

SENATE—Friday, June 22, 2001

The Senate met at 9:30 a.m. and was called to order by the Honorable JEAN CARNAHAN, a Senator from the State of Missouri.

PRAYER

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

Gracious Father, we praise You for Your love that embraces us and gives us security, Your joy that uplifts us and gives us resiliency, Your peace that floods our hearts and gives us serenity, and Your Spirit that fills us and gives us strength and endurance.

We dedicate this day to You. Help us to realize that it is by Your permission that we breathe our next breath and by Your grace that we are privileged to use all the gifts of intellect and judgment You provide. Bless the Senators as they continue to sort out the crucial issues of providing patients' rights. Give them a perfect blend of humility and hope, so that they will know that You have given them all that they have and are and have chosen to bless them this day. We join with them in responding and committing ourselves to You. Through our Lord and Saviour. Amen.

PLEDGE OF ALLEGIANCE

The Honorable JEAN CARNAHAN led the Pledge of Allegiance, as follows:

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

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

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

The legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, DC, June 22, 2001.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable JEAN CARNAHAN, a Senator from the State of Missouri, to perform the duties of the Chair.

ROBERT C. BYRD,
President pro tempore.

Mrs. CARNAHAN thereupon assumed the chair as Acting President pro tempore.

RECOGNITION OF THE ACTING MAJORITY LEADER

The ACTING PRESIDENT pro tempore. The Senator from Nevada.

SCHEDULE

Mr. REID. Madam President, on behalf of Senator DASCHLE, the Senate is advised that we will have debate, the time equally divided between the two managers of the bill, on the McCain amendment. Following a vote on that amendment, we will turn to an amendment offered by the Senator from New Hampshire, Mr. GREGG, the manager of the bill. That matter will be debated this afternoon. We are going to be in session Monday afternoon for purposes of debating this matter, with further action on this bill Tuesday and the rest of the week until we complete this legislation.

RESERVATION OF LEADER TIME

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

BIPARTISAN PATIENT PROTECTION ACT

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

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

Pending:

McCain amendment No. 809, to express the sense of the Senate with respect to the opportunity to participate in approved clinical trials and access to specialty care.

AMENDMENT NO. 809

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 10:30 a.m. will be equally divided between the Senator from Arizona, Mr. MCCAIN, and the Senator from New Hampshire, Mr. GREGG, or their designees.

The Senator from Arizona.

Mr. MCCAIN. Madam President, I intend to speak again shortly before the vote, but I would like to discuss the President's threat to veto the Patients' Bill of Rights, the letter that was sent over yesterday.

I am disappointed that the President issued a veto threat yesterday regarding our bipartisan bill protecting America's patients. However, I continue to pledge my cooperation in any sincere effort to reach fair compromises on the outstanding issues that still divide us. Negotiations continue. We will continue over the weekend, and into next week, in the continued hopes we can reach agreement.

I repeat, we are in agreement on the vast majority of issues. It would be a terrible shame for us to not be able to resolve those remaining differences.

But we cannot compromise on our resolve to return control of health care to medical professionals, and to hold insurers to the same standard of accountability to which doctors and nurses are held. That is all we are seeking and all that the American people expect from us, a fair and effective remedy to a grave national problem.

Following are some concerns that were raised in the veto threat regarding our bipartisan bill that do not accurately represent our legislation.

In the President's threatened veto message, he said that the legislation will only serve to drive up costs and leave more individuals without health insurance coverage.

The reality is, the year after Texas passed its liability protections, premiums actually decreased; and last year the number of people with insurance increased by over 200,000. In their annual report, the Census Bureau attributed a large portion of the increase in the number of insured Americans to the increase in employer-sponsored coverage.

As the Congressional Budget Office has stated:

[A] reliable estimate of the coverage declines associated with a mandate can only be determined by analyzing the specific legislative proposal.

No such analysis on the bill before the Senate has been produced.

In the Presidential statement, it said that our legislation circumvents the independent medical review process in favor of litigation.

The reality is, no patient and no physician wants to go to court just to seek the care they need or to avoid being harmed. Under our legislation, patients must exhaust internal and external appeals before going to court. That is why the legislation requires that all appeals be exhausted. The sole exception is when death or irreparable injury is incurred as a result of the denial. Even in that case, either party can request the appeals process continue and the results of the process be considered in court.

In the Presidential statement, it said this legislation overturns more than 25 years of Federal law, and in so doing, would not ensure that "existing state law caps would apply to the broad, new causes of action in state courts."

The reality is, the legislation corrects the unintended consequences of the 25-year-old loophole contained in ERISA, the Employee Retirement Income Security Act, which gives HMOs

special legal protections—not enjoyed by any other industry—from legal recourse if they make medical decisions that result in injury or death. Our legislation merely accepts Chief Justice Rehnquist's recommendation adopting the policy of the Federal Judicial Conference that "in any managed care legislation, the state courts be the primary forum for the resolution of personal injury claims arising from the denial of health care benefits, should Congress determine that such legal recourse is warranted."

I hope my friends on this side of the aisle will pay attention to Chief Justice Rehnquist's words.

In so doing, this legislation simply returns to how this Nation has overseen disputes in the courts over the last 200 years and applied the same standards with which all other industries comply.

Finally, by deferring explicitly to State courts on medical decision disputes, this legislation specifically accepts tort reform and caps that States have adopted, all of which exceed any Federal tort reform currently in place.

The President's statement goes on to say this legislation would allow causes of action in Federal court for violation of any duty under the plan, creating open-ended and unpredictable lawsuits against employers for administrative errors.

In reality, there would be no open-ended, unpredictable lawsuits as a consequence of this legislation. Plans would be free of any liability if they followed their own plan rules and did not make decisions that explicitly caused injury or death. Moreover, if they follow the internal appeals process provided for in this legislation, it is extremely unlikely that any business or plan would be exposed to any liability risk at the Federal level.

The President's statement said that the legislation would subject employers and unions to frequent litigation in State and Federal court under a vague standard of direct participation. The reality is, this legislation related to direct participation is neither vague nor would it subject employers to frequent litigation in State and Federal court. The bill language specifically states that direct participation is defined as "the actual working of [the] decision or the actual exercise of control in making [the] decision or in the [wrongful] conduct."

This legislation specifically exempts businesses from liability of every type of action except specific actions that are the direct cause of harm to a patient.

We are having continuing negotiations to try to tighten further language to prevent employer liability.

Finally, the President's statement says this legislation subjects physicians and all health care professionals to greater liability risk. My only an-

swer to that: Read the bill. Section 302(a)(1) states that physicians, other health care professionals, insurance agents, and health care record keepers have explicitly been exempted from any new liability exposure. In fact, by extending accountability provisions to HMOs, this legislation will actually serve to protect physicians and other health care professionals from unwarranted, unnecessary liability exposure.

Once again, the critics need to read the bill before inaccurate charges are made.

Madam President, there is either a misunderstanding or a failure to comprehend what this legislation is all about in the message that was sent over and the threatened veto. Again, I urge all of our friends and adversaries of this bill to continue to negotiate, to continue to resolve the issues that exist between us so that we can come to closure on this.

I repeat, we cannot sacrifice the principles upon which this legislation is based, but we certainly can discuss and perfect this legislation. That is something we want to continue to do. As we speak, there are groups who are discussing ways of improving the legislation. We are open to it.

I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts.

Mr. KENNEDY. Madam President, how much time is remaining now?

The ACTING PRESIDENT pro tempore. The sponsor has 19 minutes, and the opposition has 28 minutes.

Mr. KENNEDY. I yield myself 7 minutes.

The ACTING PRESIDENT pro tempore. From the sponsor's time?

Mr. KENNEDY. Yes, from the sponsor's time.

The ACTING PRESIDENT pro tempore. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Madam President, the sense-of-the-Senate we will vote on soon is a critical one. It puts the Senate on record as supporting patients in two critical areas covered by our bill: Access to clinical trials and access to specialty care.

The reason this vote is critical is that adoption of this sense-of-the-Senate language effectively endorses the solid protections contained in the McCain-Edwards-Kennedy bill and rejects the inadequate protections contained in the alternative legislation.

Our friends on the other side of the aisle started out rejecting the idea that managed care companies should be required to cover the routine doctor and hospital costs of quality clinical trials. Then they said they would support coverage of clinical trials, but only for cancer. Now they have finally endorsed the idea of covering clinical trials, but they continue to offer the American people coverage that is unconscionably delayed and that bars patients from

some of the most crucial clinical trials—studies carried on in the private sector that are not funded by the Government but are approved by the Food and Drug Administration.

Of course, this, too, represents a shift in position. Last year they were for coverage of FDA trials, but only for cancer patients. This sense-of-the-Senate makes clear that managed care companies should cover the routine doctor and hospital costs of all clinical trials that offer a meaningful opportunity for cure or improvement. It also makes clear that coverage should be provided without further delays—no ifs, ands, or buts. If someone can benefit from a clinical trial, if their doctor recommends it, and if they want to participate in it, their insurance company should pay the routine doctor and hospital costs associated with the trial.

I reviewed the comments my good friend Senator FRIST made last night, and the sum and substance of it was that clinical trials are a wonderful thing but it might cost too much if insurance companies have to pay for routine doctor and hospital costs. So he was willing to cover some of the trials but not all of the trials.

Now of course this specter he has raised of the vast unknown mass of clinical trials out there ignores some fundamental facts. First, most studies have not found much difference between the cost of clinical trials and the cost of conventional care. Obviously, there are cases where a clinical trial can cost more, but there are also cases where it can cost less.

Second, Senator FRIST talks as if we are proposing something novel and dangerous. The fact is that CBO found several years ago that insurance companies routinely pay these costs. They pay them 90 percent of the time. But managed care is cutting back on that wise policy and patients are being left to bear the burden.

So we are not talking about imposing something new. We are talking about preserving and restoring what is already there. We are simply extending to the private sector a policy that works well under Medicare.

One of the most fundamental parts of quality medical care is access to an appropriate, qualified specialist to treat serious complex conditions. This is also one of the areas in which the abuses of managed care have been most serious and widespread. Our legislation provides patients the opportunity to see a specialist outside the managed care network at no additional cost if no one in the network can meet their needs.

The competing legislation offered by Senator FRIST purports to afford the same rights, but it essentially makes the plan the judge and jury of whether or not a non-network specialist is needed. The plan's judgment is not appealable.

Senator MCCAIN's sense-of-the-Senate simply affirms the right to see a

specialist outside of the network, if needed. It also affirms the right to appeal to an independent third party if the plan disagrees about the need to go outside the plan.

These rights are especially critical to cancer patients. That is why cancer patients are specifically mentioned in the McCain sense-of-the-Senate. It is also why so many organizations representing cancer patients and their families have spoken out so strongly in support of our legislation.

The story of the following patient illustrates why these rights are so precious and why the passage of the McCain amendment is so critical. The family of Carly Christie was horrified when their 9-year-old daughter was diagnosed with a Wilms' tumor, a rare and aggressive form of kidney cancer. They were relieved to learn that a facility close to their home in Woodside, CA, the Lucile Packard Children's Hospital at Stanford University, was world renowned for its expertise and success in treating this type of cancer. The Christie family's relief turned to shock when their HMO told them it could not cover Carly's treatment by the children's hospital. Instead, they insisted that the treatment be provided by a doctor in their network, an adult urologist with no expertise in treating this rare and dangerous childhood cancer.

The Christies managed to scrape together the \$50,000 they needed to pay for the operation themselves. Today, Carly is a cancer-free, healthy, happy teenager.

If the Christies had been less tenacious or had been unable to come up with the \$50,000, there is a good chance Carly would be dead today. The Christies had faithfully paid their premiums to their HMO, but their HMO was not faithful to them when their daughter's life was in jeopardy. The protections in our legislation would have avoided that situation.

No family should have to go through what the Christies did. No child should face a possible death sentence because an HMO thinks profits are more important than patients. The McCain amendment puts the Senate on record as saying that families such as the Christies should have the right to a speedy, fair appeal to an independent review agency to get the care their daughter needed.

The ACTING PRESIDENT pro tempore. The Senator has used 7 minutes.

Mr. KENNEDY. Madam President, I withhold the rest of the time and hope the McCain amendment will be approved.

How much time remains on either side, Madam President?

The ACTING PRESIDENT pro tempore. The proponents have 12 minutes. The opponents have 28 minutes.

Who yields time? If neither side yields time—

Mr. KENNEDY. Madam President, I yield 5 minutes to the Senator from North Carolina.

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

Mr. EDWARDS. Madam President, I rise today in support of the McCain amendment.

Before I get to that, I want to say a few words about a patient in North Carolina who has had problems with HMO health insurance coverage. Ethan Bedrick was a young boy who was born in 1992 in Charlotte, NC. Because of the circumstances surrounding his birth, unfortunately, Ethan was born with cerebral palsy. As a young child, he was treated by a wide variety of health care providers—many specialists, doctors, pediatric specialists who tried to help Ethan and his family with Ethan's problems.

