagues may have read a book that came out several years ago, in 1995. The book was called "The Death of Common Sense." The book was written by Philip Howard, a lawyer by training. His premise was that American law and regulation are stifling human judgment and good sense.

Well, Mr. Howard just published a new book, and I encourage my colleagues to read it. It is called "The Collapse of the Common Good." In the book, he describes how law and regulation in America create a warped sense of individual rights. In America today, people use the concept of individual rights to bully other members of society, using the threat of legal action as a weapon.

Some of what Mr. Howard has written is pertinent to this debate. For in-

stance, some of my colleagues believe that this legislation would limit a patient's right to sue a doctor. We all believe that patients who are truly injured deserve fair compensation. The problem is that some personal injury lawyers are taking advantage of this belief to bring all sorts of claims against doctors, whether the doctors are at fault or not.

Let me share a passage from Mr. Howard's book. He writes on pages 22 and 23:

Like ancient Mayans accepting human sacrifice or Catholics in the Middle Ages buying indulgences, Americans today accept that being sued is the price of freedom, and that diving for cover is the natural response to reasonable daily choices. Our faith in individual rights keeps us from pausing even to question this conception of justice. But should individual rights include the right to go to court over a sandbox disagreement involving 3-year-olds, or to milk the system whenever there is a freak accident, or to scare towns and school systems out of seesaws and peanut butter? The idea of individual rights derives its moral force from the rhetoric of liberty. But is this what our founders had in mind when they organized a society around the freedom of each individual?

Actually, no. Our founding fathers would be shocked. There is no "right" to bring claims for whatever you want against someone else.

Suing is a use of state power. A lawsuit seeks to use government's compulsory powers to coerce someone else to do something. Asserting individual rights sounds benign, like praying in the church or synagogue of your choice. Sticking a legal gun in someone's ribs, however, is not a feature of what our founders intended as an individual right. The point of freedom is almost exactly the opposite: We can live our lives without being cowed by use of legal power. The individual rights our founders gave us were defensive, to protect our liberty. Liberty, we somehow forgot, does not include taking away someone else's liberty. . . .

Courts are not supposed to be commercial establishments where, for the price of a lawyer, anyone can buy a chance on a raffle. Courts supposedly represent the wisdom of law, overseeing when those powers can be used against others in a free society. There's no right to sue except as the state permits.

I can practically feel your confusion. How else can we organize justice? People obviously have the ability to go to court. But by what rules and standards? Our modern consciousness is so focused on individual rights we can't conceive of another way to ensure fairness. But if lawsuits are recognized as an exercise of state power, perhaps the state should make conscious judgments of who can sue for what. That's what legal rules and interpretations are for.

That is what this debate is about. That is what this legislation intends to do—make conscious judgments about who can sue and for what, and the rules and limits under which medical lawsuits can go forward.

Is this bill a perfect bill? No. I have yet to see a perfect bill, and I am in my seventh year in the Senate, following 10 years in the Wyoming Legislature. But we ought to vote to begin this debate and move on to the consideration of this bill, and the amendments to the bill, so that we can address this medical liability crisis before it further compromises the liberties of the people in Wyoming and the other States, and especially their access to medical care.

We are debating whether to proceed to debate, whether to proceed to begin the amendments which can even be whole substitutes to this bill. So if my colleagues have a better idea, a way to solve this, they should vote to proceed, then bring their amendments.

Our Declaration of Independence speaks to our unalienable rights, as granted to us by our Creator, and that among these rights are life, liberty, and the pursuit of happiness.

Well, it is pretty hard for an expectant mother in Wyoming to pursue her happiness when she has to pursue her doctor for one more well-baby check-up before he closes his practice and leaves for a State where insurance premiums are lower.

There is another passage in Mr. Howard's book that is pertinent to our discussion about limits on pain-and-suffering awards. The statistics show that insurance premiums are lower in States with such limits, but I have heard Members on the other side of the aisle argue that the limit in this bill is too low, that it is unfair to someone who is severely injured, despite the fact that the bill does not limit in any way that person's right to recover every cent of the economic damages that result from that injury.

Well, if the limit on pain-and-suffering awards in this bill is too low, then what is the right amount?

I quote another passage from Mr. Howard's book, and I hope everybody will read at least the first chapter of this book.

A great thing about bringing lawsuits in modern America is that it is so easy to threaten the adversary's entire livelihood. One stroke of the finger on the lawyer's word processor, and damages go from \$100,000 to \$1,000,000. Three more key strokes, and we're suing for a billion dollars. This is fun.

What kind of justice system is it that allows someone to make up an amount of money to demand? Is that a fact to be "found" by a jury? It doesn't even qualify as a value judgment, which at least is a conclusion based on facts. Damages claimed today are completely arbitrary. Just stick your finger in the air and threaten someone with any number that comes to mind.

Judges treat damage claims almost as if they are property, and only with greatest reluctance intercede. In 1987, five-year-old Gregory Strothkamp climbed up several shelves to the top of the linen closet, got an unopened box of Q-Tips, and, while trying to use them, punctured his eardrum. His parents sued the maker of Q-Tips for, among other things, \$20 million in punitive damages. Whatever the merits of the argument that Q-Tips should come in childproof packaging (which would raise everyone's cost), most people probably agree that making Q-Tips is not an evil act.

When the jury awarded young Gregory \$20 million in punitive damages, the judge did what was obvious from the beginning and overturned the award. The claim ended sensibly, but is this how justice should work? Sweating through trial and verdict to get to obvious justice, while the judge is sitting there the whole time, doesn't exactly instill confidence in the system.

Do judges enjoy watching the Q-Tip companies, or a Little League coach, or a doctor squirm at the end of a multimillion-dollar hook?

Lying dormant along the side of society is another important legal principle: that a person injured should be "made whole" by damages. Traditionally, this meant out-of-pocket losses, like lost wages or medical bills. In an unusual case, like a homemaker with no wages, claims were permitted in categories not actually calculable, like "pain and suffering." In cases of genuine evil, punitive damages were possible.

Today, the exceptions have engulfed the rule, with all kinds of side effects. Juries are regularly asked "to assume the baffling task of trying to place a monetary value on pain and suffering," Dean Bok observed, "although the predictable result [is] to encourage a rise in litigation and the growth of the most unsavory and deceptive practices."

Judges might concede the principle but can't imagine how to apply it. They need some objective legal post to hang on to. If \$1.35 billion is too much, what is the right amount? The "exercise of judicial power is not legitimate," as one scholar put it, "if it is based on a judge's personal preference rather than law." So what do the judges do? They abdicate. Judges look up at the allegorical figure of Justice and interpret her blindfold as impotence.

But Justice is also holding balanced scales. How does Justice achieve balance but through the values and wisdom of judges? Proportion is critical to justice. Equals should be treated alike, Aristotle believed, and unequals proportionally to their relative differences: "the unjust is what violates the proportion." These distinctions, Aristotle observed, can only be made with human wisdom.

Dead people can be so smart. "[T]o speak somewhat paradoxically," Cardozo observed, there are times "when nothing less than a subjective measure will satisfy an objective standard." Justice Potter Stewart had it right after all. Judges have to know it when they see it. One billion dollars for a wrongful dismissal case is absurd. Everyone knows it. The case should be dismissed unless the plaintiff comes back with some amount he can plausibly justify.

I wonder if judges ever ask themselves why it is that damage claims have escalated to a level where they are like a parody of a dysfunctional system of justice. The answer couldn't be more obvious. Judges sit on their hands and tolerate claims that make lotteries seem like small change. The reason people bring huge claims is not hard to divine: It's a form of extortion. Why else sue for such ridiculous amounts? Being sued for, say, \$5 million for a regular accident may not cause you to fold your hand, but the possibility of ruin never strays far from your consciousness. Most million-dollar claims end up settling for thousands or less. But not all. All that it takes is for a jury to get mad. . . .

The point I am making is that there is an imbalance. I think that everybody recognizes there is an imbalance. We want to have a just system. What we need to do is approve this cloture petition, end the debate of whether to proceed to the debate, and bring in substitute bills. And I have heard of some pretty good ones floating around. We can debate the issue and come up with something that will make doctors still accessible in States such as Nevada and Wyoming and the other ones that we have had on the chart of states in crisis. There are only about five that are not in crisis. Then there are varying degrees of crisis among the rest of them.

The problem we are facing today is that multimillion-dollar awards for pain and suffering are contributing to dramatic increases for insurance premiums for doctors. When this forces doctors to leave their practices, it hurts innocent patients who lose their access to medical care. Do we not have an obligation to say enough is enough, and set some limits on lawsuits?

As Mr. Howard points out in his book, if lawsuits are an exercise of State power, perhaps the State should make conscious judgments of who can sue for what.

When I spoke on this bill yesterday, I said the current medical liability crisis and the shortcomings of our medical litigation system make it clear it is time for a major change. I also said that regardless of how we vote on this legislation, we ought to start working toward replacing the current medical tort litigation scheme with a more reliable and predictable and faster system of medical justice.

I have heard Members on the other side of the aisle say they want to work with Republicans to find a better way to solve this problem, to find reasonable good-faith alternatives to this legislation. If we vote not to proceed on this bill, I hope this process will begin sooner rather than later. I hope we proceed so Members can bring their ideas out and suggest amendments; then we can vote up or down. The people of Wyoming and other States in crisis cannot afford to lose any more doctors. We cannot afford to lose any more time.

If we do not proceed on this bill today, I pledge to continue working to find solutions to this million-dollar liability crisis. I hope Members on both sides of the aisle will also take this pledge to keep working on this.

I yield the floor.

The PRESIDING OFFICER (Mr. GRAHAM of South Carolina). The Senator from the State of New York.

NOMINATION OF VICTOR WOLSKI

Mr. SCHUMER. Mr. President, I will talk today about the nomination of Victor Wolski to the Court of Federal Claims. This nomination admittedly has not gotten much attention from our colleagues because the Court of Federal Claims does not handle the breadth or the number of cases that the courts of appeals do or even Federal district courts.

However, I remind my colleagues that in one area these courts are extremely important—they are important in many areas, but in one area where we have our usual ideological discussions and battles, the area of the environment. The Court of Federal Claims is the place where claims of takings reside. Takings have been the way many have opposed the advances we have made in the environment. They make their arguments this is a government taking from you your right to use your property as you see fit.

When the Government says you cannot pollute the water on the land you

own or you cannot pollute the air on the land above which you own, some have come up with the theory that the Government is taking something from you. It is sort of denying the theory of compact that we all live together and we all have to be responsible for our land and our water.

I argue that the vast majority of Americans do not agree with this argument. However, there is a small group of people who tend to be propertied, tend to be quite well off in society, who are very much for this argument.

The nominee to the Court of Federal Claims, Victor Wolski, if we nominate him, if we approve him, we are approving somebody who has led the charge in this area—not somebody who sees some merit to the taking argument and sees the other side but somebody who is a committed ideologue, not somebody who would have the balance we need on the courts.

If anyone does not believe me, I take Mr. Wolski's own words to the National Journal:

Every single job that I have taken since college has been ideologically oriented trying to further my principles.

He then goes on to describe his principles as "a libertarian belief in property rights and limited government."

This man is a self-described ideologue. I thought we had been making some progress in this body, that while some would propose more conservative nominees and some would propose more liberal nominees, that it was a bad idea to put ideologues on the bench, ideologues of the left or the right.

Mr. Wolski is clearly an ideologue and does not belong on this sensitive court. For that reason, he is opposed by 13 national environmental groups. When he was counsel for the Pacific Legal Foundation, Mr. Wolski consistently furthered his ideology through sweeping arguments that would have dramatically undermined the Nation's environmental laws.

My guess is he preferred an America of the 1890s or the 1930s where our air was much dirtier, our water was much filthier. Whether you are a Democrat or Republican, if you believe at all in preserving the environment, it would seem to me it would make a good deal of sense not to further this nomination. We can find people who might be more consistent with the President's views, with many views on the other side in terms of not extending environmental laws or making sure that the excesses of environmental laws are limited. Mr. Wolski is just not that. He is so committed to this ideological view that the Government has virtually no right to tell you you cannot pollute the air or the water, that if he had his way, we would turn the clock back dramatically in the environmental area. As a result, as I mentioned, 13 national environmental groups oppose his nomination.

In addition, a broad coalition of groups, civil rights, women's rights,

human rights organizations, including the Leadership Conference on Civil Rights, the National Fair Housing Alliance, and the National Women's Law Center have expressed serious concerns with Wolski's "extreme views on governmental power and his troubling record in race and sex discrimination cases."

Admittedly, this court does not handle race and sex discrimination cases, but it does handle the takings cases that relate to our environment.

In addition, I argue to my colleagues, Mr. Wolski does not really have the judicial temperament to be a Federal judge. He argued a case where there were ponds that were providing habitat for migratory birds. I know from my own experience that some would think every piece of water, every pond and every lake is a wetlands and cannot be touched, and sometimes the advocates, I would be the first to say, go overboard. However, in this case, Mr. Wolski called ponds "puddles," and he belittled the possibility that there might be any interest in protecting migratory birds. "Jurisdiction over puddles was justified by the Ninth Circuit on the basis that birds might frolic in these puddles."

He wrote:

Will one fewer puddle for the birds to bathe in have some impact on the market for these birds?

In the argument he is making—I don't know, the facts of the case might be right—the language does not show the temperament, a fair and balanced temperament, that we seek in nominations to the bench, whether they be Democrat or Republican.

In a letter to the San Francisco Chronicle, Wolski derided what he called "a rogue Congress" and referred to the Members of Congress as "bums." Again, many of our constituents have hard words about Congress Members, but I don't think a lawyer, a trained advocate, ought to be using that kind of language. Again, it shows the kind of temperament Mr. Wolski has.

On the merits of his views, he is way over to the extreme. On his judicial temperament he has used incendiary language that is inappropriate for a lawyer or a judge. Mr. Wolski should not be put on the bench.

I make one other argument in this regard. The Federal Court of Claims has some vacancies. It has 16 slots. It now has 13 senior judges in addition to the 11 regular judges. This court does not have much of a caseload. The average number of cases the United States District Court judge handles is 355 cases; the number of cases a current judge of the Court of Federal Claims handles is 24. If we add the new nominees, each will handle 19 cases.

Let's say you don't agree with CHUCK SCHUMER on the environment. Let's say you even agree with Victor Wolski, but you are a fiscal conservative. Why are we adding more judges to a bench that does not need any help?

The Washington Post editorial—and, as you know, the Washington Post on

the issue of judges has not agreed with many of us on this side—called the CFC:

... a court of extravagance and an unnecessary waste of judicial resources that should be abolished.

Each of these judges costs a million dollars. I would say to my colleagues, those on the other side of the aisle did not allow nominees to the Court of Federal Claims when President Clinton was in office because, they said, the caseload was too low. Today the caseload is even lower, and there is a rush to nominate. This should not be dispositive.

If Wolski were a good man, if the caseload were growing, I would support him no matter what was done between 1995 and 2000. But I have to tell my colleagues on the other side, it is extremely galling to us that the very arguments that have been used in the past now seem irrelevant, now that there is a new President making different appointments. If the Court of Federal Claims should not have had appointees under the Clinton administration and the Republican-controlled Senate did not allow any because the caseload was too low—24—why are we now nominating 4 and bringing the caseload down to 19? It is just not right. It is not fair. There ought to be some consistency to the argument. There is not. There absolutely is not.

So for these grounds, I urge Mr. Wolski's defeat. No. 1, he is a good man—he may be a good man, I don't know him personally, but when I said "a good man" before, I did not mean in terms of his views for this court. He is an extremist. By his own words, he is an ideologue. He does not believe in the progress we have made on the environment.

If the President wishes, as our great process unfolds, to nominate somebody who would cut back a little bit on the environmental laws, or not make decisions that move them forward, that is a fair and legitimate argument. To nominate an ideologue—a self-admitted ideologue who has made it his career to say that anytime the Clean Water Act or Clean Air Act has effect, it often means it is a taking—is really not what the American people want. My guess is maybe half of the people on this side of the aisle, on the Republican side of the aisle, do not agree with these views at all—in terms of their voting record.

His temperament is poor. He uses inflammatory and derogatory language. That makes sense, in a certain sense—that when you nominate ideologues, they are not dispassionate. They are not going to interpret the law, which is what the Founding Fathers wanted; they are going to make law. I have rejected nominees from the left in my own judicial panel because they are ideologues, too, and they want to make law. We want judges to interpret the law. Those far right and those far left tend to want to make law. On temperament and ideological grounds, he is not the right man for the job.

One other argument to boot. Even if you think he is the right person for the job—and I argue, I plead with you to think otherwise—this court has no caseload. This court could handle many more cases without an additional new judge. This is a total boondoggle. This is a waste of the taxpayers' money. If it was right that this court did not have the caseload under the Clinton administration so we would fill the vacancies, with the caseload even lower today, why are we doing that?