Among the things they prescribed was therapy on a regular basis—physical therapy and other kinds of therapy—to help prevent the kinds of problems we often see with older persons who have cerebral palsy of becoming constricted, tightened up, and not able to use his limbs properly.

Every medical provider who made these recommendations to Ethan suggested that he needed this therapy and that it was medically necessary for his ongoing care. All of the doctors who treated him, and there were a multitude of them, believed he needed this therapy. The only one who disagreed was his insurance company. That decision was made by someone sitting behind a desk somewhere many miles and many States away from Ethan.

This is a photograph of young Ethan. As a result, it was necessary for Ethan's case to be taken first to Federal district court, and then to be taken through an appeal that lasted a long time—2, 3 years, approximately.

After all that time and effort, Ethan was finally able to get the care he needed when a U.S. Circuit Court of Appeals in Richmond, VA, the fourth circuit, said the decision made by the insurance company was arbitrary, ridiculous, and completely inconsistent with any kind of medical standards because it was obvious that Ethan needed the therapy that all of his health care providers said he needed. In fact, the insurance company said: We don't want Ethan to get this therapy. He is never going to walk. It is not going to do him any good. We are not paying for it.

Well, the Fourth Circuit Court of Appeals found, not surprisingly, that Ethan's doctors, with training and experience in treating children in his condition, knew better than some insurance company clerk sitting behind a desk somewhere. Unfortunately, it took years to get this accomplished—years of being in court and years of effort by Ethan's family.

Young Ethan, under our Bipartisan Patient Protection Act, would have had a right to an immediate internal review within the insurance company

and, had that been unsuccessful, to an external independent review, where the odds are almost 100 percent that he would have been successful since every single doctor in all areas of specialty treating Ethan said he needed this daily therapy to keep him from becoming bound up and constricted.

This is a perfect example of why we have to do something about what health insurance companies and HMOs are doing to people in this country.

Now, specifically to the amendment offered by my friend from Arizona. It is critically important that patients have access to all clinical trials, including FDA-approved clinical trials. The FDA-approved clinical trials are where much of the cutting edge research is being done in the area of cancer. For many patients around this country—I spoke of one yesterday—that is the place of last resort. They have nowhere else to go. When chemotherapy, surgery, all these other cancer treatments are not successful, they are left with one option, which is to participate in a cutting edge clinical trial.

Unfortunately, if that is not paid for by their HMO or the insurance company, many times they have nowhere to go. Our bill specifically covers these clinical trials. We think it is very important that HMOs and insurance companies cover them. The competing bill does not. This amendment specifically covers that provision.

Second, access to specialty care. We simply want patients to be able to go outside the HMO when that is their only option. We support the amendment, and I urge my colleagues to vote for it.

The ACTING PRESIDENT pro tempore. Who yields time?

Mr. KENNEDY. Madam President, I understand we have 5 minutes left?

The ACTING PRESIDENT pro tempore. Six-and-a-half minutes.

Mr. KENNEDY. The other side has 28 minutes?

The ACTING PRESIDENT pro tempore. Yes.

Mr. FRIST. Madam President, I will speak for about 5 minutes and then I will be happy to yield the floor. I want to reserve our time in the event someone else wants to speak. Right now, I will plan to only speak for 5 minutes of our time.

For those who are just beginning to pay attention, about 35 minutes from now we will be going to a vote on the amendment by the Senator from Arizona which addresses issues of clinical trials, coverage of clinical trials as one of the patient protections in the Patients' Bill of Rights, and also access to specialists.

On the floor last night, we spent about an hour and a half walking through the very critical importance of access to clinical trials for the individual patients who can potentially benefit. Remember, clinical trials are

investigations and experiments. We don't know if you can benefit from a trial, but it is cutting edge. We want to expand access to these clinical trials as much as is reasonable.

In addition, access to clinical trials is critically important from a societal standpoint, because without an adequate number of people participating in clinical trials, there is no way to translate the tremendous investment that we put into research and basic science. We must learn through clinical trials, clinical experiments, and investigations. Ultimately, the knowledge ends up in clinical application to benefit people who have heart disease, lung disease, myasthenia gravis, mental health problems, or who are recovering from stroke. So it is critically important in terms of benefitting individual patients and society at large that we can do this transformation or translation of basic science into clinical application.

I have been blessed to be able to participate in that process as a physician and clinical investigator. I have been personally involved in a number of clinical trials. I obtained consent for those trials and have given the interventions, whether it was an artificial heart or pharmaceutical agent. As a physician and investigator, I have participated and seen the great value in those clinical trials.

In the Frist-Breaux-Jeffords bill, we include clinical trials as one of the major patient protections. We feel strongly about this particular right.

The Senator from Massachusetts, in responding to my comments, mentioned two things. One, studies show these clinical trials do not cost very much. I have two points in response. First, we do not know how much it is going to cost. I made that case on the floor last night. Second, there have been several studies in one field—the field of cancer. However, what we are putting into the Frist-Breaux-Jeffords bill goes much beyond cancer.

The McCain-Edwards-Kennedy bill goes beyond cancer as well. The cost of those blinded, prospective peer-reviewed studies—when you look at artificial hearts and lasers and expensive technology—all of which are part of FDA, simply have not been calculated. We do not know how much it is going to cost. Some studies have examined the cost for cancer, and many of those are cost effective because the trials are done in centers of excellence, with the best physicians in the world, investigators who know the literature, and the best practices. There is no way you can extrapolate what we know about cancer and its good studies to those that have been done on heart disease and lung disease. It cannot be done.

Two, the point by the Senator from Massachusetts was made as a criticism—but I take it more as a compliment—that we have expanded cov-

erage in the Frist-Breaux-Jeffords versus the bill which passed on the floor of the Senate last year.

The following passed the Senate a year and a half ago with regard to clinical trials: Plans would cover routine patient costs in NIH, FDA, VA, or DOD approved or funded cancer clinical trials. Why did it pass in the Senate? Because there was good data as to how much cancer clinical trials would cost. We thought it most prudent to pass legislation only for cancer trials.

In the Frist-Breaux-Jeffords bill, we said we are going to expand it beyond cancer; we are going to expand it to all other diseases.

Madam President, I yield myself another 10 minutes.

The PRESIDING OFFICER (Ms. STABENOW). The Senator has that right.

Mr. FRIST. Madam President, what we have done in the balanced Frist-Breaux-Jeffords bill is expand what passed in the Senate last year and take the position we were going to cover all diseases in clinical trials. I do not take that expansion as a point of criticism; I take it as a compliment. It shows we are not entrenched; we are willing to move and do what is right for the American people, given what we know at this point.

Three years ago, we did not have these studies. We are getting them as we go forward. We do not have studies on medical devices and, yes, we may have those studies 2, 3, 4 years from now.

It comes back to the approach in the McCain-Edwards-Kennedy bill which, again, is going to drive health care costs up for all 170 million people who get health insurance from their employers. Everybody listening to me is not on Medicare and Medicaid. If someone has insurance, they are most likely getting it through their employer. Your premiums are going to go up. How much? It depends on how much we add to this bill and how far we go. Therefore, the prudent thing is to add what is balanced, reasonable, and in the best interest of the patients.

The Senator from North Carolina showed a picture of a family. We have seen lots of families. Republicans and Democrats have shown them. What is important is, when we look at the appeals process and access to patient protections, those patients would, under both bills, have access to patient protections—access to a timely appeals process, access to independent physicians in the external appeals process, and the right to sue the HMO.

We will keep coming back to the differences. In their bill, one is not required to exhaust the internal/external appeals process. One can go right to court. We say, no, you have to exhaust the internal appeals process. The Senator from Arizona said that his bill states you do have to exhaust the ap-

peals process. Our reading does not come to that conclusion. Hopefully, next week we can have a debate on exhaustion of the appeals process. We have to read the language and debate the language.

We know what our bill does. We do not have an exception to opt out of the external/internal appeals process. At the end of the day, in the Frist-Breaux-Jeffords bill, we clearly allow suing HMOs, and the McCain bill allows one to sue the HMOs. We will continue to argue that they also allow you to sue the employer. We will have an amendment offered at some point so we can go head-to-head arguing whether or not their language protects the employer. Again, an amendment will be coming.

It is important for my colleagues to understand that when we see these pictures of individuals, the Frist-Breaux-Jeffords bill adds the same protections: internal appeals, external appeals, access to suing the HMO at the end of the day.

The cost issue: When we see pictures of individuals—I hate to keep coming back to cost, but every time I mention cost, I want my colleagues to understand that when we drive up the cost of premiums for the 170 million getting insurance, that means they pay more. However, if you are the working poor, there is some limit as to how much more you can pay. Therefore, we need to balance how far we can go in expanding rights to sue and new coverage with providing necessary patient protections. We have to come back with that balance.

What do we cover in the clinical trials in our bill? We cover all the clinical trials for all diseases for the National Institutes of Health. We have made tremendous progress in this country in increased funding for the National Institutes of Health, in large part because of the leadership of Republicans in this body and in a bipartisan way.

There are about 4,200 clinical trials in NIH, and about 1,800 of those are cancer trials. Yes, we have expanded coverage compared to what passed 2 years ago. Two years ago, there was a universe of 1,800 trials at NIH. Now it is up to 4,200. All clinical trials in the Department of Defense are covered also in our bill. Additionally, all clinical trials in the Veterans' Administration are covered under our bill. There is somewhere around 40,000, 50,000, 60,000 U.S. researchers, clinical investigators doing the investigations like I was doing before I came to the Senate, participating in those trials.

Last night, I mentioned an issue which we have not really talked much about in this Chamber, and that is when there is a clinical trial, there can be an adverse reaction. We know that. We have held hearings in oversight on human subject protection.

Last night, I mentioned the fact that there are adverse reactions by definition when you are experimenting on human beings, which clinical trials are. You have good reactions and bad reactions. Bad reactions can result in the loss of an arm, or it can result in death. Clinical trials can result, unfortunately, in adverse reactions. We need to minimize that over time.

Now, under the McCain-Edwards-Kennedy bill, they can sue with unlimited damages and on the basis of that adverse reaction. The trial lawyer will sue the physician for sure, but now, under this new cause of action in their bill, we open the door to suing or potentially suing the HMO because we are forcing them or encouraging them to pay for these clinical trials. I would like to see some modification in the language so we do not open that door.

The amendment by the Senator from Arizona, which I think is a very good amendment addressing the importance of clinical trials, also addresses access to specialists. In the Frist-Breaux-Jeffords bill, we feel strongly that you do need to make sure people in managed care, HMOs, have appropriate access to specialists.

We require timely coverage for access to appropriate specialists when such care is covered by the plan. If the plan determines there is no participating specialist that is available to provide that care, the plan is required to provide coverage for such care by a nonparticipating or an out-of-plan specialist at no additional cost.

Mr. KENNEDY. Will the Senator yield on that point?

Mr. FRIST. I will be happy to yield.

Mr. KENNEDY. The plan makes the decision that specialty care is necessary. However, if the plan says no and the patient believes that it is necessary, what rights does the patient have to question the decision that is made?

Mr. FRIST. I appreciate the question from the Senator from Massachusetts. That circumstance is going to happen. We know the HMOs, at least historically, will do anything they can to restrain care and narrow it down. That is the importance of having—it is in your bill and in my bill—a very quick, rapid internal appeals process.

Then the response is: What if the internal appeals process says no? Then you can go to the external appeals process. Who is in that external appeals process? We will come back and debate that later, I am sure, as well. The patient goes through the external appeals process under our bill in a rapid, timely way. He or she makes the case, and the person who makes the final decision, looking at all the data and all the information is an independent—not just a clerk, not a bureaucrat, not somebody back at the plan—but an independent—that is the word used. An unbiased physician makes that final decision.

Mr. KENNEDY. If I understand, and we will have a chance to talk about the appeals process—

Mr. FRIST. Madam President, let's take this time off—

Mr. KENNEDY. We only have 6 minutes.

Mr. FRIST. If we can take the time we use appropriately off each side.

The PRESIDING OFFICER. Is there objection?

Mr. KENNEDY. I only have 6 minutes left.

The PRESIDING OFFICER. The Senator from Massachusetts has 6½ minutes.

Mr. KENNEDY. I will take half a minute. Can the Senator show me where the appeals provisions are in his bill with regard to speciality care? Can he refer me to that in his proposal? My understanding is that there is no appeal by the patient. Once the judgment is made to reject the speciality care, there is no appeals provision. The Senator from Tennessee has given us an assurance that there is. I ask—not right now—if he can give us the parts of his legislation that indicate that because we have not been able to see that.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. FRIST. Madam President, in response, any of these medically reviewable decisions—any of them—can go to the appeals process, and speciality care would be one of those. When you are talking about care and access to speciality care for a particular problem, you can go through our appeals system very specifically.

I will close because there are other people, and I would like to reserve the remainder of my time.

We have not talked much about access to specialists. It is critically important. In the Frist-Breaux-Jeffords bill, we have a separate provision for access to a specialist, especially access to an obstetrician and gynecologist. We require plans to cover OB/GYN care under the designation of a primary care provider. Thus, providing direct access to a participating physician who specializes in obstetrics and gynecology. Additionally, access to specialists should also take into account age appropriateness by providing access to pediatricians.

I believe strongly this amendment by the Senator from Arizona should be supported. It addresses, in a sense of the Senate, support for clinical trials, support for breast cancer treatment, and support for access to specialists.

I yield the floor.

Mr. KENNEDY. If I could have the attention of the Senator from Arizona, he has 5 minutes remaining. The Senator from New York has been active and involved in the clinical trial issue and will address it.

May I yield the remaining time to the Senator from New York?

Mr. MCCAIN. Could you yield 2 minutes so we could have 3 minutes at the end?

Mrs. CLINTON. That is fine.

The PRESIDING OFFICER. The Senator from New York.

Mrs. CLINTON. I rise in support of this important sense of the Senate. I have a question to address to the Senator from Arizona who has done so much to bring this issue of clinical trials to the forefront. We heard yesterday important testimony from the head of the National Cancer Institute, Dr. Richard Klausner, who testified that clinical trials are not more expensive than standard therapies and that we need to make them even more accessible. This is what the sense of the Senate provides, what the underlying bill provides.

Probably the premier institutions in our country that deal with cancer, the large cancer centers, are the source of so much of the research done that translates into therapies, treatments and cures, for people suffering from cancer.

I ask the Senator from Arizona, I am sure his sense of the Senate as the underlying bill includes these cancer centers, places such as MD Anderson in Texas, Sloan Kettering in New York, or Dana-Farber in New York. Is my understanding correct that the cancer centers and the research they do as qualified research entities are included in the sense of the Senate?

Mr. MCCAIN. I say to the Senator from New York, she is absolutely right. That is the intent of this legislation. I appreciate the fact she is bringing it to the attention of the Senate to make clear the sense-of-the-Senate resolution.

Mrs. CLINTON. I thank the Senator from Arizona. I congratulate him on his leadership on the underlying bill and on this important sense of the Senate which clarifies that clinical trials are an essential part of modern medical practice and providing the opportunity for physicians to refer patients for these lifesaving treatments. Although they are experimental, it is a way we make advances in medicine which eventually help everyone.

I yield the remaining time.

The PRESIDING OFFICER. If neither side yields time, time will be charged equally to both sides.

Mr. FRIST. How much time remains?

The PRESIDING OFFICER. The Senator has 13½ minutes.

Mr. FRIST. I rise to speak about the amendment on the floor which is the amendment by the Senator from Arizona which addresses the issue of access to clinical trials and access to specialists.

There is a section on access to appropriate care for women and men in terms of breast cancer. For our colleagues, these are issues in the Frist-Breaux-Jeffords bill. My bill is not on

the floor of the Senate. We are introducing amendments to the Kennedy-McCain-Edwards bill, and we are contrasting the two to say: Should we amend their bill? Should we pull back in areas they have greatly expanded over the last several months? Or should we modify?

This amendment is a sense of the Senate expressing the importance of clinical trials. As someone who has been engaged in clinical trials testing as to whether or not certain drugs work to suppress an immune system, I was part of a trial as an investigator. When you perform a heart transplant, the first 2 weeks there is higher incidence of rejection. We used to give powerful drugs and drive the system down, and when we did that, people would become susceptible to infections.

Science led to the field of monoclonal antibodies, more targeted ways of going after rejection. You do a heart transplant, and the first 2 weeks you investigate the new drug. The new drug might work or might not work. If it does work and is more targeted, you get fewer infections and it is a benefit. If not, you figure out the side effects. There could be harm, there may be injury; indeed, in some trials there is death. That is why last night I talked about the need for human subject protections. We need to address that in hearings in the Subcommittee on Public Health and on health education. That needs to be fixed. It is inadequate today. I talked about that last night.

Access to specialists, from personal experience, is very important. We need appropriate access to specialists. This is where balance is important. If we have anybody at any time going to any specialist or any physician, it is inefficient use of dollars, which we know are limited in health care today.

I was not in this Senate when this body designed HMOs. I think the idea was to have more efficient use of the health care dollar for better outcome. That is translated to better coordination. The pendulum has swung too far that HMOs are in the medical decision-making process, moving the doctors out. We are trying to correct this in the Frist-Breaux-Jeffords bill and the McCain-Edwards-Kennedy bill also, but it goes too far.

If I do a heart transplant, the next day someone hears about it, and it is in the newspaper. In the early days, everybody called my office if they had a problem with a chest pain. I was a heart transplant specialist, trained to fix hearts, but people came in with heart murmur, with sore ribs, and they came directly to me. It doesn't really make sense to use my time, and I am not set up to make a diagnosis whether it is esophagus pain or rib-cartilage pain. That coordination we need to have. That is part of managed care. That is why we can't, in our effort to beat up on the HMOs, destroy managed

care coordinated aspects of health care today. That is where we can go too far. If we destroy coordinated care and destroy all managed care and destroy all HMOs, the people we hurt are those individuals whose pictures we have seen all around because they lose their insurance.

Then they don't have access to get into this system where we are guaranteeing the rights they deserve.

Again, it comes back to the balance of going as far as we can but not going overboard and promising everybody everything in a disorganized way.

I mentioned access to specialists. It is a little bit of a fine line because we want to be able to coordinate people so they can get the care when they need it without going through hoop after hoop, which HMOs have an incentive to do—because the more hoops people go through, the more of a backup there is, and people will say, I am not going to fool with this anymore, I give up—as a way of rationing care.

That is what we are trying to eliminate. The Frist-Breaux-Jeffords bill I believe does that. The McCain-Kennedy bill attempts to do that and in some ways goes too far and moves too much in the direction of destroying coordinated care. Again, this is going to come out in the debate as we go forward.

We went through costs last night. How far do you go in terms of promising access to investigations and clinical trials? You can go keep enlarging and enlarging. I talked about it being enlarged in our bill, from cancer to all diseases. You can keep going further. But there is a cost.

The CBO, I think, has done a very poor job in estimating the clinical trial aspect—again, because I have looked to see what their assumptions were, and they just weren't based on factual data. They have to do the best they can. People have not done the studies to do the cost estimates. It grossly underestimates. The difference between the Kennedy-McCain bill and the Frist-Breaux-Jeffords bill is significant. It is about 50 percent. I don't know the exact figures, but ours is about a little over 50 percent of what their cost is.

The Congressional Budget Office estimates raise their premiums by a factor of .08. If you agree with what most economists tell us, a 1 percentage point in premium increase results in the loss of insurance for 200,000 to 300,000 people. That means the difference between my bill and their bill is that it costs about 180,000 people their insurance, they become uninsured, if you agree with that assumption.

I mentioned that because that is a tiny piece of this bill—180,000 people become uninsured who do not become uninsured in my bill. It is a little piece of the bill. Remember that this is one of many patient protections. And you

have the appeals process—internal external. Then we have the lawsuits. With this one little part, you have 180,000 people losing their insurance that you might not otherwise have. But my bill causes people to lose insurance as well. It is just not as much as they do. I think that cost factor again comes down to balance.

Susan Miller, who is the office manager of Miller Equipment Company in Heiskell, TN, that has 19 employees, wrote to me:

At the present time we offer health care coverage to our 19 employees. We pay the employee's coverage and they have the option to cover their dependents. We have had some health problems among our employees in the last few years, so our options in looking at new insurers have been limited. We received a 30% increase in our premium last April when we renewed and, from what I'm hearing, I can expect as much next year. I do not know how long we will be able to absorb these increased costs and still be able to give our employees at least a cost of living raise. We already have a \$1000 deductible of which the company covers \$750. The company cannot afford to cover any more.

She closes:

I am just afraid that if we have to reduce coverage or require the employee to pay part of the premium they will just drop the insurance altogether.

Robby Esch from the Knoxville Computer Corporation, Knoxville, TN, with about 29 or 30 employees, again tells the story in an attempt to explain how we just can't keep driving those cost of premiums up.

He says:

This request is for you to take into consideration, Senator Kennedy's Patients Bill of Rights Bill and what kind of devastation this could have on small businesses. As the cost of health care rises (roughly 12%-year), it places great stress, on a small-business, to provide benefits of this type. All too many businesses are unable to provide health care coverage for their employees for no other reason than the cost. If costs keep rising at the current rate, many companies will have to make the same sacrifice in order to survive.

As increased pressure is placed on small businesses such as increasing tax burdens and this proposed Patient's Bill of Rights, it brings more job losses and devastation into the realm of possibility.

I have letter after letter after letter.

Again, I am not arguing that we should not pay for these new rights, but we need to understand that these are rights we are guaranteeing. Where we have the opportunity to inject some balance, we must do so because we are guaranteeing these rights at a true cost—a true cost that translates down to uninsurance or loss of insurance and down to the faces of the families we have seen on this floor again and again over the last several days.

The Senator from Arizona commented on the statement of administration policy. The President issued a statement yesterday. I am sure it has already been made part of the RECORD. I don't think we need to do that at this

point in time. But, again, the President of the United States made it very clear. It says:

The President objects to the liability provisions of S. 1052.

The President will veto the bill unless significant changes are made to address his major concerns—in particular, the serious flaws. The Senator from Arizona listed a number of those.

I don't think we need to delay the debate because the President in his analysis says one thing, and the Senator from Arizona says their analysis is incorrect. That is why these amendments need to come to the floor so we can debate them.

I think in the Frist-Breaux-Jeffords bill we have shown a willingness to move to where we are compared to where we were last year. A good example is the clinical trials.

I look forward to working with the Senator from Arizona again as we go forward to come to a strong Patients' Bill of Rights. We have demonstrated a willingness to do so.

Two years ago, suing HMOs was basically a liability. For the most part, we said, No, we can't do it; it drives the cost too high. We have been willing to shift to that standpoint. I think we have demonstrated that. We made proposals for changes in language of this sense of the Senate, and I am very hopeful we will be able to do that as we go forward.

I am happy to yield to the Senator from Arizona.

The PRESIDING OFFICER. The Senator from Arizona.

MODIFICATION TO AMENDMENT NO. 809

Mr. McCAIN. Madam President, I have a modification at the desk. I ask unanimous consent that it be made a part of the sense-of-the-Senate resolution.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The modification to amendment No. 809 is as follows:

Add the following to the "Findings" section:

(11) While information obtained from clinical trials is essential to finding cures for diseases, it is still research which carries the risk of fatal results. Future efforts should be taken to protect the health and safety of adults and children who enroll in clinical trials.

(12) While employers and health plans should be responsible for covering the routine costs associated with Federally approved or funded clinical trials, such employers and health plans should not be held legally responsible for the design, implementation, or outcome of such clinical trials, consistent with any applicable state or Federal liability statutes.

Mr. McCAIN. Madam President, I ask unanimous consent to be allowed to speak for 2 minutes on my modification.

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

Mr. REID. Madam President, how much time is left?

The PRESIDING OFFICER. The sponsor has 1 minute, and the opposition 1 minute 20 seconds.

Mr. McCAIN. Madam President, in discussions with the Senator from Tennessee on the issue of clinical trials, the Senator from Tennessee brought forward some legitimate concerns, in our view, about increased liability or increased costs associated with clinical trials. He has asked, and we have agreed, to additional language in the findings section of this sense-of-the-Senate resolution which basically states that research still carries the risk of fatal results and future efforts should be taken to protect the health and safety of adults and children, and, also, while employers and health plans should be responsible for covering routine costs associated with federally approved or funded clinical trials, such employers and health plans should not be held legally responsible for the design, implementation, or outcome of such clinical trials consistent with any applicable State or Federal liability statutes.

I appreciate the input of the Senator from Tennessee. I am glad we are able to come to agreement on this. I hope we can all support the sense-of-the-Senate resolution.

Mr. FRIST. Madam President, my colleague and friend from Arizona and I are in agreement that, No. 1, we need to address the problems in the human subject research today. Second, we don't intend for the bill that we are debating or anything that we might pass to hold employers and plans legally liable for the design, implementation, or bad outcomes of trials.

I very much appreciate being able to work with the Senator from Arizona on these modifications to the underlying amendment. I believe it is important for us to continue to work together as we go forward and address this bill.

I know that we can pass a strong, enforceable Patients' Bill of Rights, with the appropriate modifications, that will be signed by the President of the United States. That would be a great service to the American people, as we go forward.

Madam President, I look forward to supporting the amendment and urge my colleagues to do so.

The PRESIDING OFFICER. The Senate majority leader.

Mr. DASCHLE. Madam President, I will use my leader time just to make a brief announcement.

For the information of all Senators, this will be the last vote of the day and of the week. We anticipate another Republican amendment, after the vote on this amendment, and amendments to be considered today and on Monday. There will be votes Tuesday morning on the amendments to be considered today and on Monday. Should we com-

plete our work on the supplemental and on the Patients' Bill of Rights, as well as the organizing resolution, by Thursday night, I do not anticipate a session or votes on Friday, a week from today. So there will be no votes this coming Friday, a week from today, if we are able to complete our work on those three matters by Thursday night. So the next vote will be cast on Tuesday morning. Consideration of amendments will take place between now and then.