I respectfully urge my colleagues to vote no on Victor Wolski.

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

The PRESIDING OFFICER. The Senator has 12 minutes.

Mr. SCHUMER. I yield the remainder of my time to my colleague, the Senator from Illinois.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, how much time is remaining for each side for debate before the vote?

The PRESIDING OFFICER. There remain 34 minutes on the Democratic side; 19 minutes remain on the majority side. The order indicates the Democratic leader will be recognized at 11:10.

Mr. SCHUMER. Mr. President, before my colleague speaks, I didn't realize when I yielded all the time, there was at least one other of my colleagues who wanted to speak on Mr. Wolski. Could we, if he should come, just leave 5 minutes to continue the debate? I just reserve 5 minutes of the time to discuss the Wolski nomination, and I will yield the remainder—whatever is left after reserving those 5 minutes—to my colleague who I know wants to speak on both issues.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I hope I understand what just happened. I have 29 minutes remaining? Is that mistaken? Five minutes will be given to some Democrat to speak on the Wolski nomination, and then the remaining 13 minutes, is that correct, are on the Republican side, majority side?

The PRESIDING OFFICER. There are 19 minutes remaining on the Republican side.

Mr. DURBIN. I think I have it, or at least close to it.

Thank you, Mr. President, for your cooperation and I thank my colleague from New York for yielding this time.

In the last 2 days we have been engaged in a debate on the floor which affects every American family and business, and the question is, What are we going to do about the dramatic increase in the cost of medical malpractice insurance that we see among some specialties in some parts of the country? It doesn't affect every State. It doesn't affect every doctor. But those doctors who are hardest hit, I believe—and I think everyone here shares that belief—need relief. They need some help.

What do we have offered to us today? S. 11. This is the bill brought to us by

the Senator from Nevada, Mr. ENSIGN, and Senator MCCONNELL and a number of other Republican Senators. This suggests that the best way to limit the medical malpractice premiums being charged to doctors is to limit the amount of recovery that a person who has been a victim of medical malpractice can receive. It is a decision which says we will no longer trust a jury of 12 people from your community, your city, and your State to decide what is fair compensation for your injury caused by another person. That decision will be made by a jury of 100 Senators, who will decide today, with S. 11, that regardless of what has happened to you or your child, regardless of the severity of the injury, regardless of how many years you are going to go through constant pain or suffering, we will decide today, in the Senate, that if your State has not come up with another number, the maximum amount you can receive is \$250,000 for pain and suffering.

Some may say that is a pretty substantial sum of money. I have heard that said on the floor here. How can the critics of this bill be coming to you and saying \$250,000 is not that much money?

I concede, if you bought a lottery ticket today and were paid \$250,000 tomorrow, you would be a happy person. But if you had a medical injury today which incapacitated you for the rest of your life, which left you in a wheelchair, quadriplegic for the rest of your life, which left you in a state dependent on others for the rest of your life, which left you permanently scarred and disfigured for the rest of your life, and you were told that your compensation was \$250,000, I think it would put it in a much different perspective.

I think that is what is missing in this debate. I cannot get over how Senators come to this floor and dismiss all of these victims of medical malpractice and say, basically: It is a shame, but they just don't get it. We have a bigger problem here. We have a malpractice insurance problem.

I have listened to the debate. I have listened to those who suggest that this bill, S. 11, is the answer to the problem. I say it isn't. The problem is national. The problem is serious. The problem will not be answered by this legislation.

There is a belief that if you limit the amount that a victim can recover malpractice insurance premiums will go down. Let me tell you that facts don't bear that out.

Take a look at these States. Some of them have State laws that cap liability. Others don't. Of the States without caps where a victim of malpractice can receive whatever a jury thinks is fair in the period 1991-2002, four of those—Arizona, New York, Georgia, and Washington—saw modest increases in malpractice insurance premiums. Here are four States with caps on what a victim can receive. The malpractice insurance premiums have shot up dramatically.

There is no direct link between limiting a victim's recovery and the malpractice insurance premiums that are charged. Yesterday, Senator ENSIGN of Nevada, I think in a very candid moment, conceded that fact. He brought out a chart. He said you can't compare States with caps that have only been in place for a short time. In the words of Senator ENSIGN, as the CONGRESSIONAL RECORD reflects, it will take 8, 10, 12, or maybe 15 years before these caps on victims in terms of what they can recover for their serious injuries really do have a measurable impact on malpractice insurance premiums.

I would say to the doctors in Illinois and in Nevada and in any State in the Union, is this a reasonable answer to today's malpractice insurance crisis to suggest that limiting a victim's recovery will ultimately reduce malpractice insurance premiums 8, 10, 12, or 15 years from now? Trust me. In some of these specialties, OB/GYN and neurosurgery, these doctors can't wait for that period of time. Sadly, even if you bought the premise of this bill that limiting a victim's recovery will help a doctor's malpractice premiums, the sponsor of the bill came to the floor yesterday and conceded that it won't happen for 8 to 15 years.

Where does that leave us? It leaves us in a situation where we have a bill that is fundamentally unfair to the victims of medical malpractice premiums.

I listened to the rhetoric on the other side. I have been a practicing attorney, a trial lawyer, both a defense attorney and a plaintiff's attorney. I guess I understand that my profession has been the butt of a lot of jokes and a lot of derision. I have heard Members come to the floor and talk about those greedy lawyers. I will have to tell you that there are an awful lot of men and women practicing law across the United States who I think are doing a service to their clients and to America. They have people come into their law offices who are seriously hurt or who have lost a loved one and who have no money to their name and are looking for justice. They want an opportunity to go to court. They can't pay for it. They can't pay for an attorney on an hourly basis and be charged \$10,000, \$20,000, \$30,000, or \$40,000 for their day in court. Some of them can't even pay the court costs or the filing fees or the necessary expenses for a deposition asking questions preparing for a lawsuit.

Lawyers who represent these people say: I will take it on a contingent basis. If you succeed, if you win, I will be paid. If you do not succeed, if you lose, I will lose with you. That will be the gamble we will take together. We believe we have a good lawsuit. Let us go forward. Some of these lawyers say on a personal basis this is what my recovery will be.

I don't think there is anything unfair or insidious about this any more than it is unfair or insidious that those who are defending the person accused of

wrongdoing are generally represented by insurance company lawyers who pay unlimited amounts of money for the defense of a lawsuit. That is just the nature of our judicial system.

On this floor the people who take contingency fee cases are referred to as greedy and selfish, exploiting the plaintiff, exploiting the claimant, and exploiting the victims. I am sure it has happened. I am sure it will continue to happen—I hope in as few cases as possible.

There is nothing unfair or unjust about a contingency fee system. In fact, it gives people an opening in the court they would never be able to afford. I have seen it. I represented people under those circumstances. I have run that risk. Sometimes I didn't succeed for the client or myself. Sometimes I did. That is the nature of the system.

Then a Senator came to the floor yesterday. He is a friend of mine. I respect him. But he used a term which troubles me greatly. He said he wants to end this "jackpot justice." That was his phrase—"jackpot justice." I guess the idea is that if someone goes into a courtroom with a flimsy case and ends up with millions of dollars, hit the jackpot. I guess that can happen, too. Maybe it has.

But I want to talk to you a little bit about "jackpot justice" in the world of medical malpractice. I would like to point, as exhibit No. 1, to Alan Cronin, a 42-year-old man from the State of California. Alan Cronin is a man who has three children. He went in for a simple surgery of a hernia repair. After the surgery, two doctors failed to diagnose an acute infection. They treated him as if he had the flu. But he had a very serious infection instead. He became septic and suffered toxic shock. Once the doctors realized that, and they had to reopen the surgery site where they repaired the hernia. They found a horrendous infection underway. They told his family that he had a 98-percent chance of dying as a result of this infection. Gangrene had set in. As a consequence of a simple hernia operation and the malpractice that occurred afterwards, this gangrene claimed all four of Alan Cronin's limbs—both of his legs, both of his arms.

He used to be a customer service representative for a medical equipment manufacturer and workers compensation paid for all of his medical expenses, including some of his future expenses. He also had a private disability policy that he used to help keep his family together, offsetting future damages.

The reason this case is important is I guess there are some in the Chamber who would say if Alan Cronin goes to a courtroom and asks the jury for a verdict against the doctor who made the mistake which led to his infection, which led to gangrene and which led to this man losing both arms and both legs and asks for a verdict against that

negligent doctor and he is given several million dollars to try to keep his family and life together for the rest of his natural life, in the words of some of my colleagues, Alan Cronin would "hit the jackpot."

What a jackpot—several million dollars for both arms and both legs? How many volunteers would sign up for that jackpot? How many people want to buy a ticket on that jackpot lottery? None of us would. None of us would ever trade places with what this man has gone through and will go through every minute of every hour of every day of every week of every month and every year for the rest of his life. This is a jackpot?

You should have been in the room yesterday when Senator GRAHAM and I met four victims of medical malpractice who came in to see us.

Colin Gouley, a young man from Nebraska, came to us. As a result of medical malpractice, when he was born he had serious problems and disabilities and is going to be confined to a wheelchair. He must sleep at night with a cast. He has a limited ability to respond and learn and speak. He won't go through the ordinary human events of experiences that we take for granted.

He has a twin brother. This is a picture of Colin and his twin brother Conner. You can see Colin on the left and his twin brother, who is healthy, happy, and an active young man. That will be the fate and future for Colin.

They took the case to a jury in Nebraska and said for the rest of his life and with all of the pain and suffering that he will endure, what is it worth? That jury said: We calculate it to be about \$5.6 million. But because of Nebraska's State law that limits the amount that can be awarded in cases of medical malpractice, the family will receive a fraction of that amount. It will mean that his mother and father and his two sisters and brother will be tending to his care for the rest of his life, as they would naturally, but they will have to do it much more because of his situation. It also means that ultimately the doctors and hospital that may have been responsible for this wrongdoing will not be held accountable but it will be the responsibility of the government to pay more and more of his medical expenses. That is not what the family wants, but look at the situation they face.

Do you believe the Gouley family hit the jackpot? This is jackpot justice? I can tell you what this bill would say. If your State does not have a limitation on recovery, this bill would say to Colin Gouley and his family: We are sorry this happened to you, we are sorry you were a victim of malpractice, but the pain and suffering you will endure for the rest of your natural life is worth \$250,000. The verdict rendered by the jury of the Senate is \$250,000 and not one penny more.

That isn't fair to the Gouley family, but, frankly, that is our idea of how to deal with the medical malpractice in-

surance crisis. At least that is what has been proposed.

We have to put a human face on this issue. We have to make sure people understand it isn't just doctors who face malpractice premiums, it isn't just people who are looking for care but cannot find it because doctors cannot practice in some areas because it is more expensive. The solution being offered by the Senator from Nevada and others is to limit the recovery of medical malpractice victims and their families, to limit the amount of money that would be paid to children who are the victims of medical malpractice.

There is no argument here about who is at fault. The fault was established by the jury. But this bill would say: The Federal Government will decide how much the Gouley family can receive. The Federal Government will decide how much Alan Cronin will receive for pain and suffering in those States that do not have a different limitation.

I guess what troubles me, too, is this bill does not go to the root issue that is before us. We were told by this administration, the Bush administration, through Dr. Clancy of the Department of Health and Human Services, that medical errors and medical malpractice have reached epidemic proportions in this country. Instead of dealing with medical malpractice at an epidemic proportion, what we are saying is the real way to control this problem is to make sure Colin Gouley and his family are not adequately compensated for the injuries and damages they have suffered.

That is so shortsighted and it is so fundamentally unfair.

If these malpractice premiums are unfair to doctors, I can tell you S. 11 is fundamentally unfair to Colin Gouley and his family and people like them across America.

Mr. President, 100,000 Americans will lose their lives this year because of medical malpractice, not because of their disease or illness but because of mistakes that are made—100,000 people. And that figure comes from the Bush administration Department of Health and Human Services.

Of those who could file a malpractice claim in any given year, 1 out of 50 actually do go to a lawyer and seek compensation; 2 percent, 1 out of 50. If we do not go to the root cause of this problem, this bow wave of malpractice that is about to swamp us in this country, then, frankly, we are not addressing the root problem. Instead, what we are doing is penalizing the Gouley family and others like them and rewarding insurance companies.

Do not be surprised by that. We do that on a weekly basis in the Senate. We find ways to take a special interest group, such as insurance companies, and give them more profitability, less accountability, whether it is HMOs, which, incidentally, are protected and rewarded by this same bill, or other insurance companies. That is the nature of the philosophy that drives the majority opinion in the Senate.

But families across America see it differently, and they should. This law we are considering, S. 11, unfairly is going to insulate from liability HMO insurance companies, managed care insurance companies, as well as drug companies and medical device manufacturers.

One last point I would like to make at this moment is they have a provision in this bill which says if your drug, for example, or medical device has been approved by the Food and Drug Administration, it virtually insulates you from liability for punitive damages. I asked my staff to prepare a list of the various drugs that have been marketed which have been found to be dangerous and deadly to people across America. Frankly, there are too many for me to list in the record at this point. I will submit them at a later time.

Why in the world would we want to put in this bill an insulation for those who make medical devices which end up killing people? Why in the world, in a bill that is supposed to be helping struggling doctors, are we talking about insulating from liability pharmaceutical companies that sell dangerous drugs?

Oh, the argument is, if it is approved by the FDA, that should be enough. We know better. Those of us who have been involved on Capitol Hill know we do not fund the Food and Drug Administration adequately. There are not enough people there doing the important work that should be done. We know they do their best, and we know that 9 times out of 10, maybe 99 times out of 100, they are going to make certain drugs are safe and efficacious, but we also know quite well that there are not enough people there doing the job that needs to be done.

Much like the tobacco companies hid behind the warning label on their packages when they were sued for cancer and heart disease, these drug companies, under S. 11, want to hide behind an FDA approval and say: We can't be held accountable for what we might have known or what we might have done if, in fact, somewhere along the way the FDA gave us a stamp of approval. That should insulate us from liability.

Think about what we are doing here, and think, for a moment, about the victims. If you love the companies, if you love the insurance companies, couldn't you have some love in your heart for these victims, some compassion for what they are going to go through? I think that should be an important part of the debate.

I reserve the remainder of my time, Mr. President.

The PRESIDING OFFICER. Who yields time?

Mr. ENSIGN. Mr. President, how much time is on each side?

The PRESIDING OFFICER. Nineteen minutes on the majority side, 13 minutes on the minority side.

Mr. ENSIGN. Mr. President, I yield myself 5 minutes.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, first of all, let's make sure one thing is clear. What we are debating today is whether to proceed to the bill. We are trying to get on the bill. If people have certain problems with the bill, they can offer amendments, but only if they allow us to proceed to the bill. That is what the vote is on today, whether or not we are going even consider that we might address a crisis that is happening in the United States.

There have been a few things that have been talked about from the other side of the aisle today that I would like to address. I want to read from a report because they have been quoting this study. The Weiss study, which has been referenced repeatedly by the other side of the aisle, supposedly took numbers from this publication called the Medical Liability Monitor.

Mr. President, I ask unanimous consent that a portion of this report be printed in the RECORD.

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

[From the Medical Liability Monitor, Oct. 2002]

2002 RATE SURVEY FINDS MALPRACTICE PREMIUMS ARE SOARING

HARD MARKET WALLOPS PHYSICIANS; AVERAGE RATE INCREASES MORE THAN DOUBLE THOSE IN 2001

A nationwide survey of rates for physicians' medical professional liability insurance confirms that not only has a hard market for this necessary coverage arrived, but from all indications, it is settling in to stay for awhile.

For the past 12 years Medical Liability Monitor has conducted an annual study of malpractice insurance rates. Reports come in from carriers in all 50 states who represent approximately 65% to 70% of the entire market. This year, that percentage may be even larger, now that former insureds of St. Paul and other companies who have quit the business must obtain replacement coverage and are moving to carriers remaining in the traditional market when possible.

For many physicians, whose incomes are held down by rigid government and health plan reimbursement schedules, coming up with funds to pay fast-rising insurance costs poses real problems. Here is a closer look at how malpractice insurance rates have risen in many places in the past year.

The chart below shows that the average cost of malpractice insurance for internists rose by 24.7% from July 1, 2001 to July 1, 2002. In 2001 the percent of increase was 10.1%. General surgeons' rates went up similarly, increasing by an average 25% in 2002 from 10.3% in 2001. The average increase in rates for obstetricians/gynecologists climbed from 9.2% last year to 19.6% this year.

For internists and general surgeons the average percent of increase in the 12-month 2001-2002 period was a staggering 145% and 143%. Increases for OB/Gyns, whose rates typically are much higher than those of their internal medicine and surgical colleagues, went up on average by 113%.