I yield the floor.

VOTE ON AMENDMENT NO. 809, AS MODIFIED

The PRESIDING OFFICER. Under the previous order, the hour of 10:30 a.m. having arrived, the Senate will now vote on or in relation to the McCain amendment No. 809, as modified.

Mr. FRIST. I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The question is on agreeing to the amendment No. 809, as modified. The clerk will call the roll.

The senior assistant bill clerk called the roll.

Mr. REID. I announce that the Senator from Vermont (Mr. JEFFORDS), the Senator from Georgia (Mr. MILLER), and the Senator from New Jersey (Mr. TORRICELLI) are necessarily absent.

I also announce that the Senator from Delaware (Mr. BIDEN) is absent attending a funeral.

I further announce that, if present and voting the Senator from Delaware (Mr. BIDEN) would vote "aye."

Mr. NICKLES. I announce that the Senator from Idaho (Mr. CRAIG), the Senator from New Mexico (Mr. DOMENICI), the Senator from New Hampshire (Mr. GREGG), the Senator from Alabama (Mr. SESSIONS), the Senator from Oregon (Mr. SMITH), and the Senator from Wyoming (Mr. THOMAS) are necessarily absent.

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

The result was announced—yeas 89, nays 1, as follows:

[Rollcall Vote No. 195 Leg.]

YEAS—89

Akaka	Cleland	Graham
Allard	Clinton	Gramm
Allen	Cochran	Grassley
Baucus	Collins	Hagel
Bayh	Conrad	Harkin
Bennett	Corzine	Hatch
Bingaman	Crapo	Helms
Bond	Daschle	Hollings
Boxer	Dayton	Hutchinson
Breaux	DeWine	Hutchinson
Brownback	Dodd	Inhofe
Bunning	Dorgan	Inouye
Burns	Durbin	Johnson
Byrd	Edwards	Kennedy
Campbell	Ensign	Kerry
Cantwell	Feingold	Kohl
Carnahan	Feinstein	Kyl
Carper	Fitzgerald	Landrieu
Chafee	Frist	Leahy

Levin	Nelson (NE)	Snowe
Lieberman	Nickles	Specter
Lincoln	Reed	Stabenow
Lott	Reid	Stevens
Lugar	Roberts	Thompson
McCain	Rockefeller	Thurmond
McConnell	Santorum	Voinovich
Mikulski	Sarbanes	Warner
Murkowski	Schumer	Wellstone
Murray	Shelby	Wyden
Nelson (FL)	Smith (NH)	

NAYS—1

Enzi

NOT VOTING—10

Biden	Jeffords	Thomas
Craig	Miller	Torricelli
Domenici	Sessions	
Gregg	Smith (OR)	

The amendment (No. 809), as modified, was agreed to.

Mr. KENNEDY. Madam President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. FRIST. I ask unanimous consent that I be recognized to offer a motion to commit—

Mr. REID. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator from Tennessee has the floor.

Mr. FRIST. Madam President, I ask unanimous consent that I be recognized to offer a motion to commit on behalf of Senator GRASSLEY, and following the reporting by the clerk, the motion be laid aside to recur after the concurrence of the two managers, and Senator GRAMM then be recognized to offer his amendment pursuant to the unanimous consent agreement of yesterday evening.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

MOTION TO COMMIT

Mr. FRIST. Mr. President, I send the motion to commit to the desk.

The PRESIDING OFFICER (Mr. DORGAN). The clerk will report.

The assistant legislative clerk read as follows:

A motion to commit the bill S. 1052, as amended, to the Committee on Finance and the Committee on Health, Education, Labor, and Pensions with instructions to report the same back to the Senate not later than that date that is 14 (fourteen) days after the date on which this motion is adopted.

The PRESIDING OFFICER. Under the order, the motion is set aside.

Mr. FRIST. Mr. President, I thank the Chair.

The PRESIDING OFFICER. The Senator from Texas is recognized.

AMENDMENT NO. 810

Mr. GRAMM. Mr. President, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Texas [Mr. GRAMM], for himself and Mrs. HUTCHISON, proposes an amendment numbered 810.

Mr. GRAMM. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

(Purpose: To exempt employers from causes of action under the Act)

On page 140, lines 11 and 12, strike “issuer, or plan sponsor—” and insert “or issuer—”.

Beginning on page 144, strike line 16 and all that follows through line 23 on page 148, and insert the following:

“(5) EXCLUSION OF EMPLOYERS AND OTHER PLAN SPONSORS.—

“(A) IN GENERAL.—In addition to excluding certain physicians, other health care professionals, and certain hospitals from liability under paragraph (1), paragraph (1)(A) does not create any liability on the part of an employer or other plan sponsor (or on the part of an employee of such an employer or sponsor acting within the scope of employment).

“(B) DEFINITION.—In subparagraph (A), the term “employer” means an employer maintaining the plan involved that is acting, serving, or functioning as a fiduciary, trustee or plan administrator, including—

“(i) an employer described in section 3(16)(B)(i) with respect to a plan maintained by a single employer; and

“(ii) one or more employers or employee organizations described in section 3(16)(B)(iii) in the case of a multi-employer plan.

Beginning on page 160, strike line 21 and all that follows through line 14 on page 164, and insert the following:

“(3) EXCLUSION OF EMPLOYERS AND OTHER PLAN SPONSORS.—

“(A) IN GENERAL.—Paragraph (1) does not—

“(i) create any liability on the part of an employer or other plan sponsor (or on the part of an employee of such an employer or sponsor acting within the scope of employment), or

“(ii) apply with respect to a right of recovery, indemnity, or contribution by a person against an employer or other plan sponsor (or such an employee), for damages assessed against the person pursuant to a cause of action to which paragraph (1) applies.

“(B) DEFINITION.—In subparagraph (A), the term “employer” means an employer maintaining the plan involved that is acting, serving, or functioning as a fiduciary, trustee or plan administrator, including—

“(i) an employer described in section 3(16)(B)(i) with respect to a plan maintained by a single employer; and

“(ii) one or more employers or employee organizations described in section 3(16)(B)(iii) in the case of a multi-employer plan.

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

Mr. GRAMM. I am happy to.

Mr. KENNEDY. Would the Senator give us some idea as to the time the Senator from Texas wants to consider this amendment?

Mr. GRAMM. The time I want to consider it?

Mr. KENNEDY. How much time would he like on this amendment?

Mr. GRAMM. I don't have any idea. I don't have any idea how many people want to speak. I don't have any idea how many want to speak in opposition or in favor of it. It was my under-

standing that the amendment would be voted on on Tuesday. So I assume people can stay here today and speak as long as they would like to, and people could speak Monday as long as they would like to. But I do not know how many people want to be heard.

Mr. KENNEDY. That is fine. I thank the Senator. I think there was the hope and desire—I don't think there was the expectation that we would vote later in the afternoon today, but there was hope that we could perhaps get a time definite for a vote on that Tuesday morning. I will let the leaders work that out with the Senator from Texas later on.

Mr. GRAMM. Mr. President, I am always amenable to try to work things out. Whatever the leaders work out on it, I am sure I will be happy with it.

May we have order.

The PRESIDING OFFICER. The Senate will come to order. Senators are asked to take their seats or take their conversations elsewhere.

Mr. GRAMM. Mr. President, probably no other issue has created as much concern in this bill as the issue of whether or not an employer can be sued in a dispute arising out of the liability sections of this bill. I think people can understand that concern. In America today, we don't require any employer to provide health insurance for their employees, either to pay for it or to pay for it on a cost-sharing basis, or to buy it as part of a plan where the employers pay all of it or part of it. Millions of families—over 100 million families—in America are covered by decisions that employers make out of what, for them, is a good business decision, in terms of trying to appeal to people to work for them in having a competitive benefits package, and out of the concern and love they have for their employees.

All over America, big companies and little companies enter into voluntary arrangements whereby they help buy health insurance for their employees. So, obviously, a big concern in the bill before us is that if a company cares enough about its employees so that it is willing to spend its money in joining them to help buy their health insurance, or help them get health coverage, by this act of voluntarily providing a benefit, can they be dragged into State or Federal court and sued under this bill? From the very beginning of this discussion, a relevant issue has been: Can Dicky Flatt, a printer in Mexia with 10 employees, be sued because he made the sacrifice, along with his wife Linda, in helping to set up a health plan so his employees can have access to health care?

Why is this question so important? It is important because there are literally millions of small businesses all over America, and some businesses that are not so small, that have made it very clear in national poll after national

poll that if we write a law where they can be sued as a result of a dispute between one of their employees and the medical plan that they helped their employee buy into, they are going to drop their health coverage.

They are either going to drop it or they are going to say to their employees: You take my money or your money or some combination thereof and go out and try to buy the best insurance you can buy, but this small business cannot afford the risk of the kinds of liability claims that are being granted by courts all over America which could put this business into bankruptcy and destroy everything that mom-and-pop businesses, such as Flatt Stationery in Mexia, TX, have worked two or three generations to build.

That is the issue. As we have talked about this bill, over and over the question has been raised: Are employers exempt from lawsuits? Can they be sued as a result of their decision to provide insurance? What proponents of the bill have consistently said is: No, you cannot sue employers.

What I would like to do is begin by explaining that is not so. I would like to then talk about my State, Texas, which has a prototype plan—in fact, the proponents of the bill before us often talk about how much their bill is like the Texas bill—and I want to talk about the debate Texas had about suing employers. I want to talk about their decision not to let employers be sued, the language they used, and then I want to talk about the amendment I have submitted and how that amendment does not allow employers to be sued and how it settles this issue once and for all.

First, as we have all heard, seen on television, and read in the newspaper as this debate has evolved, proponents of this bill have said over and over again that employers cannot be sued. When you look at the language of the bill, basically it appears they are right.

In fact, on page 144 of the bill—I know my colleagues in the Chamber can see these words. I do not know if other people watching the debate can, but I am going to read part of it anyway so you will hear it.

On page 144 of S. 1052, which is the McCain-Edwards-Kennedy bill, there is a very bold headline that says: "Exclusion of Employers and Other Plan Sponsors." Obviously, that headline is promising. Then it says:

(A) Causes of Action Against Employers and Plan Sponsors Precluded.—

Then it goes down and sure enough says: "Subject to subparagraph (B)" and, obviously, that should be an immediate warning because what they are about to say is relevant only in the context of a paragraph you have yet to read:

Subject to subparagraph (B), paragraph (1)(A) does not authorize a cause of action

against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment.)

When the proponents of this bill say you cannot sue employers, they are obviously talking about paragraph (A). In fact, if the provision related to employers ended right there, then we would be in agreement on this issue that you could not sue employers. But unfortunately, as is true in so many cases of this bill, it does not end right there. What happens is it goes on to the paragraph (B), which is mentioned above, and it says: "(B) Certain Causes of Action Permitted.—"

Then it goes on to say:

Notwithstanding subparagraph (A), a cause of action may arise against an employer or other plan sponsor. . . .

The bill goes on for several pages talking about circumstances in which an employer can be sued. Then it excludes in this section suits against physicians and it excludes in this section suits against hospitals, but it does not exclude suits against the employer that bought the health insurance to begin with. That is the problem.

The question is, How do we fix it? This is where it gets to be very difficult. There were many efforts in the Texas Legislature in deciding what to do about suing employers, and they tried to come up with all kinds of ways where you could sue under some circumstances, you could not sue under others, and they finally decided that if they wanted to be sure that businesses did not drop health insurance out of fear that they would be sued simply because they bought health insurance for their employees, that the simplest and safest—because they were very worried about people losing their health insurance and given that we have 43 million Americans today who do not have private health insurance or do not have health insurance coverage of any kind—they decided that the safest route was to have an outright carve-out where they said:

This chapter does not create any liability on the part of an employer, an employer group purchasing organization . . .

And this language is right out of their HMO reform bill, their Patients' Bill of Rights. They also talk about licensed pharmacy and State boards being exempt but that is not at issue here. And they go on to say that an employer, an employer group that purchases coverage or assumes risk on behalf of its employees is not liable under their legislation.

Many people have claimed the bill before the Senate is virtually a mirror image of the Texas law. In fact, the bill before the Senate allows employers to be sued, whereas the Texas Legislature, out of their deep concern especially about small businesses canceling their health insurance if they could be sued under any circumstance, decided to do

an outright carve-out, where they excluded employers so there were no ifs, ands, or buts about it. You cannot sue an employer in Texas that provides health insurance for its employees.

Many of our colleagues have talked in glowing terms about how great the Texas program is because businesses have not canceled health insurance. One of the big reasons employee health insurance has not been canceled is because employers are exempt under the Texas law. No ifs, ands, or buts about it.

I am sure we will hear from people who say they don't want to sue employers but are not willing to exempt them. We will be hearing arguments why they should not be exempt. The human mind is a very fertile device. We can come up with all kinds of possibilities, many of which have no relevance whatsoever to anything on this planet, and you can almost always come up with some convoluted situation in which something that generally is nonsense might make sense.