The effects of the rate increases were uneven, falling most heavily in certain states and metropolitan areas, like New York, Chicago, Detroit, Cleveland and Miami. Unlikely spots for exploding premiums were Las Vegas, West Virginia, and the Rio

Grande Valley in Texas. Even though there were rate hikes in most states, they sometimes were more modest. Two states, Alabama and Alaska, had no increases at all. Insurers in several states raised rates only modestly. There were even a few, but very few, downward adjustments in rates for certain specialists in specific territories in a handful of states. One company in Alabama cut rates for general surgeons by 6%. A company in California pared rates for internists in certain areas by 4% and 7% and for obstetricians in other areas by 1% and 3%. An Illinois company lowered rates for general surgeons, except in Cook and two other counties by 4% to 8.6%. There were some modest reductions for certain type of physicians in two or three other states, but these were by far the exceptions, not the rule.

The size of increases in some areas in which malpractice problems with claims and claims severity have exploded was mind-boggling. Increases of 40%, 50%, 60%, 80% were not uncommon. In Arkansas one carrier boosted rates by 90.1% to 112.7%.

BASEMENT TO THROUGH-THE-ROOF VARIATIONS

The differences in premiums for specialists in various states and areas are widespread. Base rates for internists in South Dakota provided by one insurer, were \$2,906, while the highest rate reported for these physicians was \$56,154 in Dade County, Miami.

The extremes in base rates for general surgeons are even greater. In Minnesota one company's manual rate was \$8,717, but in Miami the highest number quoted by a carrier for this specialty was \$174,268. The wide swings were also typical for OB/Gyns. One company's rate for these physicians was \$13,317 in South Dakota, but once again, the highest rate was \$210,576 in Miami.

Mr. ENSIGN. Mr. President, the editor of this report has basically said the Weiss study they quote is completely misusing their numbers. I refer you to a portion of the report entitled "Survey Finds Wide Swings in Premiums" because my colleagues on the other side of the aisle state that there have not been these wide swings in premiums. The report says:

The size of increases in some areas in which malpractice problems with claims and claims severity have exploded was mind-boggling. Increases of 40 percent, 50 percent, 60 percent, 80 percent were not uncommon. In Arkansas one carrier boosted rates by 90.1 percent to 112.7 percent.

Notice what it said here. It said, "malpractice problems with claims and claims severity have exploded." The premium increases have been "mind-boggling."

The Senator from Illinois has put up pictures of victims of malpractice. I want to show a picture of one of the victims, because there are victims on both sides of this issue.

Picture this gentleman shown here.

This was a gentleman, Mr. Lawson, who was visiting the city in which I live, Las Vegas, Nevada with his family. Unfortunately, the time they visited was the week the trauma center closed because of the crisis we have in the State of Nevada. The trauma center closed, and this gentleman, unfortunately, could not get care. In this picture he looks healthy. Unfortunately, he is no longer with us.

There are a lot of people the other side have shown as victims. Those peo-

ple, if we do not do something, will not even have doctors to go to because doctors are leaving the profession, and new doctors are not coming in to replace them.

We have a crisis in this country in 19 States. All but six States are showing serious problems. The Senator from Illinois quoted my words yesterday, that it takes years to find out whether legislation in the States that have enacted reform will be effective. The reason for that isn't that they aren't necessarily good pieces of legislation, it is that they are being challenged in court and then appealed and appealed and appealed. A lot of the State courts are striking down these laws, because of some technicality in their constitution or a particular problem in their piece of legislation. Because of that, there is uncertainty even when States pass legislation if this crisis will remain out of control. The insurance companies don't know whether the laws are going to be upheld, so they can't lower rates because they may end up with a huge liability down the road if the law is struck down. That is the problem.

We must act now while we still have some time. How bad does the situation have to get in the future? I would love to add into this bill, as we did with campaign finance reform legislation in the year 2001, an expeditious judiciary review of the law so that we can find out whether it is going to be held constitutional or not. But we can't do any of that because the other side of the aisle will not even allow us to proceed to the bill. We can't debate the legislation and we can't offer any amendments unless we can at least agree to proceed to the bill.

If the opponents don't like the legislation, if they think there are ways to fix it, they should allow us to at least proceed to the bill so that we can have amendments offered, have a full debate, bring out all the pictures of the victims you want to bring out, amend the bill, and come up with legislation that is going to actually fix the problem in the United States. It really is a crisis and you can be sure that debating on the motion to proceed, and not agreeing to take up the bill will not fix the problem.

I wish to again illustrate the differences in the premiums across the country by the use of this chart. In white are the two States with cities represented that have had medical liability reforms in place for some time.

I yield myself an additional minute.

The ones in gray have not.

Let's go to obstetrics and gynecology. Los Angeles, CA, the bill before us today mirrors the law they have there. There is a \$54,000 medical liability premium in Los Angeles. In Denver, where they have had it since 1988, it is \$30,000. New York, Las Vegas, Chicago, Miami are much higher: \$89,000, \$108,000, \$102,000, over \$200,000 in Miami. That illustrates the difference in the premiums in States that don't have the reform. These numbers are continuing

to go up at a rapid rate. The numbers reflected here are actually a couple years old, and they are continuing to skyrocket in States without reform. That is why we need to act. It is a national priority, and we must act now.

I reserve the remainder of my time.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. I yield myself 5 minutes.

My question is, Why do we need to consider a bill of this magnitude without taking it through the ordinary committee process? The Senator from Nevada said yesterday, we just know we would never get it out of committee. I am a little bit surprised at that because, if I am not mistaken, it is the party of the Senator from Nevada that is the majority in every committee that would consider this bill. If they are truly looking for a bill that is fair and one that compromises where necessary and negotiates a good-faith outcome, then it would come out of committee. And certainly with the direction of the majority leader, Senator FRIST, who has spoken in favor of it, there would be an urgency to it.

That is not the way this bill is being considered. This bill is coming to the floor without committee hearing. They haven't had a chance to hear the witnesses, not the four malpractice victims and their families we met yesterday, not the doctors on both sides of the issue, not the practicing attorneys, not representatives of the insurance companies, none of them, no hearings from them, no statements from them, no suggestions from them. I don't know where this bill came from.

I can tell you the people who want it: Not only the American Medical Association but clearly those who represent HMOs and managed care companies that are insulated from liability under this bill, those who represent prescription drug companies that are insulated from liability under the bill, as well as medical device manufacturers. They put this bill together.

Mr. ENSIGN. Will the Senator yield for a question?

Mr. DURBIN. On the Senator's time I am happy to yield.

Mr. ENSIGN. Is the Senator aware, last year, when his party was in control, 115 bills bypassed the committee process, including the economic growth package, No Child Left Behind, the Patients' Bill of Rights, a Medicare prescription drug bill, the energy bill, and the Trade Promotion Act? All were brought directly to the floor and bypassed the committee process. Is the Senator aware his party did that?

Mr. DURBIN. I am aware of that. I also have quotes from Republican Senators who screamed in outrage every time that happened.

S. 11 is too important for us to consider without deliberation. It is too important for us to ignore that this bill is an historic precedent. It will take away from States across America the power they have had from the beginning of

this Republic to establish standards for procedure and recovery in civil lawsuits.

That is something that, honestly, we do very rarely around here. If we do it, if we consider it, as we are right now, for example, on the asbestos issue, it is with a long and deliberative process. Not so when it comes to medical malpractice. This is being brought to the floor on a take-it-or-leave-it basis. When you say take it or leave it, I hope my colleagues will leave it because the thought that we would limit recovery to \$250,000 for pain and suffering for every case defies logic, common sense, and compassion. If you are looking for compassionate conservatives, you won't find them in those supporting this bill.

Let me give one illustration. This poor lady is from the city of Chicago. She had two moles on the side of her face. She went to an outstanding hospital to have the moles removed. She is about 50 years of age. During the course of the simple surgery, she was receiving oxygen. They were using a cauterizing gun, which you are not supposed to do. As a consequence, there was an explosion with the oxygen. Her face was literally burned off because of the fire which happened.

Her nose was so burned and scarred, she went through several successive surgeries and, even after those surgeries, has to rely on oxygen tubes to breathe 23 hours a day. It is anticipated she will go through more surgeries to deal with the scarring and disfigurement and problems she has had. She is in her fifties. She went in for simple surgery. She came out disfigured for life.

According to this bill, the hospital and doctor responsible for it should both come together and pay her medical bills. I certainly hope so. If she bought health insurance to cover her own medical bills, that would be brought up in the courtroom, so that the jury might not believe she receives quite as much money because her payment of health insurance, frankly, would be used against her. She would receive lost wages for time off the job. That is reasonable. But when it comes to the pain and suffering she will endure and has endured from the moment this occurred until the day she dies, the jury of the Senate has reached a verdict through this bill: She is entitled to recover not one penny more than \$250,000 for a lifetime of disfigurement.

She wrote an article in the Chicago Sun-Times and said: How many of you would trade what I went through for \$250,000? The answer, obviously, is no one. No one would.

For those who come before us today and say this is the only way we can deal with the medical malpractice insurance crisis is to ignore what happened to this woman who went in for routine surgery and saw her life tragically changed. That is what is wrong with the bill.

What we need to do is to be honest about addressing malpractice. I have not heard one word from the other side of the aisle on how we can reduce medical errors. What can we do about HMO insurance companies making medical decisions when in fact doctors know better? It is happening. This bill does nothing about that.

What can we do about the nursing shortage which accounts for 20 percent of the deaths in hospitals each year for malpractice? Nurses overworked. They can't keep up with the caseload, the patients coming. This bill does nothing about that.

The PRESIDING OFFICER. The Senator has consumed 5 minutes.

Mr. DURBIN. I yield myself an additional 1 minute.

This legislation addresses the issue from one perspective only. To deny to this person and other victims an opportunity for their day in court, to say we don't trust a jury in America, in any State in the Union, to make a decision on the death penalty in a criminal case, or we cannot trust a jury in Chicago to make a decision on what she is entitled to receive because of the injuries she endured in that one tragic moment in the hospital, that just defies logic.

It says to me that this bill is being brought to us by insurance companies, by drug companies, by HMOs, by medical device manufacturers, and it is not being brought to us with an eye toward solving a serious national problem of bringing down malpractice insurance rates.

I am going to reserve the remainder of my time. When I return, I will talk about an alternative bill that Senator GRAHAM of South Carolina and I are offering, which addresses this in a more responsible and timely fashion. I reserve the remainder of my time.

Mr. ENSIGN. Mr. President, I think we have 12 minutes 20 seconds on our time. How much time is on theirs?

The PRESIDING OFFICER. Six and a half.

Mr. ENSIGN. Two Senators have just come into the Chamber. As soon as they are ready, I would like to yield them 10 minutes and reserve 2 minutes on our side and we can close up. At 11:10, the Democratic leader will be recognized. So I will yield 10 minutes to the Senator from Missouri, Mr. BOND.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I rise to speak about the Patients First Act of 2003. Going to the doctor for a checkup is hard enough these days. You have to juggle your family and work schedules. A few of us get all the checkups and screenings we need, but making matters a lot worse is the fact that more and more doctors are closing their practices or limiting the services they offer. They are doing so because they cannot afford the increasing costs of their medical malpractice insurance, which they are required to carry.

According to the American Medical Association, 19 States are in a full-blown medical liability crisis, including, regrettably, my home State of Missouri.

In Missouri, physicians' average premium increases for 2002 were 61.2 percent. This was on top of increases in 2001 of 22.4 percent. As a result, over 31 percent—almost one-third—of all physicians surveyed by the Missouri State Medical Association said they are considering leaving their practices altogether. Let me repeat that. Almost one in three physicians in Missouri are considering leaving their practices altogether because they simply can no longer afford to practice because of exorbitant medical malpractice insurance rates.

In some cases, medical liability insurance rates are tripling in Missouri, forcing older doctors into retirement and younger physicians into other fields.

What is the cause of that? The cause, quite frankly, is the unrestrained plaintiffs' legal actions asserting all kinds of noneconomic and economic damages, which are paid, ultimately, by the consumers who must compensate the doctors or lose their doctor services because of the rates of malpractice insurance. Those judgments go against doctors, and they have to be paid by insurance companies. But the insurance companies raise their rates and drive good and bad doctors out of practice.

According to the Missouri State Medical Association, 32 insurance companies are licensed to write professional liability insurance for Missouri physicians. Currently, only three of them are willing, or able, to write new business. Three companies, which accounted for almost one-third of Missouri's markets in 2001, have left the State of Missouri altogether. The result: doctors who have practiced for years in Missouri are closing their doors, moving their practices and families across State lines, or limiting the care and services they provide. It is happening in my State and it is happening across the country.

But this is not just a problem for doctors. They are well educated, and they can move elsewhere and resume their practice, as difficult and unfair as that is. The real damage and pain is being felt by the patients, or people who would be their patients if they had the choice. Look at what is happening in Kansas City, MO, for example. Twelve doctors at the Kansas City Women's Clinic, founded in 1953, used to serve women in Missouri and Kansas. Because of rising medical liability rates, the clinic could not find a single company that would offer them a single medical malpractice insurance policy that they need to keep their office open in Missouri. The result: On December 31, 2002, they closed their doors to Missouri patients. They closed their doors.

There were over 6,600 visits a year in the Missouri office. Now women in

Kansas City, MO, tell me that when they are expecting a child, in order to go in for a checkup, they have to go to Kansas—drive across the State line to Kansas. They either travel to Kansas to see an obstetrician/gynecologist or try to find a new doctor elsewhere in Missouri.

In a recent letter, Dr. Anthon Heit, president of the Kansas City Women's Clinic, said:

Our loyal patients from Kansas City, Missouri, and many surrounding Missouri communities, lost large, well-respected groups of OB/GYN physicians as a source of their maternity care. This type of action is going to continue to occur in the Kansas City area, and in many other specialties, if the trend does not reverse.

Sadly, that is not an isolated case. Also in Kansas City, the Midwest Women's Health Network suffered a 170 percent increase in the cost of its medical malpractice insurance. It used to pay \$200,000 a year for liability coverage. Now it pays \$543,000.

Two Kansas City inner-city OB/GYNs, who serve low-income, high-risk patients, had to sell their practices to their hospital in order to continue to see patients in Missouri. Excessive litigation has created an environment that forced these two doctors—committed to serving some of the most vulnerable in Kansas—out of business. They are no longer in independent practice.

One OB/GYN practice in Missouri is taking out a \$1.5 million loan to pay its medical malpractice insurance for this year. That doesn't even cover the cost of previous actions over which they might subsequently be sued. Other doctors in Missouri are considering going without insurance for those past actions, or the "tail" coverage, as it is called, because they cannot afford the premiums.

In Missouri, this year alone, we have already lost 33 obstetricians and it is only July. If this trend continues, potentially 3,564 pregnant women in Missouri will be forced to find new physicians annually to provide their obstetric care—probably outside of the State—thus, interrupting continuity of care and long-established physician-patient relationships upon which so many women have come to rely.

Patients cannot get the care they need. The communities are losing their trusted doctors. We have a health care system that is in crisis in Missouri.

Mr. President, I yield such time as he may require to my friend and colleague from Kansas.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

Mr. ROBERTS. Mr. President, may I inquire as to how much time remains that was yielded by the Senator from Nevada to the Senator from Missouri.

The PRESIDING OFFICER. Four minutes 45 seconds.

Mr. ROBERTS. I thank the Chair.

As his neighbor to the west, I share Senator BOND's concern for our health care providers and patients. But it

seems that we have a "tale of two cities" between Kansas City, KS, and Kansas City, MO.

Just across the State line, we in Kansas have problems and challenges. But we don't have the same severe problems Missouri doctors and patients are facing. That is because, in the 1980s, Kansas enacted sweeping medical liability reform legislation that does create a hard cap of \$250,000 on noneconomic damages.

By contrast, that same cap in Missouri is \$557,000 and can go even higher under certain circumstances. As the Senator from Missouri said, you won't find it surprising that nonsurgical specialists in Missouri are now seeing very dramatic liability premium increases that have been, until now, limited to surgical specialties. One pulmonary practice's quote for traditional insurance went from \$35,000 to \$125,000 per year. Another pulmonary specialist quit practicing at North Kansas City Hospital because he couldn't afford the premium on his Missouri practice. Now, as the Senator knows, he practices in Kansas.

Here is another example.

We have learned that both neurosurgeons in Independence are moving out of Missouri this summer leaving eastern Jackson County with no neurosurgeon. There is no trauma care basically between the Kansas State line and Columbia, 2 hours to the east.

According to the Kansas Medical Society, the two largest companies in Kansas that provide medical liability insurance, Kansas Medical Mutual Insurance Company and Medical Protective, had increases that were not nearly as excessive as the increases in Missouri. Kansas Medical Mutual, the largest insurer in Kansas, took rate increases of 16.2 percent last year and 8.5 percent this year. Medical Protective took a 13-percent increase last year.

Premiums for the standard policy in Kansas that have been available for the last 15 to 20 years were actually lower in 2002 than they were in 1991.

As I have stated, premiums for the standard policy in Kansas are actually lower than they were in 1991. I simply want to make the point in the short time I have that we have a tale of two cities. We have a Kansas law in which we have 15 percent more doctors in Kansas than in the past. Their premiums are not excessive. People are leaving Kansas City, MO, to practice in Kansas. It is a tale of two cities. That is why I think we should support the bill that has been authored by the Senator from Nevada, S. 11.

A study by Weiss Ratings on medical malpractice caps was mentioned yesterday evening. The study found that States with caps experienced higher premium increases than those States without. I cannot speak for other States but I can speak for Kansas, and the reports conclusions were untrue.

First, as I have stated, premiums for the standard policy in Kansas are actually lower now than they were in 1991.

Secondly, the point needs to be made that all caps are not the same. The Weiss report lists the 19 States with caps, but only 5 States, including Kansas, have \$250,000 caps on noneconomic damages. The rest are significantly higher, thus reducing the cap's impact on payouts and premiums.

There is no question that the cap on noneconomic damages has had an impact on premiums. It has created an unparalleled period of premium stability for Kansas physicians and hospitals. Yes, premiums are increasing in Kansas but at a much lower rate than other States.

Case in point: a family physician who delivers babies paid \$13,790 in 1991 . . . in 2001, that same physician paid \$12,575—an 8.8 percent reduction. Similar reductions exist for virtually every specialty. In the aggregate, physicians paid \$75.3 million in premiums in 1991 and \$60 million in 2002.

Finally, I wish to point out that there are probably about 15 percent more physicians practicing in Kansas today than there were 12 years ago, and the total premium is still lower.

Senator BOND and I have shared with our colleagues what good medical liability reform can do.

Our Kansas City doctors have provided an outstanding example of how medical liability affects doctors and patients on different sides of the State line.

I urge my colleagues in the Senate to take a closer look at the differences between our two States and the positive impact medical liability reforms have had in Kansas. I hope that the Senate will support S. 11 so that States like Missouri which are struggling to retain doctors and offer the best patient care are not left out in the cold.

I yield back the remainder of my time.

The PRESIDING OFFICER. The Senator from Illinois.

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

The PRESIDING OFFICER. Six and a half minutes.

Mr. DURBIN. I thank the Chair.

Mr. BOND. Mr. President, I wish to reclaim the remaining time. How much time is remaining?

The PRESIDING OFFICER. The Senator will have 1 minute 30 seconds left, but the Senator from Illinois has been recognized.

Mr. DURBIN. Mr. President, I yield to the Senator from Missouri.

Mr. BOND. Mr. President, I thank my colleague and fellow Cardinal roofer from Illinois for allowing me to finish.

It is important, as I hope the Senator from Kansas and I have pointed out, that we must do something on a national basis. Missouri patients cannot continue to lose their trusted doctors to the State of Kansas. We cannot see people driven out of the practice of medicine—well-educated, good practitioners who cannot afford the premiums. Unless we act today, retaining and recruiting doctors in Missouri will continue to be a difficult task.

I urge my colleagues to consider the experience of patients in Kansas City and across Missouri and support the essential medical liability reforms in S. 11.

Mr. President, I ask unanimous consent that an editorial in today's Wall Street Journal entitled "Political Malpractice" be printed in the RECORD.

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

[From the Wall Street Journal]

POLITICAL MALPRACTICE

Democrats are expected to muster the 41 votes needed to kill medical liability reform in the Senate today, so why are Republicans smiling? Perhaps because they know they're teeing up what promises to be one of their better issues going into 2004.

Democrats have long made the Senate the graveyard of any and all legal reform. The news is that they're having a harder time getting away with it. The scandal of asbestos litigation has forced them at least to bargain on that issue, while momentum is also building to limit class-action suits. It says something about Tom Daschle's devotion to the trial bar that he's willing to ask his Members to walk the plank even on medical liability, just as voters are discovering the damage it is doing to health care across the country.

No fewer than 19 states are in "malpractice" crisis; Doctors have protested or walked out from Nevada to New Jersey, while pregnant women have had to cross state lines to find an obstetrician. One New Jersey doctor has held seminars to train toll-booth operators in emergency delivery, since more live births are likely to occur in transit to a distant hospital.

Before Texas passed a recent reform, 14 of 17 medical insurers had left in the past two years. In Arkansas, doctors who treat nursing-home patients face a 1,000% premium increase on renewals. In West Virginia, trauma centers closed and doctors went on strike before Democratic Governor Bob Wise led a successful reform effort. Because they contribute to the practice of "defensive" medicine—or unnecessary procedures just to be sure—liability suits are also a major cause of rising health-care costs.

All of this prompted the House to limit medical damages by a vote of 299-196 in March. But Senate Democrats continue to just say no. California's Dianne Feinstein dallied with support for a while, before the lawyers and Mr. Daschle yanked her back into line.

The irony is that the proposed Senate bill is modeled after California's own successful 1975 reform that limited pain and suffering damages to \$250,000. Victims of genuine malpractice still get compensated for economic harm, but they are no longer able to win the lottery of a huge jury award. In the past 25 years premiums across the U.S. have risen three times more than in California.

Even if reform fails in Congress, the national battle has helped to trigger a wave of change in the states. Ten states have passed some liability reform in the past year, and another 17 have debated it. Nearly all of these reforms include some limit on non-economic damages, the kind that drive insurance rates out of sight and are unconnected to genuine harm.

Still more state reforms are on tap this year. Florida Governor Jeb Bush is calling his legislature back for an unprecedented second session starting today to address the problem. Connecticut, where obstetricians will see an 85% increase in premiums for

next year, may also have a special summer session.

As federalists, we think this wave of state reform is probably better than a single national law. Unlike class actions, which damage commerce nationwide, medical liability affects health care in individual states. If a state's political-legal class is driving doctors away, then its voters can throw the political bums out. That may be what eventually happens in Missouri, for example, where Democratic Governor Bob Holden is promising to veto reforms passed by the GOP-run legislature. There's also a danger that a national reform might override even better state laws, such as California's.

The argument for national reform is that the crisis is too acute to wait for 50-state trench warfare, especially against a trial bar grown so rich on tobacco and asbestos shake-downs that it can buy entire legislatures. Some states in crisis, notably Pennsylvania, also have constitutional obstacles to capping non-economic damages. And yet reform's recent success shows that it can be done.

The vote in Congress will help this along by educating Americans about the problem and who refuses to solve it. Among Republicans, we'll be watching Pennsylvania's Arlen Specter in particular. He's typically a pal of the trial lawyers (his son is a medical liability lawyer), but he also faces a primary challenge next year from a reform proponent, Congressman Pat Toomey.

But the main result of today's vote will be to get the Democrats on record for killing reform one more time. They will then have handed President Bush and most Republicans an issue that is both good policy and good politics for next year. In a debate between lawyers and patients, we know where the voters will come down.

Mr. BOND. The Wall Street Journal says:

As federalists, we think this wave of state reform is probably better than a single national law. Unlike class actions, which damage commerce nationwide, medical liability affects health care in individual states.

It goes on:

The argument for national reform is that the crisis is too acute to wait for a 50-State trench warfare, especially against a trial bar grown so rich on tobacco and asbestos shake-downs that it can buy entire legislatures.

I yield the remainder of my time. I thank the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, let me say at the outset, we have talked a lot about the Patients First Act that is before us, S. 11. As far as I can tell, this is "patients last." It says, regardless of the injury you sustained because of medical errors, medical negligence, medical malpractice, we are going to limit you to \$250,000 that you can recover for your pain and suffering no matter how many years you have to endure.

This is a photograph of Sharon Keller whom I met yesterday, a proud registered Republican, as she announced in our press conference. After a hysterectomy, she went into the doctor's office for an exam. Unfortunately, the surgeon, as she examined her, made a move and removed a suture and bleeding started. When the bleeding became excessive, the doctor left the room and left Sherry on the examining table as she went out to find someone

who could respond to the need and, at the same time, went to see some other patients while Sherry was bleeding on the examining table.

Unfortunately, after a period of time, she went into shock and fell off the examining table, as she was left unattended in the examining room. When she fell off the table, she hit the counter as she fell and damaged her spinal cord, rendering her an incomplete quadriplegic.

In this state of bleeding and virtually paralyzed, she dragged herself out into the hallway to beg for help. The doctor called an ambulance to take her to the emergency room but said: Just transport her; you do not need to treat her on the way. She waited several hours at the emergency room before they eventually treated her. She will never walk again. She is a housewife and mother who had no lost wages because of this and, frankly, because of this bill, she would be limited to recover \$250,000.

Is that jackpot justice? Has Sherry Keller made out like a bandit—\$250,000—for what she is going to go through for the rest of her life? Is she being treated first as a patient? She is being treated last, and that is unfortunate and unfair.

There is a medical malpractice insurance problem in America. We should address it in a responsible way and not at the expense of victims such as Sherry Keller.

Senator GRAHAM of South Carolina and I have introduced a bill as an alternative to this which we believe is a constructive first step toward dealing with this.

First, to increase patient safety efforts across the United States to reduce malpractice.

Second, to provide an immediate tax credit for doctors and hospitals for their malpractice premiums. Doctors and hospitals cannot afford to wait 8 to 15 years, as the sponsor of this legislation says it will take, before limiting the recovery of victims results in lower premiums.

Incidentally, there are people in the insurance industry who will not even say it will result in any reduction in premiums over a period of time.

We also repeal the antitrust exemption given to the insurance industry, which is totally unfair, which will end collusion among those companies in setting rates.

We reduce frivolous lawsuits in saying to attorneys, those few bad actors: If you do it, we not only will fine you, but ultimately we will prohibit you from filing this type of lawsuit.

We give grants to hard-hit areas described in Missouri, Kansas, Illinois, and North Carolina, so they can deal with losing doctors and hospitals. We say that punitive damages are going to be allowed in only the most egregious cases, serious intentional situations. But if a doctor has been involved in helping his or her community through Medicare and Medicaid, they would be

immune from punitive damages in medical malpractice cases.

We do not provide this great protection for the drug companies and the medical device manufacturers who decided to jump on this medical malpractice bandwagon for the ride and limit their own liability.

We do not preempt State laws. Individual States can still make decisions they made historically, and we do provide statute of limitations be decided by each State.

This is going to result in lower premiums and better situations for people across America. It is a better way to go. I, frankly, think we have to look at the root causes of the malpractice insurance problem. First is the incidence of malpractice of epidemic proportions, according to the Bush administration. That is the root cause.

Secondly, the malpractice insurance companies, when they made investments during the Clinton era, as the stock market was booming—and we all remember that—they did quite well. When the bottom fell out a couple years ago in the stock market, so did their investments.

What does an insurance company do when their investments start to lose ground? They raise the premiums on the doctors. That is what is going on here. We are being asked to penalize patients and victims of medical malpractice because of the investment practices of insurance companies. We are riding to the rescue of insurance companies at the expense of children whose lives are forever damaged and changed because of medical malpractice. We are putting limitations on recovery for people who are innocent victims so we can help the bottom line and profitability of insurance companies.

Time and again, this Senate races to protect special interest groups and forgets the families, children, and elderly people across America who are the victims of this wrongdoing. That is not fair to them. It certainly is not fair to this country.

I end by saying to doctors and hospitals across this country, after we defeat this bad bill, let us come together for a reasonable solution to reduce medical malpractice, to bring in the insurance companies and hold them accountable and say to the legal profession they must guarantee to us as well that there will be responsible conduct on their part.

I reserve the remainder of my time.

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

Mr. ENSIGN. I have 2 minutes and 20 seconds remaining.

The PRESIDING OFFICER. There is no time remaining.

Mr. ENSIGN. I yielded to the Senator from Missouri and reserved 2 minutes and 20 seconds for myself.

The PRESIDING OFFICER. It is my understanding the Senator from Missouri used that time.

Mr. DURBIN. If I might, I am happy to yield 2 minutes to the Senator from Nevada. I ask unanimous consent that the Senator from Nevada have 2 minutes.

Mr. PRESIDING OFFICER. There is no time to be yielded.

Mr. SCHUMER. Mr. President, as I understand it, I have 10 minutes.

The PRESIDING OFFICER. Under the previous order, at 11:10, the Democratic leader will be recognized for 10 minutes. At 11:20, the majority leader will be recognized for 10 minutes.

Mr. SCHUMER. I designate myself as the Democrat to control those 10 minutes.

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

Mr. SCHUMER. I am happy to yield 2 of those 10 minutes to the Senator from Nevada, and I will then take the next 8 minutes.

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

The Senator from Nevada.

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

I will make a couple of quick points. First, we have seen a lot of pictures from the Senator from Illinois. He talked about the \$250,000 cap on damages included in this bill. Let's get one thing straight. It is a \$250,000 cap on pain and suffering.

He put up a picture of a young child. I will read some of the totals. California has comprehensive medical liability reform in place that this bill I have presented today is modeled after. These are the following awards, and these are almost all economic damages or medical damages that were awarded to these infants: \$43,500,000 in May 2002; July 1999, \$30,800,000; April 1999 in Orange County, almost \$7 million; January 1999 in Los Angeles County, almost \$22 million; December 2002, \$84 million. So for pictures to be put up and to say, what is this child going to get, this child can get a lot. Most of these awards are in economic damages or in medical expenses. Those damages are not capped in this bill.

The next picture we have to put up is a woman with her child. Because there was no OB/GYN available, she had to deliver this child on the side of a road by herself. Unfortunately, the patient did have complications, and the mother had to provide CPR to the baby on the side of the road in the middle of the Arizona desert. Thankfully, the baby survived. But she could have had serious consequences, and then they would not have been able to get compensation from anybody. And this is because there was no care available at the community hospital that she had to bypass because the doctors could no longer afford the premiums because of the frivolous and outrageous lawsuits that are destroying our court system.

I yield the floor.

NOMINATION OF VICTOR J. WOLSKI

The PRESIDING OFFICER. The Senator from New York.

Mr. SCHUMER. Mr. President, I ask that I be given 4 minutes of the remaining 8 and the Senator from Illinois be given 4.

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

Mr. SCHUMER. Mr. President, I want to repeat the arguments against Mr. Wolski. Something new has happened since I spoke an hour ago. The AFL-CIO has come out against him, which is understandable, because of his ideology.

Mr. Wolski should be defeated for two reasons. First, he is an ideologue. This important court, when it comes to the environment, does not deal with much else we would care about, other than just claims issues, and we should not have somebody who is a self-described ideologue. Let me repeat that Victor Wolski, in his own words, said every single job he has taken since college has been ideologically oriented, trying to further his principles, which he describes as a libertarian belief in property rights and limited government.

I do not think the Founding Fathers intended judges to be ideologists. That is why they have us advise and consent, so that if a President, as this President does, sees judges through an ideological prism and does not nominate moderates—I do not like judges far right or far left—when he nominates them, we can be the check. We have used that power judiciously. We have defeated or filibustered only two of the 134 nominees the President has made.

This man deserves to be defeated. He is an ideologue, way over. If my colleagues believe we have made advances in clean water and clean air, his theory is that any type of environmental law is a taking, which denies the compact on which we all live: That if someone lives upstream on a river from somebody else, they do not have the right to dirty that river and foul the water of the person who lives downstream. If someone lives 100 miles east and they own a factory where the winds blow in that direction, they do not have a right to spew SO₂ and NO₂ in the air and foul the lungs of people who live downwind.

Mr. Wolski does not believe in that. He says if someone has the money and can build the plant, go build it. That is the core of his beliefs in terms of takings. So he is an ideologue. He does not have the temperament for the bench, as mentioned. He said that Members of Congress were, and this is his word, bums. If he does not like us, he has a right to denounce us, but that is not the kind of word of a person we want to see as a judge.

Just as importantly, whatever one's views on Wolski, this is a boondoggle, a waste of money. The average number of cases a court of appeals judge handles is 355. The Court of Federal Claims handles 24. If we add these judges, it will go down to 19—a million-dollar boondoggle.

The Washington Post, in an editorial, called it the "Court of Extravagance." When President Clinton was President,

Members of the other side refused to fill these vacancies, stating there were too few cases and too small a workload. Well, the workload is even smaller and we are nominating four judges. We do not have money for all of what we are talking about—prescription drugs health care, education—and we are doing this. It is wrong. It is hypocritical of those who have said in the past that this court should not be filled, because it has such a low case-load, to fill it now.

I urge Mr. Wolski's nomination be defeated.

Mr. SANTORUM. Mr. President, I rise in support of proceeding to the consideration of S. 11, the Patients First Act. The issue of medical liability reform has been studied extensively, and clearly Federal policymakers have an obligation to address the explosion in litigation across the country and jackpot-sized awards that are having a severe impact on doctors, hospitals and patients' access to care.