When the Texas Legislature looked at this issue, they looked at a lot of possibilities. One of the problems they had, however, when they took each of the possibilities and worked it out, they could not figure out how to let employers be sued for anything without opening up a floodgate of unintended consequences.

Let me give the most damning example. What if the employer calls the health plan and tries to tell them how to run the health plan. None of us are for that. Here are relevant points. First, the health plan can be sued if they act in an arbitrary and capricious manner in responding to the employer, so there is still a party standing there that can be taken to court and be held accountable. Why would a health plan put itself in a position of being sued by doing something that violates the structure that has been established in Texas law, and with the passage of a Patient's Bill of Rights will be established in national law because an employer puts pressure on them?

Second, under both Texas law and the national law as proposed by Republicans, Democrats, and all the variants of all the bills proposed, the hallmark of each of those bills is external review. If I have a problem and I don't feel I have gotten the treatment I need, I can go before a panel of specialists, that is doctors who specialize in this area of medicine. They are independent of the health plan and, therefore, by definition, independent of any employer that bought coverage under the health plan. If they agree with me, I get the health care; if they disagree with me, I can go to Federal court and sue for the health care or go into court somewhere depending on the bill we are talking about.

In the context of this bill, health plans are not final decisionmakers. A

panel of independent physicians takes the role of final decisionmaker. When people say, let us sue the employer, if the employer is the final decisionmaker, the plain truth is, when we look at the bill before the Senate or any bill proposed, who is the final decisionmaker? Not the employer, not the plan, not the physician treating the patient. The final decisionmaker is the external review process.

Here is the problem, and this is something those who were working on the Texas law, which is our prototype that has been in effect and which has worked relatively well, discovered in trying to write the law where you could sue the employer only if the employer was a final decisionmaker or intervened in any way. They found every time they tried to do that, you got unintended consequences. For example, many health care plans will appoint one or two of the employees of the employer to interface with the health care plan as part of their looking at new benefits or looking at the cost of relative add-ons or a grievance process. Any time you have that interfacing, which many employee groups demand, want, and deserve, and employers are eager for them to have because they want them to be happy with the plan, then you get them involved as a decisionmaker, and potentially, in a lawsuit—even in negotiating and putting the plan together. To what extent are you making a final decision when you decide something can be covered or can't be covered?

Basically, while the Texas legislature recognized it may very well be you might have one bad employer who tries to intervene in the health care system, there were a lot of checks and balances to protect from that. First, you could sue the health care plan if they allowed the employer to do it. Second, the final decisionmaker is not the health care plan, but an independent panel of physicians. Finally, whatever avenue for lawsuit you opened up against the employer created more problems than it solved. It created numerous unintended consequences where a very effective plaintiff's attorney in a sympathetic court might be able to argue that something we would agree on the floor of the Senate was perfectly reasonable behavior in negotiating a plan or negotiating grievances with a plan that the firm's employees might do and in doing so they would be the agent of the employer, that could end up bringing a small mom-and-pop business into court and a judgment be rendered against them because they cared enough to buy health insurance and in the process are driven into bankruptcy.

The problem is, and what will happen is, small businesses—and some large businesses—will look at the provisions of the Federal law and say under this law, notwithstanding the fact that supposedly employers are exempt, a cause

of action may arise against employers or other plan sponsors, and they will look at all this language that goes on and on and on until it finally, interestingly enough, and amazingly, after going on for several pages, describing conditions under which the entity that bought the health insurance can be sued, which is the employer, it then concludes that you can't sue the physician and you can't sue the hospitals under this section of the bill, but you can sue the employer.

Now, here is the point. If there is any ambiguity with regard to suing employers, what is going to happen all over America is employers are going to get out of the business of buying health insurance. What was decided in Texas, I think, was the correct decision and therefore I have proposed it as an amendment to the Federal bill.

What was not decided was that there were no possibilities for abuse by employers. That was not decided by the Texas Legislature. It doesn't take much imagination to figure out how an employer's behavior might be bad, or why an employer might try to influence a plan.

The Texas Legislature concluded that there are all kinds of provisions in the bill to protect against that, including that anything a plan does that an employer or anybody else tries to get them to do that is harmful, they can be sued for.

Another Senator here on the floor is a great prosecutor. He understands health plans can be sued because if some bad actor employer wants them to do something wrong, but they are not going to be eager to step into the courthouse.

Second, the legislature concluded that ultimately the final decisionmaker was the external appeals process, which was totally independent of both the health plan and the employer.

So they concluded, wisely in my opinion, that they would not create any liability on the part of the employer or the employer group's purchasing organization.

This amendment is very straightforward and very simple. It does not say that there could never be a circumstance where employers could misbehave. But it concludes that the law of unintended consequences is such, and the protections in all of our Patients' Bill of Rights are strong enough that the most prudent avenue to follow is to exempt the employer because if we don't, we are going to have millions of Americans losing their health insurance.

I urge my colleagues to look at both sides of the argument. Obviously, with a fertile mind you can come up with some hypothetical examples where employers might do bad things. But you can also come up with far more examples where they might be doing good and proper things. Yet under this bill,

and under any language you could write letting employers be sued, or where they would be in danger of being sued, and, therefore, would drop health insurance, the prudent action for America is a prudent action that the most successful plan in America followed when it became basically the blueprint. That was the action that the Texas Legislature followed when they decided looking at the whole picture, the pros and the cons, that the safest thing to do was to totally exempt people who care enough to buy the health insurance—the employers.

Under the Texas plan you can sue the HMO. You can sue the insurance company, but you cannot sue your employer who has joined with you in a partnership in buying your health insurance.

I think this is prudent policy. I believe if we adopt this amendment that we will dramatically minimize the number of people who will lose their health insurance as a result of this bill.

But I am absolutely confident that if we do not adopt this bill, and if we make it possible in any shape, form, or fashion to sue employers who are helping people buy health insurance all over America, small and large employers are going to cancel their health insurance.

We all say we don't want that to happen. We all say we don't want to sue employers. Yet the bill before us allows employers to be sued.

I urge my colleagues to look at both sides of this argument and to take a prudent course by adopting this amendment.

I know several of my other colleagues wanted to speak. If I can, my dear colleague from Texas, who is the cosponsor of the measure, has to catch a plane. With the indulgence of those who are on the floor, I would like to yield the floor and allow her to be recognized.

THE PRESIDING OFFICER. The Senator from Texas.

Mrs. HUTCHISON. Mr. President, I thank those who are waiting to speak for allowing me to talk on this amendment of which I am a cosponsor because I am very familiar with the Texas law, as one would hope. I know about the success it has had since it was enacted in Texas.

I have heard many people around the country talking about the Texas law, and that it would be a model for what we would want to do for every State in America that doesn't already have laws. I think it is an important point that we are not trying to preempt State laws in the Frist-Breaux-Jeffords plan. I support that. I think it is a very important point.

The Kennedy-McCain-Edwards bill preempts the States that have already acted. I don't think we need to do that. The Texas law is serving very well in Texas. Yes. We can cover the plans

that are not covered by State law in the Federal plan. But there is no reason to preempt a State law that is already working in a particular State. We all know that every State has different needs. People have different ways to look at things. Oregon has been a leader in many health care issues which might not work in Texas. That goes across all the State lines.

I will make the point about this amendment as it would apply to the Federal parts of the law. It has worked in Texas.

The No. 1 thing that we want to do in this country is encourage more people to have health care coverage. We want them to have good quality health care coverage, which is why we are passing a Patients' Bill of Rights.

There have been some concerns raised about patients' rights with an HMO. I have heard many stories that are very sad, such as an HMO failing to respond to a patient.

That is why all of us want to pass a Patients' Bill of Rights. It is why we want a woman to be able to go see an OB/GYN without going through a gatekeeper. We want pediatricians to be able to be seen without going through a gatekeeper. We want every American who has an HMO to be able to go directly to an emergency room.

These are very important rights about which we are speaking. But I think it is most important that we also encourage employers to give health coverage options to their employees. We want to make sure that everything we are doing will be an encouragement—not a discouragement—for employees to get health care coverage because generally the best plans are those that are based on an employer relationship.

Keeping that in mind, the Texas law says:

This chapter does not create any liability on the part of an employer, an employer group purchasing organization, or a pharmacy licensed by the State Board of Pharmacy that purchases coverage or assumes risk on behalf of its employees.

Specifically, in Texas law we have a prohibition against suing an employer because we want to make sure that an employer is encouraged to continue to offer health care options for employees.

I want to give a couple of statistics that talk about the importance of this and how fragile it might be.

In looking at some of the reasons that people give for not having health care coverage, we have some interesting statistics.

According to the Employee Benefits Research Institute, a 5-percent increase in premiums would cause 5 percent of small businesses to drop coverage. A 10-percent increase in premiums would cause 14 percent to drop coverage.

There is also some good news in these figures; that is, if you have a 10-percent

decrease in premiums, 43 percent of small businesses would be more likely to offer coverage.

I have talked to small business owners. I can tell you that they would like to offer coverage even when they can't. Even when they can't, they have found that it is too expensive, but they feel badly about it. They would really like to do that.

But the other statistic we have seen is that the number of people who are uncovered are actually people employed. They do not take health care coverage because it is too expensive even though the employer pays part of the premiums. That is the No. 1 reason given by an employee who is not covered, even though they have access to health care coverage.

This is an employee who says: I need that money in my paycheck more than I need the health care coverage for myself or my family. That is an astounding thing to say because most employees would rather have health care coverage even more than higher wages because they know the importance of that for themselves and their families.

So I do think when we look at the bill that is before us today that one of the key components should be that we try to keep the costs to employers down. That is why we want to specifically say in the bill that employers will not be able to be sued.

We have had some debates here where it seems that some of the people who are supporting the McCain-Kennedy-Edwards bill think employers cannot be sued. What we want to do is clarify that. Whatever language it takes, we want to do that. But we know the Texas language has worked. We know it has been referred to. So we want to put the Texas language on suing employers in the bill to assure that costs will not be raised, and to assure that employers will be encouraged—not discouraged—from offering their employees health care benefits.

Last point—and then I will turn this over to the others who are waiting to speak—I have talked to big employers and small employers who now offer health care coverage who say, unequivocally, if it is not very specifically clear that you cannot sue an employer for offering health care coverage to employees, they will drop the coverage. They will just give the employee a certain amount and say: You find health care coverage with this amount of money the best way you can. I can't be connected with it because I can't afford to take the risk that I might be liable in the millions of dollars that are provided for in the Kennedy-McCain-Edwards bill. That would be too costly, so I can't do it.

Even really big employers would drop their coverage. We could wreck the health care system and the stability of the coverage that people have if we do not explicitly keep employers from

being able to be sued for giving their employees this very important option as a perk of employment.

This is the basis of coverage in our country. We cannot take a chance that we would mess it up for the people who are covered in our country, and those we hope will be covered, if we encourage employers to act. I hope we can adopt this very clear language that came right out of the Texas law where it has worked very well to make sure that we encourage employers to continue to offer health care coverage for their employees.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Missouri.

Mrs. CARNAHAN. Mr. President, it is important to remember that what underlies today's debate are the lives of real people. This is about healthy new babies entering the world, parents worrying in the middle of the night when their child has a fever, and families coping with a terminal illness. It is about the quality of life.

When your family is dealing with a medical crisis, it is time to come together in love and support. It is not the time to have to argue with an HMO over whether they will allow your child to go to an emergency room or whether your elderly parent is allowed to see a specialist.

Physicians should not have to ask permission from HMOs to provide patients with the care they need. There is something fundamentally wrong with our health care system when medical decisions are not made by doctors, but by HMOs.

One year ago this month, a comprehensive Patients' Bill of Rights came before the Senate. It was a strong bill that protected all Americans. It was designed to put patients before profits. It held managed care organizations accountable for their actions. It would have made a difference. What happened to this legislation? It failed by one vote—one vote.

My late husband, Mel Carnahan, understood the power of one vote in the Senate. He ran for the Senate because he believed that his one vote would make a difference. I am in this Chamber today because I share that belief. That is why I support the McCain-Edwards-Kennedy Bipartisan Patient Protection Act.

Many Missourians know from firsthand experience the power that a patient protection law can have. In 1997, Governor Mel Carnahan signed into law one of the most comprehensive HMO consumer protection laws in the country.

What happened in Missouri during that time took real political courage. Legislators such as Tim Harlan and Joe Maxwell stood up to the powerful HMOs and said: Enough is enough.

Those who opposed the Missouri HMO reform law—like those who oppose the

McCain-Edwards-Kennedy bill—said that costs would increase significantly, employers would drop coverage, and patients would crowd the courts with lawsuits.

How many of these dire predictions came true? None; absolutely none.

The insurance lobby predicted costs would increase by 24 percent. After the law was passed, insurers, business groups, professional medical societies, and health systems called for a review of how much the new law would cost. Do you know what the report concluded? That the average price increase would only be about 2 or 3 percent.

I have not heard a single complaint from an employer that they have had to drop health care coverage for their employees or that they have experienced an unacceptable increase in premiums.