This is a national crisis that requires a Federal solution. The crisis is not confined within State lines, as patients are losing access to physicians within their State and are having to cross State lines merely to get access to care. Similarly, physicians are being forced to leave their practices due to high insurance rates, and relocate to a State that has enacted some type of reasonable reform that has remained on its books through judicial review.

In Pennsylvania and many other States, health care providers are facing enormous increases in their medical liability insurance premiums or are unable to obtain coverage at all due to a significant rise in scarce resources being drained from our health care system because of sporadic and sometimes frivolous health care litigation. As a result, real patients are being denied access to care and losing their family doctors because of exorbitant medical liability costs.

In some States including Pennsylvania, some ob-gyns have been forced to stop delivering babies, trauma centers have closed, and physicians are grappling with how they can continue to provide other high-risk procedures. South Philadelphia now has no operating maternity wards. In Fayette County, a practice of three obstetricians that delivers half of the babies born in the area stopped delivering babies when faced with a premium increase from \$150,000 in 2002 to \$400,000 in 2003. And according to the Pennsylvania Medical Society, 72 percent of doctors in our State have deferred the purchase of new equipment or the hiring of new staff due to increased medical liability costs.

To be sure, Mr. President, the health care profession is not free of error. And I fully support a person's right to seek just compensation when they are harmed by negligent or improper medical care. And I also fully support initiatives referenced over the past couple of days that would help to root out and

prevent medical errors. But escalating jury awards and the high cost of defending against lawsuits—even frivolous ones—are driving up liability premium increases, with devastating results for patients.

According to Jury Verdict Research, the median jury award increased 43 percent in just one year, 1999-2000. More than half of all jury awards today top \$1 million, and the average jury award has increased to \$3.5 million. And the vast majority of medical liability claims do not result in any payments to patients.

And so how does this impact patients? Quite simply, medical professionals are fleeing from areas where medical liability premiums are escalating at a rapid pace. We have heard of many horror stories over the past couple of days and in Congressional testimony about patient access to care being adversely affected. The Wilkes-Barre Times Leader, on October 23, 2002, reported the experiences of one of my constituents in Northeastern Pennsylvania who suffers from two herniated disks, having to travel an entire day because high insurance premiums have decreased the number of neurosurgeons.

The truth is—every American pays the price for this country's liability crisis, and Congress and the President have a responsibility to fix this very serious problem.

Pennsylvania's own Representative JIM GREENWOOD has been a strong leader on this issue and has introduced the bipartisan HEALTH Act, legislation which would put in place new Federal minimum standards for liability reform, based on measures that have been proven to be effective in States like California with its proven MICRA reforms, to help prevent excessive awards that are driving up health care costs, encouraging frivolous lawsuits, and promoting time-consuming legal proceedings.

The Patients First Act we are seeking to consider here in the Senate is largely based on the House-passed HEALTH Act, and includes many commonsense provisions which can serve as a bipartisan model for medical liability reform. It would establish a reasonable Federal fall-back cap on non-economic and punitive damages, but would allow States the flexibility to set levels higher and lower if they choose. It would allow for unlimited economic damages, and would ensure fair allocation of damages, in proportion to a party's degree of fault. It would also ensure that more of the awards from meritorious cases are paid to the patient instead of trial lawyers.

Far from limiting the opportunities of patients to seek redress in the courts, S. 11 would ensure full and unlimited recovery of economic damages, of medical expenses, of rehabilitation costs, childcare expenses, all current and future wage earnings that are lost, including employer-based benefits, and any other economic losses.

We have heard a lot from the other side of the aisle about how this legislation would somehow limit patient access to the courts by forcing a Federal mandate to limit non-economic damages to \$250,000. This is completely false, and the other side of the aisle knows it. S. 11 would give States the flexibility to establish or maintain their own laws on damage awards, whether higher or lower than those provided for in this bill.

And the experience of California shows that injured patients have not only maintained access to the courts, but in many cases have received multi-million dollar awards in economic damages, including minors and non-working spouses.

The opponents of moving to consideration of this bill have also tried to move the spotlight away from the underlying issues of cost and access and suggest that the answer lies in insurance reform. This is a flawed argument that takes needed attention away from the real problems.

Suggestions that liability rates are high because insurance companies are trying to recover past losses are, quite simply, factually wrong. As a matter of law, medical liability rates are determined by estimates of future losses from claims. State regulators are already required by law to reject liability insurance rates that are excessive. Changing insurance laws will do nothing to change the underlying reason for rising premiums—an increase in meritless litigation and skyrocketing jury awards.

President Bush is committed to passing balanced bipartisan legislation that will put reasonable limits on liability lawsuits while allowing compensation for patients truly harmed by medical malpractice. Such reforms can save the Federal government and our health care system tens of billions of dollars in rooting out frivolous lawsuits and reducing defensive medicine.

We can and should create a medical liability system that more equitably and rapidly compensates patients who have received substandard care, but which at the same time limits frivolous lawsuits and increases access to health care by reducing the excessive costs of the system.

Mr. President, we have an obligation to at least move to consideration of this bill, to have the opportunity to offer amendments, and to show the American public that Congress is capable of working toward real solutions on this growing health care crisis.

Mrs. DOLE. Mr. President, today the Senate must make a decision that will affect the entire state of our health care system. For years, America has enjoyed world-class health care. We have led the way in cures and treatments, we have developed the latest and the best technologies, and we have ensured that our doctors are trained in ground-breaking procedures. Indeed, our Nation has accomplished much in the area of health care.

But today the future of our world-renowned health care system sits in the balance as this Senate mulls two very important choices. Will we succumb to some trial lawyers who have nearly crippled the system by filing hundreds of frivolous lawsuits each year? Or will we do the right thing and place limits on these lawsuits and the big-money fees lawyers earn off of them, so that our doctors can have the peace of mind they need to do the job they love? I challenge my colleagues to do the latter.

America is in the midst of a crisis. Those who need health care, the most vulnerable and sickest among us, are the real victims. We have all heard their stories. Too many of our patients can't get doctors, can't get specialists, can't get health care. In North Carolina, rural residents have been among the hardest hit. Patients tell stories of driving miles just to find a doctor to treat an illness. There have been reports of women driving for miles and miles just to find someone to deliver their baby. This is beyond unacceptable. No one in this country should have to struggle like this for health care. The America I know is better than that.

I have heard from doctors in my State. And this crisis is having a detrimental effect on our medical providers. Too many of them can't afford rising malpractice insurance rates. They have had to curb their medical practices, stop taking some patients, move to another State and perhaps the most painful, leave the profession altogether. Dr. Jack Schmitt says his insurance premiums went from \$18,000 to \$45,000 a year. He eventually decided to leave his practice and teach at the University of Virginia Medical School.

Doctors who decide to remain are forced to practice defensive medicine and order an excessive amount of tests and procedures to protect themselves from lawsuits. Dr. Steve Turner of Garner estimates that internists like him prescribe close to \$5,000 a day in defensive medical practices or \$1.2 million a year per doctor. This cannot continue.

North Carolina is included on a list of 18 States that the American Medical Association says is suffering from a medical liability crisis. According to the AMA, some North Carolina hospitals have seen their liability insurance premiums rise three- and five-fold in the last few years. Specialists—like our obstetricians, emergency doctors, and anesthesiologists—are seeing even higher increases.

Consider this: Novant Health, the corporate parent of Presbyterian Hospital in Charlotte, saw its malpractice insurance increase by 114 percent between the years 2000 and 2003. They are now paying \$4.5 million in malpractice insurance.

In Catawba County, doctors participating under the Network of Primary Care practices have been told that because of rising premiums, charity care will no longer be purchased for them

under their policy. This means if doctors want to volunteer their medical services at a soup kitchen, homeless shelter, or some other charity, they are going to have to first buy separate, costly insurance coverage themselves.

Even our Level III trauma center in Cabarrus County is in danger of closing after premiums increased 88 percent. The list, the stories, and the pain are endless.

The legislation before us is a solution that we know works. It is modeled after California's MICRA law which has been in place since 1975 and has kept insurance premiums down in that State. This legislation does not cap damages. Victims who suffer from a doctor's malpractice will be able to recover every penny of their actual economic damages. It does limit non-economic damages, like pain and suffering. Punitive damages would be limited and so would attorneys' fees. But the legislation allows patients to collect for medical bills, funeral expenses and other costs. And States would still have the option of setting higher or lower caps than what is in the bill.

This really is one of those issues where the Senate cannot sit idly by. The House has passed a bill. It is time for the Senate to do the same.

We have a choice. We can vote with some trial lawyers who file endless lawsuits and watch our health care system spiral into decay, or we can put an end to this debate and protect our health care system by casting a vote for our patients and the medical professionals who so tirelessly care for them. I urge my colleagues to vote in favor of cloture. Let's pass the bill for our patients who need it most.

Mr. NELSON of Florida. Mr. President, while I recognize that medical malpractice insurance premiums have increased at an alarming rate in many States, I rise today in opposition of the Patients First Act of 2003, S. 11. This bill does not put patients first, and fails to address major parts of the problem.

Any legislation aimed at reducing premiums for medical malpractice insurance must include reforms to the industry, and should be done by experts at the State level. Insurance regulation and tort law are traditional State issues.

The Senate is moving forward on this bill even though it has not been vetted through the appropriate committees. To date, there have been no hearings in Judiciary or a markup of S. 11.

In addition to foregoing the appropriate legislative process, I am also concerned that this proposal, as introduced, fails to do what it promises to do—ensure patients' access to doctors and decrease malpractice insurance rates for physicians.

As a former insurance commissioner, I learned first hand that insurance is best regulated at the State level. That level or regulatory oversight over the industry ensures that residents of a particular State are all afforded the

same protections and guarantees. A one-size-fits-all approach like S. 11 is not the best policy.

In addition, one of the cornerstones of the McCarran-Ferguson Act in 1945 was that in exchange for exemption to Federal antitrust laws, the regulation of the business of insurance would be carried out at the State level.

In the late 1980s and early 1990s insurers flocked to the medical malpractice insurance market because of increased cashflow and rising interest rates. These insurers pursued as much business as they could and as competition increased, prices dropped. This competition created an environment of underpricing the actual risks of the insurance.

As the economy worsened and investment income dried up, insurance companies increased premiums to recover investment as well as insurance losses. The Senate should not ignore the business practices of the insurance industry in the so-called "medical malpractice crisis."

In a recent report by the Institute of Medicine it was estimated that 98,000 people die each year due to preventable medical errors. That is 268 each day. Why then instead of solely focusing on the tort system are we not also addressing this issue? After all these errors are the reasons most people seek compensation.

The Senate's proposal fails to improve overall patient safety and the reporting of medical errors. Patients should have access to this information and be allowed to make informed decisions about their physicians.

Proponents of this legislation argue that by limiting the risk of insurance companies through caps on damages, that by protecting their interests, we will then lower medical malpractice insurance premiums and ensure access to health care providers. I do not believe this is accurate.

In the State of California, which already limits non-economic damages to \$250,000, the average actual premium is \$27,570, 8 percent higher than the average of all States that have no caps on non-economic damages. Clearly a cap did not keep these premiums from rising.

In Florida, as in the Nation, we have had some sad malpractice cases. If patients had access to information about their doctors then perhaps Willie King may not have had the wrong foot amputated in 1995.

Mr. King was admitted to University Community Hospital in Tampa, Florida, for the removal of his right foot. Imagine his surprise when he woke up to find that Dr. Rolando Sanchez had removed the left one instead. As it turns out 2 years earlier, Dr. Sanchez had settled a claim from a man who agreed to one type of hernia operation but instead had another, State records show.

Still, Mr. King—who was already collecting disability—still had to have his other foot removed and was unable to

remain independent as he had been prior to the operation.

To cap damages, without regard to the extent of an injury is shortsighted and unfair. Caps just do not fix the problem. It is far more complicated than that.

In California, which is often touted as the example of how effective caps are, medical malpractice premiums increased by 190 percent during the first 12 years following enactment of the \$250,000 MICRA cap. It was not until California's Proposition 103 was enacted that malpractice premiums were lowered and stabilized.

In Florida, where this issue is being hotly debated, insurers have made no guarantees to lower their premiums. Even after the Governor sought to get that assurance by further protecting them from lawsuits, the industry still refused to guarantee any sort of decrease in rates.

In addition to caps not reducing malpractice insurance premiums, they are also unfair. Take the case of Janet Pandrea from Coconut Creek.

In January 2002, at the age of 65, Mrs. Pandrea was diagnosed with cancer in her chest. Janet had been married for 46 years, she had been a healthy and active mother and grandmother. She was told to begin chemotherapy treatments, and died from complications after only 2 months.

The doctors did not tell her family why she died so suddenly, so they requested an autopsy. The autopsy showed that she never had cancer. Janet should never have been subjected to the chemotherapy that killed her.

The economic damages for a 65-year-old woman would cover only her medical bills. Her family would not be able to recover more than \$250,000 for the loss of their wife, mother, and grandmother.

Mr. President, I rise in opposition to this legislation, not because I do not think that there is a serious problem with the medical malpractice insurance in this country, but I do not support this bill because it will not reduce premiums or enhance a physician's ability to provide care.

Mr. FEINGOLD. Mr. President, I recognize that we have a problem in this country with malpractice insurance premiums. I would like very much for Congress to address that problem. It is my judgment that S. 11 will not solve that problem, and it will harm innocent Americans who have suffered horrible and permanent injury at the hands of negligent medical practitioners. I will therefore vote no on the cloture motion.

Mr. President, there are many provisions of S. 11 with which I have serious disagreement. Let me just mention a few. In a provision called the fair share rule, the bill eliminates joint and several liability in medical malpractice cases. What that means is that if one responsible defendant is insolvent and has no insurance coverage, the victim of malpractice ends up without a full

recovery of his or her damages. This is not fair. Most State laws provide that the risk of one defendant being insolvent or judgment-proof is borne by the other responsible defendants. There is no reason to change this longstanding principle of law.

Another problem with this bill is the new statute of limitations that the bill imposes on medical malpractice claims. Shorter statutes of limitation don't discourage frivolous claims, they encourage them. Lawyers facing a looming statute of limitations have to file lawsuits to protect their clients' options. Imposing a statute of limitations of as little as 1 year, as this bill does, does not allow adequate time to investigate a claim and determine if it is really worth filing.

I am also concerned that this bill has been drafted to protect not only doctors but medical device manufacturers and drug companies from liability claims. There is no evidence that suits against these defendants are contributing to rising medical malpractice insurance premiums. So this bill is not just a medical malpractice bill, it is a product liability bill.

But the most ill-advised provision in this bill is the cap on noneconomic damages of \$250,000. At the one hearing held on this issue this year, the Judiciary and HELP Committees heard from Linda McDougal, a 46-year-old Navy veteran from Woodville, WI. Last year, Ms. McDougal underwent a double mastectomy after her biopsy results were switched with those of another patient. She didn't have cancer, she never had cancer. We can be thankful for that. But her life, and her family's life, will never be the same.

I hope everyone in the Senate will read Linda McDougal's testimony and learn about her experience. It is a powerful cautionary tale for those of us who are charged with voting on legislation concerning medical malpractice.

I find it hard to believe that anyone in this body can look Linda McDougal or any of the thousands of victims of catastrophic medical malpractice in the eye and say, "\$250,000 is all your pain and suffering are worth." Would any of us be able to tell our mothers or our wives or our daughters that their damages should be limited to \$250,000 if they were the victims of the unspeakable pain and lifelong sadness that Linda McDougal will endure? Remember, Linda McDougal didn't have extraordinary medical bills or lost wages. Her damages are noneconomic. But her loss is real, it is permanent, it is unfathomable.

There is no question that we have a problem in this country over the cost of malpractice insurance. But the solution cannot be to penalize innocent victims like Linda McDougal, to prolong and extend this suffering by denying them adequate compensation.

We have virtually no evidence that caps on economic damages will actually lower insurance rates. Indeed, as Senator DURBIN noted in this debate, in

States that have caps on noneconomic damages, insurance premiums increased 48 percent from 1991 to 2002. But in States without caps, the insurance has been only 36 percent. So the case has just not been made that the caps in this bill will lower malpractice premiums. But more importantly, the case has not been made, and in my view cannot be made, that these caps are fair to victims like Linda McDougal.

There very well may be solutions that we in the Senate can develop to address the cost of medical malpractice insurance in this country and the effect on patient care that rising premiums are causing. And there certainly are things we can do to address the disturbing problem of medical error in this country. The Institute of Medicine estimates that between 44,000 and 98,000 adverse medical events occur in hospitals every year.

If we want to reduce malpractice insurance premiums we must address these problems as well as looking closely at the business practices of the insurance companies. What we shouldn't do is limit the recovery of victims of horrible injury to an arbitrarily low sum.

This is obviously a complicated issue. This is the kind of issue that needs to be explored in depth in our committees so that a consensus can emerge. It is not the kind of issue that should be brought directly to the floor with such a great gulf between supporters and opponents. So I will vote "no" on cloture today, and I hope that the bill will go through the HELP Committee and/or the Judiciary Committee before we begin floor consideration of this important topic.

Mr. ALEXANDER. Mr. President, I come to the floor today to express my concern with the rising cost of medical liability insurance. I have heard from doctors and hospitals from one end of Tennessee to the other, all concerned with the sky rocketing cost of medical liability premiums. The increasing cost of medical liability insurance is creating a patient access crisis because doctors are leaving the practice of medicine.

At Hardin County General Hospital in Savannah, TN, both an orthopedist and an OB/GYN have left the hospital to go practice in other States because their insurance premiums were too high. High medical liability insurance is one more reason it is difficult to recruit specialists to rural areas.

At the University of Tennessee Health Sciences Center in Memphis, young people just entering the profession are being sued at a horrifying rate, discouraging them from continuing with the practice of medicine. Since 1990, one third of all residents in training have been served with a malpractice suit. Some specialties, such as OB/GYN and Neurosurgery, are being sued so frequently that students are not pursuing these specialties. This will soon cause a crisis in access to specialty care.

Tennessee hospitals experienced liability insurance premium increases of 75 percent to 400 percent last year. Baptist Memorial Health Care Corporation in Memphis, TN, had liability coverage of \$2.7 million for 2002. For 2003, Baptist was quoted \$8.3 million for liability coverage. This is an increase of \$6 million in 1 year.

In 2002, the medical liability premium for an OB/GYN in Tennessee was \$62,000. In 2003, the premium more than doubled to \$160,000, and in 2004, it is estimated to more than double again to \$285,000. This sort of increased cost is not sustainable. I am worried about who will deliver babies in my State. Other physicians are also feeling the squeeze. In 2002, the medical liability premium for a family practice physician was \$44,000. In 2003, the premium increased to \$117,000. Again, this sort of increased cost is not sustainable.

I believe that S. 11, the Patients First Act, is a great step in the right direction. The Patients First Act will reduce the effects of excessive liability costs by placing a sensible cap on noneconomic damages. The bill will still allow unlimited economic damages. If a patient is injured, they will have unlimited access to economic damages to pay for their recovery.

S. 11 will help stem the tide of rising medical liability premiums before patients lose access to medical care. I hope we reach cloture on the motion to proceed so that we can consider this very important legislation.

Mrs. MURRAY. Mr. President, there is a health care crisis in this country. Millions of Americans have no health insurance. Insurance companies continue to increase their premiums and doctors and patients are the ones who are paying.

In my home State of Washington, our health care system is in trouble. Some doctors are closing their practices, retiring early, or moving to other States. We have a shortage of nurses and other medical professionals. And one in nine Washington State residents do not even have health insurance.

Doctors in my State are seeing their malpractice insurance premiums increase by 100 and even 200 percent. At the same time, Medicare, Medicaid, and private insurance companies are reducing their reimbursement amounts. These multiple forces have created a perfect storm for doctors and patients.

In some specialties, like OB GYN, the malpractice insurance market is out of control. Insurance companies keep jacking up their premiums. These insurance company increases are simply not sustainable.

I strongly support legislation to correct these problems and to get skyrocketing insurance premiums back under control. We must help to stabilize our health care system by making sure that doctors are not forced out of business by rising insurance rates.

Unfortunately, the proposal before us is not the answer. There are major

flaws with both the process and the substance of the proposal.

First, this bill would preempt State patient rights laws, and give more protection to HMOs and insurance companies at the expense of real people who are hurt.

Second, caps on noneconomic malpractice awards have not been effective at reducing insurance rates in States where they have been tried; and

Third, this bill is being used as a political club, instead of a real attempt to find a meaningful solution.

I am deeply disappointed that some Senators would rather play political games with our Nation's health care instead of trying to find a real solution.

One problem is that this proposal preempts State patients' right laws and protects HMOs and insurance companies rather than doctors and patients.

For the past 3 days Senators have talked about the impact of the medical malpractice crisis on doctors and patients across the country. And those who have been following this debate might assume that this legislation would only provide protection to doctors and hospitals. But this bill goes much further.

S. 11 also extends additional protections to nursing homes, HMOs, drug and medical device manufacturers.

Not only does S. 11 provide liability relief for these groups. In some cases it preempts State patient bills of rights laws and protections—protections that patients and doctors have fought hard to achieve.

Since 1997, I have worked to secure passage of a Federal Patient's Bill of rights to protect patients and to ensure that insurance companies make decisions based on sound medicine, not profit margins.

Working with doctors and hospitals we have twice tried in the U.S. Senate to enact a comprehensive Patients' Bill of Rights, but were defeated by special interests. The foundation of any patients' bill of rights legislation is holding HMOs accountable for making medical decisions. Unfortunately, S. 11 would take us in the opposite direction.

Many States, like my home State of Washington, did not wait for Federal action to protect patients and doctors. In March 2000, Washington state enacted a strong Patients' Bill of Rights law that held HMOs and insurance companies accountable and liable for harm caused when insurance plans denied or delayed access to recommended health care services.

The State law also provides a 3-year statute of limitation from the completion of the independent external review process. But, S. 11 would preempt this law. It would impose a Federal noneconomic limitation of \$250,000 and would reduce the state of limitation to 1 year.

This is the wrong approach. The Senate leadership is proposing to substitute the judgment of the Federal

Government in Washington, DC for the judgment of the State legislature in Washing State. As insurance has historically been a State, not a Federal, issue, Congress must be careful about this Federal expansion.

The second problem with this proposal is that caps on malpractice awards do not necessarily reduce insurance rates.

I have heard my colleagues refer to California's experience as a model for Federal action, since California has enacted caps. However, recent data shows that average actual premium rates in California are actually higher than States that have no such caps, according to the Medical Liability Monitor.

Across the country, States that have imposed caps on noneconomic damages, are now seeing similar increases in insurance premiums as those States without caps. If the goal is to help insurance companies with their profit margins, then this bill might help. But if the goal is to help doctors afford to pay for insurance, then this bill will not help.

Even if caps did force insurance companies to reduce their rates, are caps fair to patients who were harmed?

We know that as many as 90,000 people a year die from medical errors. Not all of these errors constitute malpractice, but limiting fair and just compensation for even a fraction of these individuals and their families is a major change in our judicial system—and a huge price to pay in the name of reform.

If this legislation had gone through the appropriate committee process, Congress might have gotten some answers to these questions, and the legislation before us might have been helped doctors and patients.

Unfortunately, this bill was brought forward for purely political reasons. This is the greatest tragedy of all for doctors and patients. Some colleagues would use this bill to help their fellow partisans rather than the physicians who need it.

This bill did not go through the standard committee process. There were no public hearings to get expert testimony to help shape the legislation. There was no committee markup for the legislation for Senators to weigh in on the issue.

In fact, there are a number of reports indicating that malpractice claims are not necessarily responsible for higher insurance premiums. These reports suggest that it is not the growing number of cases or even the size awards that are driving premium increases, but rather the decline in the value of investments for insurance companies.

Without the opportunity to fully understand the problem—with hearings and markups—Congress cannot develop a real, workable solution.

Instead, some Republicans are exploiting this legislation, according to the Washington Post, "as an issue for next year's election."

In fact, even Republicans have acknowledged that this is not a serious proposal, but instead is a "political document."

A Republican Senator was quoted in the New York Times this morning discussing this bill. He said the Senate leadership is "bringing this bill up to get most of my Democratic friends to vote against it, a handful of Republicans to vote against it, and they're going to take it on the campaign trail."

This is outrageous. Patients are losing their doctors. Doctors are going out of business. And rather than address a critical problem, the Senate leadership is playing political games.

So what is the answer?

Clearly, the medical malpractice insurance rates doctors are facing are untenable. They are a real problem for doctors, for patients, and for our entire health care community. Every week, I hear from doctors throughout Washington State about the challenges that soaring malpractice insurance premiums are causing.

That is why I support the Durbin-Graham proposal to provide immediate relief to doctors.

When insurance markets are dysfunctional—as they certainly are in malpractice—the Federal Government has a tradition of providing needed support. We did that with flood insurance a few years ago, and we did it again with terrorism insurance in 2001. When an insurance market fails, there is certainly precedent for Federal corrective actions.

If we can provide relief for terrorism and flood insurance, we should be able to provide relief for high-risk, critical practices like trauma and OB GYN services.

While we need to examine every way that we might address this crisis, as I look at this idea, I am also realistic. Noneconomic damages are not the only factor impacting insurance premiums. It is not clear to me that capping just noneconomic damages will really solve the problem. In addition, malpractice insurance is traditionally a state issue. If the Federal Government is going to insert itself so dramatically in a State matter, we need to be sure this approach is going to work.

There are still too many unanswered questions to proceed with this bill. We know that the status quo is not sustainable, but we need to recognize that this is a complicated problem and there can be no quick fixes.

It is time to stop playing politics and start working together to find solutions and heal our ailing system.

Mr. EDWARDS. Mr. President, I speak out for ordinary people.

We all recognize that we need to do something about the medical malpractice problem in this country. Premium rates are too high and, in some cases, drive away the medical care these people need. I have spoken out

loud and clear about this issue and recently published an op-ed piece in the Washington Post calling for common sense provisions included in our bill, which I am proud to cosponsor.

The PRESIDING OFFICER. I ask unanimous consent to have that printed following my remarks. Without objection, it is so ordered.

Mr. EDWARDS. We have to do something about this problem. But the answer is not to slap down the victims, which is exactly what the Republican plan will do.

This is nothing new. Time and again, we have seen this administration and the Republican majority stand up for corporate interests with little regard for the people who will be harmed by this rush to protect big business. This time it is the malpractice insurance companies who are being protected at the expense of ordinary people.

S. 11 comes right off the insurance companies' wish list. It might as well have been written by the insurance companies. It drastically limits the compensation these companies have to pay children and parents who have been blinded, paralyzed or otherwise severely injured. The victims who make the least money will suffer the most under this plan. The harm to the kinds of families I represented as a lawyer for nearly 20 years will be enormous. We need to stand up for these people.

We need to fight for people like little Tristan Lewis, who lives in my State of North Carolina. Tristan was born 3 months premature, but her early signs were good. She was breathing on her own and had scored eight out of 10 on the APGAR tests, used to rate newborn babies. Unfortunately, nurses attempted to warm Tristan with heated IV saline bags that burned the tiny girl. They heated the bags in a microwave without doctor approval; they failed to check the temperature of the bags, and then left Tristan on the boiling hot bags for over 10 minutes, even though she was crying loudly.

Black burns covered much of Tristan's back. The third-degree burns had penetrated her skin. Nine days after she was born, Tristan was sent to another hospital for a surgery, commonly needed by premature babies, to close a blood vessel near her heart. The doctors there discovered a dangerous infection. Tristan had meningitis, which likely entered her little body through the burn wounds. Tristan spent most of her first year in the hospital and she had more than a dozen surgeries.

The pain and complications of the burns increased Tristan's blood pressure and caused or aggravated bleeding inside her brain. The bacteria that led to her meningitis probably entered her body through the burn wounds, where the skin's ability to serve as a barrier against infection had been weakened.

Tristan, who is now 7, is legally blind. Her eyes bring in images, but her brain cannot process them. She is fed through a tube. Antiseizure medications make her groggy, so she spends most days sleeping. Tristan has no purposeful movement and cannot communicate.

The hospital's insurance company agreed to settle the case. Now Tristan's mother knows that her little girl will always have what she needs.

But if the administration had its way, the hospital would have been less likely to settle the case and Tristan would have been limited to \$250,000 for her "noneconomic" suffering. That is just not right. It is wrong to try to protect the profits of big insurance companies at the expense of victims like little Tristan.

But every time we point out these inequities, we are shouted down with cries of "class warfare!" Well, the American people need to hear the truth. We are engaging in class warfare. What we have here is a fight for fairness.

The Republican plan is just plain, flat out unfair. And it won't work. It penalizes the worst injured people but it doesn't do a thing to solve the problem. It doesn't do anything to punish the bad lawyers while rewarding the good. It doesn't do anything to make doctors accountable for bad behavior. All this plan does is save insurance companies money by slamming the courthouse door in the face of innocent victims who have nowhere else to turn. But it doesn't require them to pass along one cent of this savings to doctors. So victims lose, doctors get nothing, and the insurance companies get richer. How can anyone claim that is fair?

Our plan is fair and it will work. It will work because it cracks down on price gouging by the insurance industry and takes aggressive action against lawyers who bring frivolous lawsuits that don't belong in court.

We have got to reform the insurance industry, something the Republican plan completely sidesteps. Today insurance companies use slow and burdensome processes to discourage both doctors and patients from filing legitimate claims. Worse still, these companies can fix prices and divvy up the country in order to drive up their profits. Even when companies don't explicitly collude, they set their rates based on a trade-group loss calculation that they know other companies will follow. In any other industry, this kind of conduct would be subject to scrutiny under the antitrust laws. But an obscure 1945 law gives insurance companies a broad antitrust exemption. Because of the insurance lobby's influence, Congress has even blocked the Federal Trade Commission from investigating insurance company rip-offs. These special privileges have go to go and our plan does just that.

Next, we need to prevent and punish frivolous lawsuits. The vast majority

of lawyers are responsible advocates for their clients, but the few who aren't hurt the real victims, make a bad name for the good lawyers and clog up our courts. But for all his talk about frivolous lawsuits, President Bush does nothing to address them. He has got it backward—instead of cracking down on irresponsible behavior and baseless cases, he is targeting serious victims who win in court and are believed by juries.

Our plan requires that before a lawyer can bring a medical malpractice case to court, he or she must file an affidavit from a qualified health specialist verifying that real malpractice has occurred. Lawyers who file frivolous cases will face tough, mandatory sanctions. Lawyers who file three frivolous cases will be punished severely—in other words, three strikes and they are out.

And, while it is important to clamp down on frivolous lawsuits, we also must do everything we can to prevent malpractice in the first place. That is why our plan includes measures that will help patients avoid doctors with bad track records.

And, finally, our plan enhances patient access to quality health care by easing the burdens imposed on doctors by out-of-control insurance companies. First, it repeals the special interest antitrust exemption that allows insurance companies to collude and jack up premium rates with impunity. Second, it provides a tax credit for malpractice premiums paid, based upon the nature of risk in their areas of practice. And, third, our plan will help stem the tide of health care providers being driven out of certain geographic areas by out-of-control insurance rates by, among other things, providing grants and tax credits to areas experiencing shortages.

Our plan is fair, it is reasonable, and it will work. The Republican plan is not only mean-spirited, but it won't do a thing to solve the problem it is supposed to address. Their plan doesn't do a thing but build more wealth for big insurance companies on the backs of ordinary people who have already suffered too much. And I won't stand by and let that happen. None of us should. That is why I urge all of my colleagues to stand up for what is right and fight for fairness by voting no on S. 11.

[From the Washington Post, May 20, 2003]

LET'S KEEP DOCTORS IN BUSINESS

(By John Edwards)

The rising cost of malpractice insurance for doctors is getting in the way of good health care. In rural areas, some specialists can no longer afford to practice, and patients can't get the care they need. We need to fix this problem now, and we need to fix it in a way that is consistent with the doctors' own Hippocratic Oath: First, do no harm.

Unfortunately, President Bush's proposed prescription comes straight off the insurance companies' wish list: a sharp limit on the compensation these companies have to pay children and parents who have been blinded, paralyzed or otherwise severely injured. The victims who make the least money will suffer the most under this plan. The harm to

the kinds of families I represented as a lawyer for nearly 20 years will be enormous.

What the president's proposal won't do is work. Insurance premiums have spiked recently because of insurance companies' losses on their investments, not their losses to victims. In fact, about half the states already have some limits on victim compensation, yet premiums in states with caps average about the same as premiums in states without caps. California finally controlled rates not by attacking victims—that didn't work—but by reforming the insurance industry and rolling back premium increases.

We need a real solution that frees doctors from crippling insurance costs—without preventing the most badly injured victims from receiving the compensation they deserve.

That real solution has three elements. Most important, we need to crack down on price gouging by the industry. We also need aggressive action against frivolous lawsuits that don't belong in court—not against the serious lawsuits that bring help to the most badly injured. And finally, we need to reduce the number of medical errors, many made by a very small fraction of the medical profession.