The insurance lobby predicted people would lose their health insurance. Wrong again. Rates of insurance went from 87.4 percent in 1997 to 91.4 percent in 1999.

The insurance lobby predicted there would be a flood of lawsuits. There has been only one lawsuit—that's right, one law suit. The problem is that State laws can only go so far. Federal laws require that thousands of Missourians be covered by Federal—not State—law. I stand in this Chamber today in support of the bipartisan McCain-Edwards-Kennedy bill because it is the only bill before the Senate that protects all Missourians and all Americans.

Recently, my office received a call from Peggy Koch, who lives in Winona, MO. A year ago, in February, Peggy's daughter Kim began having migraine headaches every day. Her headaches became debilitating. She could not work. She stopped attending college. She slept all the time and was in constant, severe pain.

Kim needed to be admitted to the Saper Clinic in Michigan, which had the ability to give her the specialized care she needed. She had a referral to receive the care, but her insurance company would not approve it.

When Kim's mother called my office for help to get Kim's insurance company to cover this needed treatment, there was nothing I could do to help her since current Federal law does not protect her.

I can do something now. I can fight for a law that protects her and other families in similar situations.

In the end, after weeks of continuous wrangling and extreme stress, the insurance company paid for 7 of the 15 days of needed treatment.

Mrs. Koch decided that Kim's health was more important than bills and told the hospital to keep her daughter until she completed the 15-day program. The treatment worked and Kim has shown remarkable improvement since completing the program. Now they have no idea how they will pay the bills.

The Kochs have always been diligent about paying their bills. They don't know how they will be able to make it with the medical bills that will hit them in the next few weeks and months.

As a mother, I understand what Kim's mother went through. When your child is in such pain, you will do whatever you have to in order to help your child.

What is sometimes forgotten in this debate is that Kim had paid for the insurance. But Kim had no way to force the insurance company to pay for the critical services directed by her physician. That is why we are here—to make sure that HMOs and insurance companies fulfill their commitment to do what is in the best interests of patients. No family should have to make this type of decision.

Today many Missourians currently have the right to access emergency room services without prior authorization from their HMO. I would like to share with you a story that happened 5 years ago before Missouri passed its law.

Doug Bouldin is a registered professional nurse and family nurse practitioner in Troy, MO with over 12 years of experience in emergency medicine and critical care. He told me this story several years ago, and I will never forget it.

Doug was working at a large metropolitan St. Louis emergency department. A husband and wife drove into the garage of his department, but the husband was in cardiac arrest. His team pulled him from the car and began resuscitation efforts immediately.

Doug showed the wife to the family room and began collecting her husband's health history. She said her husband had been suffering chest pain for several days, and when they called their health plan, they were told to drive to a hospital approximately 50 miles from their home instead of going to the closest facility. They passed by four major facilities that could have more than adequately handled his care.

They ended up in Doug's emergency department after he slumped over unconscious in the passenger seat on the highway less than half way to their destination. The doctors were unsuccessful in resuscitating him, and when the physician and Doug went to tell her, the first words out of her mouth were, "Why did they tell us to drive so far?"

Why did they tell us to drive so far? There is no way to answer that question.

I received a letter from Dr. Alan Weaver who works at the Tri-County Medical Clinic in Sturgeon, MO. He wrote to me about the problems he experiences trying to provide emergency care to patients who get their insurance through self-funded plans. Access

to emergency room care is a particular problem when people suffer an injury outside of their health plan's network.

Two years ago, a worker who was covered by a self-insured plan through his employer was admitted for a heart attack into the hospital where Dr. Weaver was Working. His insurance company demanded that he be transferred to a hospital in St. Louis, which is 3½ hours by road, before he was stable. They refused to pay for in patient care. The patient had no choice and transferred to the other hospital.

This patient is the exact reason why we are here today. We need to pass a Federal law to protect these individuals and give them access to emergency room care.

Not all of the problems associated with HMOs involve coverage denials. In many instances, the structure of the current HMO health care system puts up so many barriers for patients to access care that they might as well be denying care. Women are particularly affected by these barriers when they need OB/GYN care.

The McCain-Edwards-Kennedy bill provides women direct access to their OB/GYN doctors. Now, women have to go through a gatekeeper—their primary care physician—whenever they have a healthcare problem separate from their annual exams.

When a woman is experiencing a health problem and needs to see her OB/GYN, it is deeply personal. For a woman to share the full extent of her health problems, she needs to feel comfortable. If she does not feel comfortable, she may not choose to seek the care she needs.

Let's think for a minute about the steps a woman takes just to see her doctor. After entering the OB/GYN's office, she goes to the front desk to check in and explain her health concern to a stranger. If she doesn't have a referral from her primary care physician, she is shown to a telephone.

Now she must call and discuss again what her health problem is with her HMO. Remember, it took courage just to make it into the office, just to walk into the door. Imagine how odd it must feel to be directed to a cold telephone.

After this phone call and hearing that the HMO has denied her request to see a specialist—her OB/GYN, I'm sure you can understand how traumatic this experience can be and how unappealing it becomes to try the process again. All she has sought to do is get the care she feels she needs.

Dr. Gary Wasserman, an OB/GYN in St. Louis, so eloquently sums up this situation stating: "We have created a system that isolates women and infringes on their privacy and dignity."

One final point: I think it is important for everyone to understand that right now, HMOs are totally unaccountable for their actions. No other institution or profession in America enjoys this status.

Is there anyone in this Chamber that would vote to make lawyers, or doctors, or any manufacturer totally unaccountable if they make a mistake that causes an injury?

I don't think there is.

The status quo is unacceptable. Of course, there will be great debate on how to structure this bill. But the bottom line is that a vote against the Patients' Bill of rights is a vote to keep HMOs totally unaccountable.

I don't think this is good policy, and I don't believe that this is what the American people want.

It is time for the Senate to pass the McCain-Edwards-Kennedy bill. As Missouri has seen, HMOs will provide better care when they are forced to step up to the plate.

Federal legislation will allow us to strengthen patient protections for everyone in Missouri as well as in the Nation. We can and should ensure that doctors, not bureaucrats, are making medical decisions. We must ensure that patients are put ahead of profits. We must ensure that it begins today.

I yield the floor.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. THOMPSON. Mr. President, we have heard several anecdotes concerning individuals who are having a problem with their coverage. We must ask yourselves, would those individuals have been any better off if they had no coverage at all? And should an employer be penalized for making the decision to have insurance coverage which may or may not present problems from time to time?

That is what we are trying to resolve, and we will be discussing that issue for several days as to how best to resolve it. But we need to remember the front end of the process. It is always set up because some employer, either a large employer or a small employer, chooses to have insurance and set up an insurance plan for his employees.

That is what we are dealing with here with regard to the amendment offered by the Senator from Texas. This is a very important amendment. I think this is fundamental. This is what we will be discussing today and Monday and Tuesday. It is the fundamental question of whether or not we want to sue not only HMOs for their transgressions, but whether or not we want to sue employers, whether or not we want to sue the people who do not have to set up these insurance plans and can walk away from them if they want to, can have no insurance if they want to for their employees, or they can give employees a certain amount of money and say you go take the headaches. I am talking about those individuals. Do we want to subject them to unlimited liability in lawsuits, too?

We, of course, are focusing on the HMOs. We will have a chance to discuss how far we can go in penalizing these

health care providers without driving up the costs so that we uninsure a bunch of people. As heartrending as some of these stories we hear are, I hope in a couple of years we don't have heartrending stories of people whose employers walked away from insurance, leaving them with no insurance, and stories of people dying in emergency rooms awaiting treatment because they had no insurance at all. Those could be logical outcomes of what we do if we go too far.

We are going to deal with that issue—with what to do with HMOs. But in the process, the sponsors of the bill on the floor have tried to make it clear, I think, that that is the focus, and they are not after the ability to sue, for example, attending physicians. They have been carved out of this bill. They are not interested in suing attending hospitals. They have been carved out of this bill. They are not interested in applying ordinary liability to the external review people and the medical reviewers who are set up in this bill to make objective determinations on coverage and what-not; they only have liability if they engage in gross misconduct.

So all along the way, whether or not you are talking about people who are set up to review these matters, whether you are talking about attending physicians, or whether you are talking about hospitals, the sponsors of this bill have either totally or partially carved them out of the process and said we are not after them, we want to hold the HMOs accountable.

They also say they are not after employers, but they are not willing to carve them out. That is what we are here to discuss today. This basically goes to the heart of the amendment that has been proposed.

As I understand the sponsors of the bill, they say they are not interested in suing employers. Finally, they get down to the other parts of the bill and say, well, there are some instances where employers can be sued if they are directly participating in the decision, for example, to deny coverage, or if they fail to perform any other duty under this act—whatever that might be.

Then they go on for 2, 3, or 4 pages in the bill to describe what direct participation means and what it does not mean—leading one to believe right off the bat that it obviously is not crystal clear as to when an employer might be subject to liability.

What does direct participation mean? My understanding is that in the front end of the process that has been set up to handle claims under this bill, the internal claims in the initial stage of the game, oftentimes in some of these plans you have representatives of employers involved that would be agents, from a legal standpoint, of the employer involved in the front end of this

making decisions on coverage issues. If that is the case, we have built in exposure from the very beginning with regard to this bill. That may or may not be a good thing.

But on the issue of whether or not employers are exposed, I think the answer under this bill is undoubtedly yes. Even if they do the right thing, they don't engage in any willful misconduct, do their best, have some of their employees perhaps involved in the initial stage, and it goes on up through the appeals process, the internal appeal and the external review, and you bring in the independent folks and medical people to analyze it and everybody does their best, still at the end of the day they are subject to being sued, as I read the bill as currently drafted.

I believe everyone who has any experience either on the giving end or the receiving end of lawsuits in this country realizes that if there is any potential exposure at all for the employer, whether or not he is ultimately found liable after a long trial, perhaps, or a motion to dismiss, or a summary judgment motion, he is going to be sued initially. Why in the world would they sue the HMO, and maybe someone else, for punitive damages, let's say, for gross misconduct, for the medical review, or anyone else in the process, and not bring in the employer to take discovery to see the extent to which he may have directly participated?

How much would it cost that employer, who ultimately was exonerated, who didn't do anything wrong? How much would it cost him to buy his way out of that lawsuit, settle his way out of it, or go through the process of a trial and win at the end of the day? That is what employers are faced with—employers who have chosen to set up a medical system to cover these employees to avoid some of these stories we have heard concerning people who are being denied coverage.

This is the result at the end of the day. If you are an employer, you have to ask yourself—and we are not talking about General Motors here alone, we are talking about not only large employers, we are talking about small employers. If you are looking at that kind of a possibility, if this bill is passed as it is, where everybody else besides the HMOs are exempted out except them, and you are looking at that kind of expense, what is going to be your natural reaction to that? I am afraid many people are going to opt out.

There is no question that health care costs have gone up; they are going up already. We are already in double-digit increases in terms of health care costs in this country. That is the reason we set up managed care. We obviously want the best of both worlds. Health care, once upon a time, was going up astronomically. We said, we can't have health care for everybody on demand,

or it will drive us all bankrupt and we will leave a shambles for the next generation. One of the things we did was set up managed care.

We talk about managed care now as if it were some kind of evil enterprise. We set it up; Government set it up. We encouraged it in many different ways in order to bring some cost control to the process because we wanted more people to be covered with insurance. So some of the HMOs that engaged in egregious activities got caught doing things they should not have been doing. States responded to much of that. The State of Tennessee has more coverage now for many of these things than the bill that is on the floor does.

Most States have their own system they have set up. This bill comes along and totally wipes all that out and says there is only so much the States can do. Tell me what it is that needs to be done that the States can't do if they choose to do it.

So now we are at the point—after having gone through the high health costs and the response to that of setting up managed care, the response to managed care abuses by the States—that health costs are now going back up. So what do we do? We come along and nationalize the rest of the system, which, under the most conservative estimates, will throw more than a million people off insurance.

More than 1 million people will not have these problems, these terrible situations they find themselves in about choosing hospitals, the nearest hospital, and all that. What hospital are they going to choose if they have no insurance at all?

We cannot fool the American people into believing we can always have all of our cake and always eat it all at the same time. There are costs connected with everything. What we are trying to do is achieve a rational balance so people have reasonable protections, reasonable coverage at a cost that is affordable and will not drive people out of the market and leave more and more people uninsured. That is what we are struggling for.

In that sense, does it make sense to hold employers who may or may not choose to set up these plans, especially small employers, liable?

I am sure some will say: Why not make an employer liable because of some kind of egregious activity? As my friend from Texas said, we can all come up with some kind of potential egregious activity. Suppose an employer called up somebody connected with the plan that he controlled who worked for him, let's say, at the front end of the process when they were processing a claim, and gave them some instructions. It would be a bad thing to do.

I could ask the same question with regard to a treating physician. What if a treating physician, because he has not been paid on time or otherwise,

was negligent, sloppy, or just angry, decided not to supply all the medical records for his patients to the plan in order for them to properly consider coverage? That would be a deliberate act, too. They have been carved out of this process. One can come up with deliberate acts of misconduct for other entities already carved out because we are not primarily looking at them. We do not want to drive them out of the system or place undue burdens on them.