The most critical step is reforming the insurance industry. Today insurance companies use slow and burdensome processes to discourage both doctors and patients from filing legitimate claims. Worse still, these companies can fix prices and divvy up the country in order to drive up their profits. Even when companies don't explicitly collude, they set their rates based on a trade-group loss calculation that they know other companies will follow. In any other industry, this kind of conduct would be subject to scrutiny under the antitrust laws. But an obscure 1945 law gives insurance companies a broad antitrust exemption. Because of the insurance lobby's influence, Congress has even blocked the Federal Trade Commission from investigating insurance company rip-offs. These special privileges must go.

Next, we need to prevent and punish frivolous lawsuits. Most lawyers are responsible advocates for their clients, but the few who aren't hurt the real victims, undercutting the credibility of the legal system and clogging our courts. For all his talk about frivolous lawsuits, President Bush does nothing to address them. He's got it backward—instead of cracking down on irresponsible behavior and baseless cases, he's targeting serious victims who win in court and are believed by juries.

Before a lawyer can bring a medical malpractice case to court, we should require that he or she swear that an expert doctor is ready to testify that real malpractice has occurred. Lawyers who file frivolous cases should face tough, mandatory sanctions. Lawyers who file three frivolous cases should be forbidden to bring another suit for the next 10 years—in other words, three strikes and you're out.

Finally, we can reduce malpractice premiums by helping to reduce malpractice. The Institute of Medicine found that at least 44,000 people die from preventable medical errors every year. In medicine, as in law, a few people cause the most problems: Only 5 percent of doctors have paid malpractice claims more than once since 1990. This same 5 percent are responsible for more than half of all claims paid. One part of the problem is state medical boards whose discipline is as lax as state bar associations'. We need to provide resources and incentives for boards to adopt real standards on the "three strikes" model. At the same time, we need to encourage doctors to report more medical errors voluntarily, so we can learn more about systemic problems.

Together these measures will give relief to most doctors who are suffering under the

staggering weight of insurance premiums. But where premiums still cause shortages of medical care, Washington must provide a temporary subsidy so good doctors can continue their essential work. We shouldn't be padding insurers' profits and hurting people who have already suffered immensely, as the president proposes. But we should be protecting good doctors and the patients who depend on them.

The writer, a Democratic senator from North Carolina, is seeking his party's nomination for president.

Mr. JOHNSON. Mr. President, I support the bipartisan medical malpractice alternative legislation, a bill that is more comprehensive than the bill previously being considered on the floor, S. 11, called the Patient First Act. I want to thank Senators DURBIN and LINDSEY GRAHAM for their leadership and hard work on this issue, and I am proud to be a cosponsor of the alternative, which really begins to address the root of the medical malpractice premium problem, rather than just attempt a quick fix as does the approach found in Senator ENSIGN's legislation.

In South Dakota, we already have a cap on noneconomic damages at \$500,000, which has been in effect since 1997. While some are claiming that caps are supposed to reduce premiums doctors pay, this issue is not that cut and dried. The Medical Liability Monitor found that in South Dakota, prior to 1997, medical malpractice premiums charged by some insurers were being maintained or on the decline, while for others rates were going up. And these rates varied across specialty. For example, in 1996 the premium rate went up for general surgery across two insurers, while one company increased premiums for internal medicine and OB/GYN and another insurer reduced rates for those exact same specialties. Since the implementation of caps in my State, rates initially declined, but in 2002 rates jumped as high as 20 percent over the previous year. This would indicate that caps are not the quick fix that Republicans would like you to believe is needed.

Generally, my feeling is that caps are really a State issue and that we should spend our time focusing on how to prevent the need for malpractice in the first place, through measures to reduce medical errors and improve patient safety. Beyond my overall view of this issue, I am disappointed that our Republican colleagues have taken the issue of medical malpractice, which touches the core of these important patient care issues, and are using it for politically motivated purposes. This legislation has not had any hearings in the Health, Education, Labor and Pensions or Judiciary Committee. It has not been given careful consideration in a bipartisan way prior to the majority leader bringing it to the floor. This is not the way we get things done in the Senate and this is one of the reasons why I cannot support S. 11.

I also cannot support S. 11 because it is crafted in such a way that has broad

implications across the health care continuum. This bill's supporters will try and tell you that it is only about doctors' abilities to continue to provide care to patients. While I do recognize that this is of significant concern and support measures to bring down the cost of medical malpractice premiums, this bill goes far beyond that. S. 11 represents a broad, sweeping initiative that would apply not only to lawsuits against doctors, but to all health care lawsuits, thereby shielding HMOs, drug companies, nursing homes, hospitals, and medical device manufacturers who injure patients.

And what is equally disturbing is that this so-called fix is not even considered the solution by all doctors, some who have conceded that this legislation would not reduce their malpractice premiums for 3 or 4 years. This legislation also discriminates against the most vulnerable: the aged, children and low-income. By placing a cap on noneconomic damages, it says to those with lesser earning potential—"your lives mean less and a small pot of money for the rest of your life is enough, irrespective of how much of your quality of life has been taken from you." I cannot support this mindset and would prefer to approach this issue more comprehensively and without discriminatory practices.

As mentioned, we have learned that caps do not necessarily translate to lower premium rates. Studies have examined this issue and results are found on both sides, some finding that caps do reduce malpractice premiums, while others find the exact opposite. This says to me that we do not have the sound evidence needed to say that caps are the way to go. Because of this, we must be looking at other creative ways to address this issue that is forcing many doctors, especially those in high-risk specialties, to leave practice. That is why I support the Durbin/Graham alternative, which takes a critical look at the causes of high malpractice premiums and seeks to address them.

The Durbin/Graham alternative does provide some relief to doctors through tax credits for malpractice premium rates. It also provides a voluntary system to share medical error information through a database that is immune from legal discovery and will improve patient safety. It addresses issues related to frivolous lawsuits and provides some protection from punitive damages for health professionals participating in federally funded programs. This alternative finally addresses Federal antitrust exemptions enjoyed very broadly by insurance companies in an effort to diminish their opportunity to collude and set rates. These initiatives get at the root of the medical malpractice problem and are a step in the right direction. I urge my colleagues to vote against cloture on the motion to proceed to S. 11 and work together to embrace the Durbin/Graham alternative.

Mr. MCCAIN. Mr. President, Americans are fortunate to enjoy some of the

best medical care available in the world. If we do not reform the current system, however, our good fortune will not last. Medical malpractice reform looms as one of the most critical factors negatively impacting our Nation's health care system. In the year 2000, doctors alone spent \$6.3 billion on medical malpractice insurance coverage. That does not take into consideration coverage paid for by hospitals, nursing homes, and other groups.

Originally intended to provide patients with security by improving quality and providing fair and equitable compensation for valid claims, our Nation's medical malpractice system has only succeeded in adding billions of dollars a year to the cost of health care, while reducing patient access to physicians and treatment. The current system is broken.

Qualified doctors with years of valuable experience are leaving the medical field in droves. Some are opting for early retirement, while others are changing fields. Many physicians, particularly those in high-risk specialties, are moving to States that have implemented reforms or are opting to scale back their practices. Discouraged by the current system, many of today's medical students cite medical malpractice as a major factor in their choice of fields.

Rural areas have been hit particularly hard. In Arizona, our rural hospitals are struggling to keep qualified doctors. In our border region, where hospitals already struggle with the high cost of uncompensated care due to illegal immigrant populations, the Copper Queen Hospital in Bisbee has been without an obstetrician for over a year because of the high cost of medical malpractice insurance. Because of this void, pregnant women in southeastern Arizona have had to drive extremely long distances to reach the nearest hospital with an obstetrician.

Earlier this year, the daughter of a hospital board member gave birth on the side of the highway as she and her husband drove over a mountain pass to the nearest hospital in Sierra Vista. Fortunately for Bisbee and the surrounding areas, a local community health center, which is shielded from high liability costs by Federal law, recently received a Federal grant to develop a birthing facility. Now, the community will be able to retain obstetricians and pregnant women will be assured access to vital prenatal care.

Unfortunately, patients suffer most from the failures of our current system. Not only are patients losing access to qualified doctors, they are also losing health care coverage, substantially contributing to the rising numbers of uninsured Americans, most recently estimated at over 41 million. A recent study by PricewaterhouseCoopers found that 7 percent of the rise in health care costs are due to litigation and risk management. Those skyrocketing health care costs are

passed from health insurance companies to employers, making it more difficult for American businesses to provide coverage to employees. Businesses today pass a larger share of the cost burden on to employees than ever before, and many, particularly small businesses, have made the difficult decision to drop employee coverage entirely.

This morning, the Senate voted on the motion to invoke cloture on, S. 11, the Patients First Act of 2003. I voted to invoke cloture on this bill, not because I believe it is the perfect solution to this crisis, but because I believe that our Nation's medical malpractice system is broken and we must begin debating viable solutions. I have long supported tort reform generally, and medical malpractice in particular, because the current system is unfair and inefficient.

Unfortunately, the medical malpractice debate has been polarized by two powerful special interest groups, preventing necessary compromise and real reform. On one side, the trial lawyers, fearing the loss of enormous jury awards, have fought tooth and nail against any cap on non-economic damages. Similarly, the insurance industry and other medical special interest groups have been equally unwilling to compromise on the dollar amount of these caps. As long as this body remains polarized in between these two competing interests, we will not have real reform and the American people will suffer.

Under the bill considered today, patients would be able to recover the full cost of medical expenses coupled with past and future wage losses through unlimited economic damages. To address exorbitant jury awards for non-economic damages, this bill, caps non-economic damages at \$250,000, while allowing states the flexibility to maintain their own caps. A federally imposed ceiling would be a tremendous help to States like Arizona that require State constitutional amendments in order to implement medical liability reform.

The reality is, we know that caps on damages do successfully reduce the cost of medical malpractice insurance. Malpractice rates nationally, have risen three times faster than in California, where caps have been in place for twenty years. Similarly, a recent study by the Agency for Healthcare Research and Quality found that states that enacted limits on non-economic damages have 12 percent more doctors per capita than states without caps.

Although I support reform efforts, I am concerned that \$250,000 may not be a realistic amount at which to cap non-economic damages. I recognize that although the state-imposed cap of \$250,000 has functioned well in California, there are also certain medical errors which are difficult, if not impossible to put a price tag on.

Additionally, I believe any medical malpractice reform legislation must be

coupled with meaningful measures to address the alarming numbers of medical errors in this country. A 1999 study by the Institute of Medicine found that upwards of 98,000 people a year die of medical errors. Congress must address this escalating problem, particularly in the context of the current debate. Bipartisan legislation establishing medical error reporting requirements passed the House and will hopefully pass the Senate later this year, however much more can and should be done on this issue.

I believe a majority of my colleagues in the Senate agree that there does exist a serious problem in our Nation, that patients and doctors are suffering as a result, and something must be done. When the Senate voted this morning to invoke cloture, this bill did not have the votes necessary to continue debate. In fact, it did not even garner a majority vote. If we are truly committed to addressing this important issue, we must put special interests and partisan politics aside and work together to craft an equitable compromise.

Mr. LEAHY. Mr. President, I am disappointed that the majority appears to be playing politics with the medical malpractice insurance debate. This is a complex issue, and the bill before us would encroach on the rights of every state and would take away the legal rights of the American people. Great care is in order as Congress considers such steps. But instead of introducing a bipartisan bill and sending it through the committee process to reach consensus, the majority is rushing a partisan bill directly to the Senate floor. That is highly unfortunate, because our health care system is in crisis. We have heard that statement so often that it has begun to lose the force of its truth, but that truth is one we must confront, and the crisis is one we must abate.

Dramatically rising medical malpractice insurance rates are forcing some doctors to abandon their practices or to cross state lines to find more affordable situations. Patients who need care in high-risk specialties—like obstetrics—and patients in areas already underserved by health care providers—like many rural communities—are too often left without adequate care.

We are the richest and most powerful nation on earth. We should be able to ensure access to quality health care to all our citizens and to assure the medical profession that its members will not be driven from their calling by the manipulations of the malpractice insurance industry.

The debate about the causes of this latest insurance crisis and the possible cures grows shrill. I had hoped for a calmer and more constructive discussion within the Senate Judiciary Committee and on the Senate floor. My principal concerns are straightforward: That we ensure that our nation's physicians are able to provide the high qual-

ity of medical care that our citizens deserve and for which the United States is world-renowned, and that in those instances where a doctor does harm a patient, that patient should be able to seek appropriate redress through our court system.

To be sure, different States have different experiences with medical malpractice insurance, and insurance remains largely a State-regulated industry. Each State should endeavor to develop its own appropriate solution to rising medical malpractice insurance rates because each State has its own unique problems. Some States—such as my own, Vermont—while experiencing problems, do not face as great a crisis as others. Vermont's legislature is considering legislation to find the right answers for our State, and the same process is underway now in other States.

In contrast, in States such as West Virginia, Pennsylvania, Florida, and New Jersey, doctors are walking out of work in protest over the exorbitant rates being extracted from them by their insurance carriers.

Thoughtful solutions to the situation will require creative thinking, a genuine effort to rectify the problem, and bipartisan consensus to achieve real reform. Unfortunately, these are not the characteristics of the bill before us. Indeed, S. 11 is a partisan bill that was introduced only a few days ago without any committee consideration. Ignoring the central truth of this crisis—that it is a problem in the insurance industry, not the tort system—the majority has proposed a plan that would cap non-economic damages across the nation at \$250,000 in medical malpractice cases. The notion that such a one-size-fits-all scheme is the answer runs counter to the factual experience of the states.

Most importantly, the majority's proposal does nothing to protect true victims of medical malpractice and nothing to prevent malpractice in the first place. A cap of \$250,000 would arbitrarily limit compensation that the most seriously injured patients are able to receive. The medical malpractice reform debate too often ignores the men, women and children whose lives have been dramatically—and often permanently—altered by medical errors. The experience of Linda McDougall, who testified a few months ago before the Senate Judiciary Committee, is just one tragic example of such an error. Mrs. McDougall is recovering from an unnecessary double mastectomy, and her testimony reminded us all of the real-life consideration of these issues. Arbitrarily limiting injured patients' remedies under the law without addressing the system-wide medical errors that result in patient harm and death is a recipe for failure.

The majority's proposal would prevent individuals like Linda McDougall—even if they have successfully made their cases in courts of law—from receiving adequate compensation. We

are fortunate in this nation to have many highly qualified medical professionals, and this is especially true in my own home state of Vermont. Unfortunately, good doctors sometimes make errors. It is also unfortunate that some not-so-good doctors manage to make their way into the health care system as well.

While we must do all that we can to support the men and women who commit their professional lives to caring for others, we must also ensure that patients have access to adequate remedies should they receive inadequate care.

High malpractice insurance premiums are not the direct result of malpractice lawsuits. They are the result of investment decisions by the insurance companies and of business models geared toward ever-increasing profits as well as the cyclical hardening of the liability insurance market. In cases where an insurer has made a bad investment, or has experienced the same disappointments from Wall Street that so many Americans have, it should not be able to recoup its losses from the doctors it insures.

The insurance company should have to bear the burdens of its own business model, just as the other businesses in the economy do. And a nationwide arbitrary capping of awards available to victims—as the majority has proposed here this week—should not be the first and only solution turned to in a tough medical malpractice insurance market. The problem at hand deserves thoughtful and collaborative consideration in committee to achieve a sensible solution that is fair to patients and that supports our medical professionals in their ability to practice quality health care.

One aspect of the insurance industry's business model requires a legislative correction—its blanket exemption from federal antitrust laws. Insurers have for years—too many years—enjoyed a benefit that is novel in our marketplace. The McCarran-Ferguson Act permits insurance companies to operate without being subject to most of the federal antitrust laws, and our nation's physicians and their patients have been the worse off for it.

Using their exemption, insurers can collude to set rates, resulting in higher premiums than true competition would achieve—and because of this exemption, enforcement officials cannot investigate any such collusion. If Congress is serious about controlling rising premiums, we must objectively limit this broad exemption in the McCarran-Ferguson Act.

In February, I introduced the "Medical Malpractice Insurance Antitrust Act of 2003," S. 352. I want to thank Senators REID, KENNEDY, DURBIN, EDWARDS, ROCKEFELLER, FEINGOLD, BOXER and CORZINE for cosponsoring this essential and straightforward legislation. Our bill modifies the McCarran-Ferguson Act with respect to medical malpractice insurance, and only for the

most pernicious antitrust offenses: price fixing, bid rigging, and market allocations. Only those anticompetitive practices that most certainly will affect premiums are addressed.

I am hard-pressed to imagine that anyone could object to a prohibition on insurance carriers' fixing prices or dividing territories. After all, the rest of our nation's industries manage either to abide by these laws or pay the consequences.

Many State insurance commissioners police the industry well within the power they are accorded in their own laws, and some states have antitrust laws of their own that could cover some anticompetitive activities in the insurance industry. Our legislation is a scalpel, not a saw. It would not affect regulation of insurance by state insurance commissioners and other state regulators. But there is no reason to continue, unexamined, a system in which the Federal enforcers are precluded from prosecuting the most harmful antitrust violations just because they are committed by insurance companies.