If something such as that happened, the person on the receiving end of the phone call is definitely liable. The HMO would be liable under a situation such as that. As Senator GRAMM pointed out, the final decision is not with anyone who is subject to being influenced by an employer.

This bill spends 12 pages under the original version setting up this independent review process and qualified external review entity to make sure he is qualified, to make sure he is independent, to make sure he cannot be swayed by anyone, to make sure the Secretary is looking over his shoulder at all times and having to report back to look at statistics to make sure he is not going too far with the employer in too many cases. He is the guy who will be making the final decisions in most of these cases, not someone the employer is going to be able to call up.

Incidentally, it raises another interesting question in this bill. It is not directly related to the employer issue, but they will be caught up in it like anyone else.

There is an excellent review process that is set up by this bill. It has the internal claims process, and then it has an internal review process. Then it goes to this qualified external review entity, which is set up as I just described—high qualifications, high degree of independence, high degree of supervision.

They take a look to decide whether or not there is coverage in this case. We could pass a law that says everybody is covered in every case. That would be the logical extension of some of the rhetoric we hear around here, but everybody knows we cannot do that for obvious reasons. But we have this entity set up to make that decision.

If he makes that decision totally objectively, not subject to corruption, then a person can go to court and totally ignore everything that has happened up to that point. Not only is that process I just described not binding, it is not even relevant to the court lawsuit.

Let's take it a step further. Let's say this independent reviewer who I just described decides it is a medically reviewable question. This bill sets up an independent medical reviewer, and he or she is independent also. The bill goes to great lengths to make sure this

is a qualified medical independent person. It describes how their compensation is set up, it puts in all these safeguards so we know we have somebody who is a qualified professional doing the best he can to make an objective determination on questions such as whether or not this is really an experimental operation for which they are asking coverage, whether or not it is medically appropriate under these circumstances—issues such as that.

Then let's say he answers no. So you are going through the internal claims process, the internal appeal process, the qualified external review entity has gone through his process. Then it has been handed over to the independent medical reviewer, and he goes through his process. If it goes through all of that and everybody looking at all the relevant documentation and listening to all the experts concludes there is no coverage, the claimant can still go to Federal court and not only is all this process not binding on the court, it is not even relevant to the court. As best I can tell from this legislation, it is not even admissible. The defendant in that lawsuit cannot even bring in the fact that they spent the last year in this review process with all these independent, objective, qualified experts looking at it. And we won, the defendant says, but then you can set it all aside.

Even if we want to subject an HMO to that process because they are all evil, is this a process we want to subject an employer to? Is a small employer going to take a look at that kind of deal and say: This is something of which I want to be a part?

We are going to be asking ourselves that question because we can do some good with this legislation and at the same time do some bad through some unintended consequences in a very complex area where people do not sit still when Congress passes broad, sweeping legislation.

People react to the laws that are on the books at the time. People look at their own self-interests, and they figure out ways to protect themselves. One of the easiest ways for a small business to protect itself from a process such as that is to get out of it.

As I said, as I have seen so far, the most conservative estimate says that, under this bill, over 1 million people will lose their insurance because prices will go up so much further on top of the increases we are already seeing even before this legislation is passed. Medical prices are going to go up even further, and a lot of people are going to say: I do not need this kind of aggravation.

Mr. President, I conclude by reiterating what I said in the beginning. This is a very important amendment. We have heard about the salutary effects of the Texas law. Next week I want to talk about lawsuits in Texas.

But Texas has been held up as an example, obviously, because that is the President's home State and people get a kick out of using Texas as an example.

Let's use it as an example in this case. If the sponsors of this bill really are not interested in targeting employers and including small employers, then why do what Texas did? Let's just carve them out the way we did attending physicians, the way we did hospitals, the way we did partially with qualified external reviewers, the way we did partially with independent medical reviewers, carving them out partially or totally. If we are really not after employers, let's carve them out, too.

This is going to be an interesting debate and an important one not only for the future of this legislation, but I think for the future of the country. I yield the floor.

The PRESIDING OFFICER (Mr. REED). The Senator from Wyoming.

Mr. ENZI. Mr. President, listening to this debate it probably sounds like the Democrats have coined a good phrase, the Patients' Bill of Rights, and they are the only ones in favor of it. It is a good phrase. What we are doing is legislating. Legislating means fixing the bill so that it does what the title says.

We want to have a Patients' Bill of Rights. Both sides want a Patients' Bill of Rights. That is the fundamental issue before the Senate. The fundamental issue is getting patients the care they need when they need it. The lawsuits are peripheral. They are not the main issue.

I have listened to my Republican colleagues discuss this matter for 2 days; likewise, my Democratic colleagues continue to raise specific examples of patients whose care was not appropriately delivered. They have cited the need for their version of a Patients' Bill of Rights to curb such abuses by HMOs. The Democrats know full well it is not a new right to sue that will address the cases they keep raising. They know it is the immediate medical review of the claim for benefits that will get people care and prevent more horrible injuries from occurring.

Here is the interesting part. We all agree on this point. Eighty percent of what is being talked about in the Patients' Bill of Rights we agree on. Eighty percent of it will take care of the patients. That is the part on which we agree. It has been reflected in every version of the bill that has ever been introduced. Speaking on specific examples of HMO wrongdoing is certainly relevant to this debate and likely reinforces what the American people need for a bill.

However, the message the Democrats are trumpeting is misleading. I hear them saying they are the only ones who want a bill. I say again for the fourth day and for the fourth year, I

want to pass a Patients' Bill of Rights and see it signed into law by the President. Patients are foremost in this debate. That should remain our focus. In our effort to meet that, we do need to make a number of modifications to the underlying bill. The other 20 percent of the bill needs to be fixed. I believe we can do that and subsequently enact into law a strong bill.

I don't know that it is universal that everybody wants a bill. I think some people want an issue. I was involved in the Patients' Bill of Rights conference committee last year. Some of my more senior colleagues tell me Members spent more time working that bill than any bill they can ever remember. We came that close to a solution. In fact, I know everybody realized we could have the solution, and we were about to get agreement on the entire package. Some decided that an issue was better than a solution, that the issue would resonate during the elections. So we don't have a Patients' Bill of Rights today. People bailed out of that conference committee, came out to this floor and introduced a package that was clear back at the beginning of the negotiations. It didn't contain a single issue we had resolved. They wanted an issue, not a solution.

We are all trying to get a Patients' Bill of Rights. We are all concerned. Right now what we are doing is writing laws. Laws have to have the right wording. I congratulate the Senators from Texas for providing wording that is extremely important in this debate. I ask that they make me a cosponsor on this amendment.

This is going to be extremely important to everybody who gets insurance. It will be more important, of course, to the businesses that participate in providing that insurance. I watch out for the little guy. I was a small businessman. My wife and I started a family shoe store in Gillette, WY. We saw what government regulation does to people's job. Most of that government regulation is not bad for big business because they can afford the specialist to do it.

The small businesses, who have to be experts in all of these areas we see as grand solutions for everybody, don't have the experts. They have to handle all of these things on their own. I have been there and done that and I will watch out for those small businesses.

One thing I will say about small business, those small business employees recognize how tenuous the business is and consequently how tenuous their jobs are. They understand it is not a gold mine out there, that it is a lot of hard work that provides people with services, and consequently, people with jobs. They do understand, also, that insurance is voluntary. They know their employer does not have to give them insurance. The businesses want to provide the insurance. They recognize it is

a benefit that helps them keep the employee, but it is not clear cut how that is provided.

As the insurance prices have gone up, more and more businesses have dropped insurance. As the price has gone up, more and more businesses have shared the cost. They have said this is all we can afford, we will have to share on the cost. Some businesses do not provide insurance and individuals have to buy it themselves.

If costs go up, fewer and fewer of those businesses that are voluntarily providing that, or are at least providing a portion of the insurance, will continue. They are going to get out. One of the things that will cause that to happen is the employer liability contained in this bill. We are told there is no liability. I spent about 20 minutes yesterday discussing that there is liability here. On page 148 is the beginning of the exclusions for physicians and other health care professionals. It is very straightforward. It covers one page of the text. It says they can't be sued. Now, that is not an outright exclusion. It is pretty close to an outright exclusion. There are other ways to be sued other than what is in the bill. This is found on page 148, with the title at the bottom, but technically, the details are on the next page, one page, double-spaced.

Page 150, exclusion of hospitals: Same deal, very straightforward. It takes a page and a half for hospitals. Physicians only take one page for exclusion, and hospitals take a page and a half. There are still ways hospitals can be sued, as there are ways physicians can be sued.

I explained yesterday how the employer liability works. Page 144 says causes of action against employers and plan sponsors precluded. It sounds about as straightforward as the others, doesn't it? The way I counted, there are two dozen pages providing exceptions. It is not just like you can begin reading at the beginning and see what the exceptions are. I mentioned yesterday, you better have a bushel basket of bread crumbs to follow the trail as you go backwards and forwards looking at the exceptions in the bill. Remember, this applies to small businesses. They have to be able to understand this. The easy way out for them, if they don't understand it, is to drop it and say, I am not going to be sued. If I don't carry the insurance, I can't be sued. It is that easy.

So they say, here is money I used to put into your insurance. I know you participated in it and had to put some in, too. I know that is not deductible. That is another sore point that ought to be cleared up while we are doing the bill. We had that opportunity the other night to allow deductibility for the insurance premiums for the self-employed.

That is another one of those small business issues that ought to be cleared

up in this bill. The big corporations get deductibility for their insurance. The self-employed don't. Is that fair? I guess they do not have good lobbyists. It is something we could get cleared up in this bill, but we have already chosen not to do that. How did we choose not to do that? Not by saying we are not going to allow the deductibility by the small employer. None would have voted for that. Instead, we said there is this little parliamentary tactic that we can use. We can say that, since the House didn't send us this tax provision, we can confuse everybody and vote against it and keep those self-employed people from getting their insurance and never have to say that is really what we are doing. Fifty-two Members—two more than needed—said they weren't going to give the self-employed the same right to deduct insurance that we give to the big corporations.

Small businesses come under the self-employed category—the single proprietor that hires four or five people. That is the small businesses about which we are talking. We wonder why they do not provide insurance. We wonder why those in that group that do are a little bit concerned about the liability that is involved in this bill. If they really intended to include employers and plan sponsors, why didn't they do it like they did for physicians? Why didn't they do it like they did for hospitals? The wording can be just as easy. That is what this amendment is about.

The bill is purported to follow the Texas plan. I congratulate the Texas Senators for kind of making them put their writing where their mouth is. The amendment we have here is the Texas version. It is a Texas version that says the employer can't be sued. With physicians and just as with hospitals, it isn't quite as straightforward as that. They can still be sued, but not specifically because of the way this bill is written. Bad drafting produces bad legislation. I hope it was just written this way as a result of speed, but I have to tell you I think it was intentional.

I sat through all of those discussions about liability before and all of the unusual cases that can happen from it and all of the strange exceptions. Those will affect a few people in this country. But most of them who will be losing their health insurance will never come into a single exception that applies to the employer, to the physician, or to the hospital. They just want to be well. When you are sick, that is what you want. When you are sick, you are not trying to figure out who to sue and how to sue. When you are well, that can be taken care of.

I congratulate them on coming up with this amendment that will clear it up. I have to tell you I was a little disappointed when we spent a couple of days talking about problems in this bill, and problems that would make this bill acceptable. We have talked

about those before, negotiated them, and have had some success on that. I was really disappointed when the first amendment by the proponents of this bill was a sense of the Senate.

I hope everybody understands what a sense of the Senate is. A sense of the Senate is merely a political statement that takes up a lot of floor time and results in a vote that is almost always unanimous. They just pick something that everybody is going to agree to. And we take time debating it when we could be debating corrections that need to be made to allow people to keep insurance. It is no surprise to anybody that those wind up with a huge vote. I have to tell you that this one was 89-1. Usually they are 99-1. I will also tell you that I am usually the one. I vote against any sense of the Senate that comes here, unless it gives direct instructions to the Senators themselves. That is what the sense of the Senate was designed for. It wasn't designed to tell the House, or the President, or anybody else what to do. It was designed to give very specific instruction to us. But we have gotten away from that tradition.

Now if there is something that is peripherally related, we want to make a big deal out of it, such as running an ad to the country. Then we propose a sense of the Senate. There have been some fascinating ones around here—ones that nobody could understand how anybody could vote against. I do not understand how anybody could vote against them either because they don't achieve anything. But they make this great political ad.

I thought that during some of this discussion there would have been an amendment that corrected a few things in this bill—maybe not even major things, but at least made a correction.

I was disappointed to hear the leader before this discussion say he thought they had compromised as much as they could. That is not how we do legislation around here. You can't have this great smile and talk about bipartisanship and then say you compromised as much as you can before the debate starts. That is not how we do legislation.