Our legislation is a carefully tailored solution to one critical aspect of the problem of excessive medical malpractice insurance rates. I had hoped for quick action by the Judiciary Committee and then by the full Senate to ensure that this important step on the road to genuine reform is taken before too much more damage is done to the physicians of this country and to the patients they care for.

But our legislation to narrow this loophole in the nation's anti-trust laws for medical malpractice insurers has languished for months in the Senate Judiciary Committee. Instead of conducting hearings and a markup on our bill, the majority now rushes a "tort reform" agenda item to the floor without any committee consideration.

I want to comment for a moment on why committee consideration is so important to building the consensus needed to enact serious legislation to address the serious issue of rising medical malpractice premiums. During the last Congress, some of my colleagues on the other side of the aisle complained about the lack of committee consideration of prescription drug legislation. This year, we had committee consideration of a bipartisan bill and the Senate passed prescription drug legislation.

Last year, during that debate, Senator LOTT said: "If we bring these important issues to the Senate floor without them having been worked through committee, it is a prescription for a real problem . . ."

Last year on the Senate floor, Senator NICKLES declared: "What happened to the committee process? Shouldn't every member of the Finance Committee have a chance to say, I think we can do a better job? Maybe we can do it more efficiently or better. No, we bypass the committee and take it directly to the floor."

And Senator SNOWE, one of the Senate's most thoughtful members, wisely pointed out: "I think each of us here knows that without a markup in the committee we are creating a predetermined train wreck. We are heading for a train wreck because we are creating a process designed for failure. It is designed for politics. It is not designed for creating a solution to a serious problem."

If Congress is serious about controlling rising medical malpractice insurance premiums, then we must limit the broad exemption to federal antitrust law and promote real competition in the insurance industry, as well as attack this problem at its core by reducing medical errors across our health care system. Unfortunately, the partisan bill before us is not designed for creating a solution to a serious problem. Instead, it is designed purely for politics.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, how much time is remaining on this side?

The PRESIDING OFFICER. Four minutes.

Mr. DURBIN. On the other side?

The PRESIDING OFFICER. They have 10 minutes.

Mr. DURBIN. I am happy to yield to the other side unless they are going to use the entire 10 minutes and then I will use my 4.

Mr. McCONNELL. I ask the Senator from Illinois, what is the time situation?

Mr. DURBIN. Ten minutes on his side, 4 minutes on my side.

Mr. McCONNELL. And the suggestion of the Senator was?

Mr. DURBIN. If the Senator is going to divide it and would like to have one speaker and then I will speak and he can close.

Mr. McCONNELL. I was going to split the time with Senator ENSIGN and use the last 5 minutes. Does the Senator from Illinois want to be the last speaker?

Mr. DURBIN. I defer to the Senator. I believe that as proponents of the bill, the Senator should have the last word. If the Senator is going to divide his time, I would just suggest that one of his speakers go first, I speak, and then the Senator be the last speaker.

Mr. McCONNELL. Let me ask if my friend from Nevada is ready to proceed? He will be ready momentarily.

Mr. DURBIN. I will use my 4 minutes.

First, I thank my colleagues on both sides of the aisle. Although we disagree on the approach, and I certainly do not support S. 11, I encourage all of my colleagues in the Senate to join me in stopping this bill from moving forward. This is too important to come to the floor without a committee hearing, without deliberation. It is unfair to address the medical malpractice premium crisis in America by simply saying that victims of malpractice shall be limited in what they can receive from a court.

It is unfair for us to put ourselves in the place of a jury. If we are going to deal with the malpractice insurance crisis that faces us, let us do it in an honest and complete fashion.

Early in this debate, I told the story about David from the small town in downstate Illinois. At 6 years of age he went in with a high fever and because of medical negligence and medical errors, this 6-year-old boy became a quadriplegic. He is unable to communicate with others. He breathes through a tracheotomy stoma and is fed through a gastrointestinal tube. They believe he understands what is being said, but he is unresponsive. He is now 17 years of age. His mother has quit her job at a local college to be with him full time.

The decision of this bill is that in cases such as David's what they are going to go through the rest of their lives, David and his family, is worth no more than \$250,000 in pain and suffering.

This verdict by this jury in the Senate is unfair. I say to doctors across America who have a genuinely serious problem that needs to be addressed, the love and compassion you give to your patients, the commitment you made to your patients is inconsistent with the message of this bill. I believe doctors in my home State and those I have met with in other places are some of the finest people with whom I have ever worked. I genuinely want to work with them to deal with malpractice premiums that are much too high, by reducing the incidence of malpractice, by saying to insurance companies, just because you made a bad investment does not mean you will run a doctor out of business—that is what is happening with these high premiums—and by saying as well to the legal profession, the bad actors have to get out of the courtroom; stop harassing doctors with frivolous lawsuits. That is relatively uncommon, but where it occurs in one case, that is one case too many.

We need to come together after this bill is stopped today in a good-faith, bipartisan effort as we did on the terrorism insurance issue. We need to bring in the AMA, the bar association, the trial lawyers, the insurance companies, and all parties that can come to a good solution. We need to do it quickly. We need a tax credit for doctors right now. We do not need to pass a bill that might help them 8 or 10 years from now; we need to pass a tax credit now, so they can get through this troublesome period where the insurance companies have seen the bottom fall out of their investment and are charging these high premiums. That is the fair way to deal with it.

Please, do not close off a day in court for deserving victims of medical malpractice.

The PRESIDING OFFICER. The Senator from Nevada.

Mr. ENSIGN. Mr. President, what is this about today? What are we really talking about? We are talking about

access to health care by patients. We have enacted reasonable limits in this bill so the crisis facing 19 States and the patients in 19 States across this country can be resolved.

The problem is caused by out-of-control jury awards and frivolous lawsuits which are cheaper to settle—and those get settled all the time—than they are to fight. The reason they will settle them is the potential huge award and the huge downside risk they have down the line. A lot of insurance companies just settle those and pass the higher rates on to doctors. That has led to many physicians leaving those 19 States in crisis and a lot of new doctors not going into the specialties which are in short supply.

If we ask ourselves the fundamental question, Is there a shortage of doctors or is there a shortage of lawyers? we do not have a shortage of lawyers in my State home state of Nevada, or in any other State, as far as I know. We do not have any shortage of people going into the practice of law. We do have a shortage of people going into the practice of a lot of the specialties in health care. The reason is that we have a jury system that is out of balance. We did not used to live in this litigious society of today. People are so sue happy and the system is set up to encourage frivolous lawsuits.

California and Colorado are the two best examples we have of medical liability reform that has been on the books long enough. We know it works. Victims get what they deserve in those States, but the system is balanced so doctors can afford their premiums on medical liability. That is what the bill before the Senate today lays out, a model very similar to Colorado and California for the rest of the country.

I encourage all of our colleagues to at least vote for the motion to proceed to the bill so we can have a full debate with amendments to proceed to solve this severe crisis we have in access to health care across the country.

The PRESIDING OFFICER. The assistant majority leader.

Mr. MCCONNELL. The vote we are about to have is not about the details of the underlying bill, it is about whether we think there is a medical malpractice crisis in America and whether we ought to do something about it. If we were able to get on the bill, it would obviously be open to amendment and we would see how the Senate felt, that some issue ought to be addressed.

The Senator from Nevada, the floor leader on this subject, says 19 States are currently in crisis and 25 are on the way to crisis, while only 6 of our 50 States are OK as far as the price of medical malpractice premiums not driving physicians out of work is concerned.

It has been incredibly stated on the other side of the aisle by numerous speakers that this crisis has nothing to do with runaway judgments. I don't know how you can reach that conclu-

sion. The people at CBO and the Department of Health and Human Services and the Joint Economic Committee, insurance commissioners, actuaries, all believe this crisis is related to runaway judgments.

California, which we keep referring to, has the model system after which the underlying bill has been modeled. My friends on the other side of the aisle think this crisis has been created by something else. They have been suggesting it is bad returns from the stock market or insurance company collusion, or a cadre of quacks who are causing problems for medicine. I don't know whether all of that has made some contribution, but we know there is one solution that works, and that is the California approach. That is what is in the underlying bill.

We ought to at least recognize this is a national crisis, a national problem that ought to be dealt with at the national level. We will have an opportunity to find out whether the Senate agrees with that shortly when we vote on cloture on the motion to proceed. I hope the Senate will give us an opportunity to get to the underlying bill. It would then be open to all kinds of amendments and we could begin to proceed, as we normally do in the Senate, in crafting legislation to deal with national problems.

We urge our colleagues to vote for cloture on the motion to proceed.

Mr. FRIST. Mr. President, today we will be voting on a cloture motion to allow the Senate to proceed to debate S. 11, the Patients First Act. I want to strongly urge my colleagues to vote for the motion to proceed.

We have had a good debate over the last three days, and it is clear that right now patients across the country are facing a crisis of access to quality health care. Congress needs to act.

The upcoming vote will allow us to fully debate this critical issue. If action is delayed, we know what will happen: Patients will suffer, doctors will continue to flee their practices, and more States will be added to the AMA crisis list. Since we last debated this issue seven more States have joined the list, that is nearly a 60 percent increase over last year.

I have received letters from doctors all over America, including from my home State of Tennessee. Premiums in Tennessee have gone up 68 percent over the last four years, and Tennessee is not even considered a crisis state by the AMA yet.

One doctor from Waverly, TN writes:

My insurance premiums as a general surgeon have jumped over 70 percent in the last four years. The current crisis has forced me to limit doing any moderate to high risk surgery . . .

There are counties around mine that have lost the services of their general surgeons who have opted to limit their practices to family practices . . . rather than continue to pay the high premiums that are prohibitive for a surgeon in rural Tennessee.

Another doctor from Madisonville, TN writes:

My wife and I came to Madisonville, Tennessee, 24 years ago as national health service corps doctors. We helped start the Women's Wellness and Maternity Center, Tennessee's first out of hospital birth center. We depend on the obstetrical service at Sweetwater Hospital for C-sections and consultation.

This doctor goes on to tell me that because of high malpractice premiums Sweetwater has only one remaining obstetrician who is now forced to bear full responsibility for providing 24-hour maternity coverage and that efforts to recruit additional doctors have failed.

As these real life stories show, this health care crisis is real and it is spreading. The current medical liability system is costly, inefficient and hurts all Americans. In addition to damaging access to medical services, the current medical malpractice system creates problems throughout the entire health care system.

It indirectly costs the country billions of dollars every year in defensive medicine. The fear of lawsuits forces doctors to practice defensive medicine by ordering extra tests and procedures. Though the numbers are hard to calculate, well-researched reports predict savings from meaningful reform at tens of billions of dollars per year.

It directly costs the taxpayers billions. The CBO has estimated that reasonable reform will save the federal government \$14.9 billion over 10 years primarily through savings in Medicare and Medicaid.

It impedes efforts to improve patient safety. The threat of excessive litigation discourages doctors from discussing medical errors in ways that could dramatically improve health care and save hundreds or thousands of lives. I am a strong supporter of patient safety legislation which I hope we will pass this year. But in addition to patient safety legislation, we need to address the underlying problem—our liability system.

We must reform this broken liability system. That is why I strongly support the Patients First Act. I want to thank my colleague, Senator MCCONNELL, the majority whip, who skillfully led this debate. I also want to thank Chairman GREGG and Chairman HATCH for their longstanding leadership of this issue, and Senator ENSIGN, the lead sponsor of S. 11, who has seen the current crisis close up in his own State of Nevada. And finally, I want to thank Senator DIANNE FEINSTEIN of California. Her State has been the model of medical liability reform and has demonstrated that commonsense reforms work. I look forward to continuing to work with Senator FEINSTEIN on this issue. We share the goal of putting patients first.

The Patients First Act will protect access to care and ensure that those who are negligently injured are fairly compensated. Again, I encourage my colleagues to move this legislation forward. We cannot afford further delay.

I yield the remainder of our time.

CLOTURE MOTION

The PRESIDING OFFICER. All time having expired, under the previous order, the clerk will report the motion to invoke cloture.

The bill clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the motion to proceed to the consideration of Calendar No. 186, S. 11, the Patients First Act of 2003.

Bill Frist, Mitch McConnell, John Ensign, Craig Thomas, Rick Santorum, Larry E. Craig, George V. Voinovich, John Cornyn, Trent Lott, Ted Stevens, Michael B. Enzi, James Inhofe, Chuck Hagel, Jon Kyl, Judd Gregg, Pat Roberts, John E. Sununu.

The PRESIDING OFFICER. By unanimous consent, the mandatory quorum call has been waived.

The question is, Is it the sense of the Senate that debate on the motion to proceed to S. 11, the Patients First Act, shall be brought to a close?

The yeas and nays are ordered under the rule. The clerk will call the roll.

The legislative clerk called the roll.

Mr. REID. I announce that the Senator from Florida (Mr. GRAHAM), the Senator from Massachusetts (Mr. KERRY), and the Senator from Georgia (Mr. MILLER) are necessarily absent.

I further announce that, if present and voting, the Senator from Florida (Mr. GRAHAM) and the Senator from Massachusetts (Mr. KERRY) would each vote "nay."

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The yeas and nays resulted—yeas 49, nays 48, as follows:

[Rollcall Vote No. 264 Leg.]

YEAS—49

Alexander	DeWine	McConnell
Allard	Dole	Murkowski
Allen	Domenici	Nickles
Bennett	Ensign	Roberts
Bond	Enzi	Santorum
Brownback	Fitzgerald	Sessions
Bunning	Frist	Smith
Burns	Grassley	Snowe
Campbell	Gregg	Specter
Chafee	Hagel	Stevens
Chambliss	Hatch	Sununu
Cochran	Hutchison	Talent
Coleman	Inhofe	Thomas
Collins	Kyl	Voinovich
Cornyn	Lott	Warner
Craig	Lugar	
Crapo	McCain	

NAYS—48

Akaka	Dorgan	Levin
Baucus	Durbin	Lieberman
Bayh	Edwards	Lincoln
Biden	Feingold	Mikulski
Bingaman	Feinstein	Murray
Boxer	Graham (SC)	Nelson (FL)
Breaux	Harkin	Nelson (NE)
Byrd	Hollings	Pryor
Cantwell	Inouye	Reed
Carper	Jeffords	Reid
Clinton	Johnson	Rockefeller
Conrad	Kennedy	Sarbanes
Corzine	Kohl	Schumer
Daschle	Landrieu	Shelby
Dayton	Lautenberg	Stabenow
Dodd	Leahy	Wyden

NOT VOTING—3

Graham (FL)	Kerry	Miller
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The PRESIDING OFFICER. On this vote, the yeas are 49, the nays are 48.

Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.

EXECUTIVE SESSION

NOMINATION OF VICTOR J. WOLSKI, OF VIRGINIA, TO BE A JUDGE OF THE UNITED STATES COURT OF FEDERAL CLAIMS

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to executive session to consider the following nomination, which the clerk will report.

The legislative clerk read the nomination of Victor J. Wolski, of Virginia, to be a Judge of the United States Court of Federal Claims.

The PRESIDING OFFICER. The question is, Will the Senate advise and consent to the nomination of Victor J. Wolski, of Virginia, to be a Judge of the United States Court of Federal Claims?

Mr. HATCH. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. REID. I announce that the Senator from Florida (Mr. GRAHAM), the Senator from Massachusetts (Mr. KERRY), the Senator from Georgia (Mr. MILLER) are necessarily absent.

I further announce that, if present and voting, the Senator from Massachusetts (Mr. KERRY) would vote "nay".

The PRESIDING OFFICER. (Ms. MURKOWSKI). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 54, nays 43, as follows:

[Rollcall Vote No. 265 Ex.]

YEAS—54

Alexander	DeWine	Lugar
Allard	Dole	McCain
Allen	Domenici	McConnell
Baucus	Ensign	Murkowski
Bennett	Enzi	Nickles
Bond	Feinstein	Roberts
Brownback	Fitzgerald	Santorum
Bunning	Frist	Sessions
Burns	Graham (SC)	Shelby
Campbell	Grassley	Smith
Chafee	Gregg	Snowe
Chambliss	Hagel	Specter
Cochran	Hatch	Stevens
Coleman	Hutchison	Sununu
Collins	Inhofe	Talent
Cornyn	Kyl	Thomas
Craig	Lincoln	Voinovich
Crapo	Lott	Warner

NAYS—43

Akaka	Corzine	Jeffords
Bayh	Daschle	Johnson
Biden	Dayton	Kennedy
Bingaman	Dodd	Kohl
Boxer	Dorgan	Landrieu
Breaux	Durbin	Lautenberg
Byrd	Edwards	Leahy
Cantwell	Feingold	Levin
Carper	Harkin	Lieberman
Clinton	Hollings	Mikulski
Conrad	Inouye	Murray