I told you that we agree on 80 percent of what is in the bill. That is the 80 percent that deals with the patients. Health insurance is voluntary in this country. I know there are a lot of people who prefer that were not the case, but we had that as another tax bill in the bureaucracy to provide inadequate care, as Canada is purported to do. At least I assume they do, since most of their people come down here for care. But we have a system where business pays, or business pays part and the employees pay part, or the individuals buy it on their own, or, in the worst of all worlds, there is no insurance in any combination from anybody.

We have to make sure this Patients' Bill of Rights doesn't become a patient

bill by driving up the costs, which, of course, will make some others decide that since they have been paying for their own insurance they can no longer afford it, or it will make businesses decide they will have to pass along a bigger share to their employees, or that they won't be able to afford insurance either.

That would be a patient's bill—not a Patients' Bill of Rights.

One of the great things about this bill, and one of the things we worked hard on in conference, and one of the things that was agreed to was an internal and external review process. If you need the care, there is a way to get it reviewed by doctors. If you do not like the decision, there is a way to get it reviewed by doctors outside of the situation so there isn't a conflict of interest.

Those approaches get care to the patient, and can even be expedited, if there is a dramatic health care problem. It can be expedited. There is the internal review and the external review, which will get you the care and which makes the external review the final decisionmaker, as the Senator from Texas said.

This bill ought to be written in a straightforward way. I was hoping that the proponents of the bill would see the error, listen to the comments that have been made, and make the changes. But they haven't. Instead, they purported that this is the Texas version, and since the Texas version and President's version is there, we ought to accept it. We are pointing out that is not the Texas version. But we are willing to do the Texas version. Then it makes it just as straightforward for physicians and for hospitals and for employers. It puts them all in the same category. We say: Look, we know mistakes are made sometimes. But we want to have health care, and we want to get everybody on board who is getting health care.

I have a few quotes that I want to share with you on this ability to sue and how effective it is of getting health care.

Dr. Richard Corlin, who is the president-elect of the American Medical Association, says:

We are for medical malpractice reform because we have seen the consequences of what happens when it gets enacted and what happens when it doesn't get enacted. . . . Premiums drive people out of practice, they do not provide anything in the way of added patient safety. . . . It's not just physicians. The costs go up inordinately and they are passed along to everyone.

He is talking about the propensity to sue in the United States, which is what we are talking about in the convoluted writing of this first provision which first says we are going to exclude the providers, the businesses, from liability, and then weaves this nasty little web which shows that the intent is to sue them.

Another thing on lawsuits by the American Medical Association:

The AMA is strongly committed to legislation that would (1) strengthen states' rights to govern the healthcare of their clients, (2) shield employers from frivolous lawsuits, and (3) not open the courts to a wide array of new lawsuits.

A member of the AMA board of trustees says:

Some opponents of patient protection legislation have spuriously alleged that employers will be held liable for simply selecting the plans, under this scenario. We therefore believe that the bill should explicitly state that employers and other plan sponsors cannot be held liable for fulfilling their traditional roles as employers and plan sponsors.

That is from a member of the American Medical Association board of trustees.

Another quote by the American Medical Association:

Although patients, physicians, and health care providers are most directly harmed by the present liability system, society as a whole is harmed. The spiraling costs generated by our nation's dysfunctional liability system are borne by everyone.

Remember, these are quotes from the people who are specifically excluded in the bill, not the ones on the macrame string trail of not being excluded. And they still feel that strongly.

Another one from the American Medical Association:

In the testimony, the AMA indicated its concerns about "enterprise liability," a proposed policy change included in the Clinton Administration's health reform, that would have made health plans liable for physicians' malpractice. At the time, the AMA stated, "Enterprise liability may also increase the frequency and magnitude of medical liability claims as individuals become more willing to sue an anonymous "deep pocket."

Everything isn't from the American Medical Association, and should not be. I have a quote from the vice president of government affairs of the Associated Builders and Contractors, Inc. He says:

Many of ABC's—

That is the Associated Builders and Contractors—

member companies are small businesses and thus the prospect of facing a \$5 million liability cap on "civil assessments" is daunting. The financial reality is that if faced with such a large claim, many of our members could be forced to drop employee health insurance coverage rather than face the potential liability or possibly even shut their business down.

The Corporate Health Care Coalition says:

Enactment of this bill (McCain-Kennedy) would unleash a flood of state court cases aimed at pushing the limits on coverage of tested and often questionable medical treatments. Cases that have been brought in state courts against state employee plans have produced huge punitive damage awards (\$120 million in a recent California case) that have reshaped health plan coverage in the plans. . . . Uncapped liability exposure driven by aggressive personal injury lawyers will raise health care costs for employees and make

health insurance increasingly unaffordable to individuals. Patient rights begin with coverage.

Once again, we are trying to give people a Patients' Bill of Rights, not a patient's bill.

I have to also quote the American Association of Health Plans:

Employers who voluntarily provide health care benefits to their employees can be pulled into lawsuits under the Kennedy-McCain bill. Under Kennedy-McCain, businesses could be forced to pay unlimited economic and non-economic damages, plus unlimited damages under state law and up to \$5 million of unprecedented punitive damages under federal law. One lawsuit could easily bankrupt a small business.

The cost of pursuing it alone could undoubtedly bankrupt some of the small businesses with which I am familiar.

Also the American Association of Health Plans says:

According to a recent survey of 600 national employers by Hewitt Associates, 46 percent of employers would be likely to drop health care coverage for their workers if they are exposed to new health care lawsuits.

Finally, from the American Health Care Partnership, the founder and chief medical officer says:

Employers, especially small and medium sized ones, operating under tight profit margins, cannot afford to place themselves at the risk imposed by onerous punitive damages. . . . Companies will mitigate the risk by either dropping health coverage altogether, or make health care a defined contribution, which, due to adverse risk selection, will make health care insurance unaffordable for most of the sick.

Again, yesterday, we passed up the opportunity to help small businesses. We used a parliamentary procedure, technique, to remove some of the liability for Members of this body, so they could vote against having deductibility for insurance for the self-employed; that is, for the self-employed and their employees.

Now we are saying it is OK if we have good, clear, concise language in this bill that exempts physicians from lawsuits, and it is OK if we have clear, concise language in here that exempts hospitals, but it is not OK to exempt the people paying the bill, the people providing voluntary health insurance in this country.

So I ask that my colleagues pay careful attention to this, make a correction in the bill, so it will make sense.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Ms. STABENOW. Mr. President, this is such an important issue. I think it is important to start with the facts in the underlying bill. With all respect to my colleagues on the other side of the aisle, I feel compelled today—after listening to the debate—to rise and to specifically speak to the language in our Patients' Bill of Rights, to state what it specifically says, not what has

been talked about, not what the HMOs and the insurance companies are telling employers that it says, but what it actually says.

Unfortunately, the biggest myth that has been perpetrated about this legislation is in relation to businesses being sued. The reality is—and I take it from the relevant section of the bill; and I welcome anyone listening today, rather than listening to us going back and forth and debating the language in the bill, to go to the Congress.gov Web site and look up the language themselves. I would encourage them to do that. In this kind of debate that is very helpful to do, as people are interpreting and misinterpreting language.

In this bill—and I am proud to be a cosponsor of this bill—we have specific language in section (5): "Exclusion of Employers and Other Plan Sponsors." Then there is another subsection: "Causes of Action Against Employers and Plan Sponsors Precluded." And other than a couple of exceptions that I will speak to in terms of direct decisionmaking, it says:

. . . does not authorize a cause of action against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment).

It does go on to talk about certain causes of action that are permitted, and it indicates that a cause of action may arise against an employer to the extent there was direct participation by the employer or other plan sponsor in the decision of the plan—this would apply to very few, if any; I don't know employers that directly make medical decisions—if, in fact, the employer was making a direct decision, directly participating. And this goes on to talk about the fact that this shall not be construed to be engaged in direct participation because of any form of decisionmaking or other conduct that is merely collateral. It defines what that is.

This is not about those employers who hire someone to manage their plan, whether they hire an insurance company, they have coverage for their employees, or whether they themselves are self-insured and hire someone to administer their plan for them. The only way an employer would be held accountable is if they had direct participation in the decision, if the employer denied the test, if the employer was the one making the medical decision; we would all agree in that small number of occasions. I don't know anyone directly providing and making medical decisions—possibly a group of physicians together in a business or some other medical group. The employers I know either have their insurance through an insurance company or they pay someone to administer the plan. In those cases, you cannot come back against the employer.

We make it extremely specific. I would not want to have the HMO or the

insurance company be able to come back against an employer.

It is extremely important that we make it clear what is going on. It is very unfortunate that we have seen so much misinformation in order to scare small businesses and other employers about what this does.

I will speak about a small business owner—this is someone about whom I have spoken before—and how he feels about this. Sam Yamin from Birmingham, MI, owned a tree trimming business, had insurance, and thought he had health insurance and care available through that insurance for himself and his family and employees. He had an accident. He had a severe accident with a chain saw.

He was rushed to the nearest emergency room. The surgeons came in to do emergency surgery on his leg to save the nerves. They called the HMO, and the HMO said: Sorry, you are at the wrong emergency room. We are not going to OK this emergency surgery to save this man's leg. You have to pack him up and take him across town.

That is what they did. And this small businessman who had insurance, who paid the premiums, who believed that he had cared for himself, his employees, his family, was packed up, taken across town, where he sat on a gurney for 9 hours before he literally pulled a phone out of the wall in desperation and pain to get attention to receive care.

In that situation, instead of the surgery the doctors had said needed to be performed in order to save the nerve endings in his leg, he was sewn up. The least amount of procedure was done. He was sent home.

Today this small business owner no longer has his small business. Today this gentleman does not have the use of his leg. This gentleman is disabled. Sam and Susan Yamin described this situation as having gone through "health care hell." This small businessman would gladly pay what is 23 cents a month per person for the accountability provisions in this bill—23 cents a month, according to the Congressional Budget Office—in order to have his leg functioning, in order to have his business back, in order to have his family out of the incredible debt that resulted from this situation.

Was the HMO held accountable for this decision? They can be held accountable for the cost of the test he didn't receive or the cost of the procedure, but they cannot be held accountable for the loss of this man's business, for his life dramatically changing, his and his family's, for the permanent disability and the ongoing pain he tells me he has and the medical costs he now has. He cannot hold the HMO accountable for the consequences of the medical decisions they made.

That is the debate, plain and simple. There are only two categories of peo-

ple—and this has been said by colleagues of mine over and over again on the floor, but we should all understand—in the United States of America who cannot be held accountable for their decisions: foreign diplomats and HMOs. That is pretty shocking.

This bill says that HMOs, insurance companies, have to be held accountable for the medical decisions they make that affect our families. People are paying the bill. Businesses are paying the bill. I know they want their employees to have the health care they are assuming they will receive because they are paying for it.

If we ask and if we are factual about what this bill entails, if people understand the truth about this bill and that they are not held accountable unless the medical decision is made by the business and that the difference in cost is 23 cents a month and you ask them: Would you add 23 cents a month per employee to make sure that when you get done, the health care is really there and that there are good medical decisions and accountability if there is a problem? I know the people of Michigan say yes.

That is what this is about: 23 cents a month per person. We know that when this provision has been put in, in other States, when patients' rights have been put in, in the State of Texas—almost the same language—they have averaged, I think it is five lawsuits a year. California has put in this language; so far, zero lawsuits. These are scare tactics being put forward by the people who control the decisions today—the HMOs and the insurance companies.

I appreciate from their perspective, they have a good thing going. They control the decisions. They can't be held accountable. That is a great deal, if you can get it. But it is a terrible deal if you are a mom or a dad who cares about your kids, if you are a business that cares about your employees, if you are a family farmer worried about what is going to happen on the farm, if you are anyone needing care or if you are anyone providing care. The frustration of doctors and nurses and dentists and other providers in this country is unbelievable because they see every day what happens.

This is not about lawsuits. We have protected employers. This is about good medical decisions. There is no evidence whatsoever that good medical decisions will not be made and that instead we will just be increasing lawsuits. There is no evidence anywhere beyond rhetoric that says that that is true.

I urge that we proceed with the language in the bill which is very clear: There is no ability to proceed to sue a business unless they participate directly in the medical decisions. It seems only right to be able to have that happen.

One other point I will make. It is true that we need to provide more sup-

port for small businesses to provide insurance. I support that. It is true that we should be allowing someone who is self-employed to deduct 100 percent of their cost. In fact, during the tax bill, we put an amendment up and colleagues on this side of the aisle—Senator DURBIN took the lead with others, and we passed a provision to help small businesses and the self-employed. It was taken out in the conference committee.

So it didn't pass, even though we tried to pass it. I support it and I will support it again. But this is about making sure that people who pay for insurance get the care they think they are buying.

One other point, there is no question that insurance costs have gone up. I believe it is 10 percent last year. There is no relationship to what we are debating now. When I talk to employers, hospitals, and physicians, they say what has a lot to do with the uncontrollable rise in health care costs is prescription drugs. That is the No. 1 uncontrollable cost in the health care system today.

I am anxious to work with colleagues on both sides of the aisle in order to address that and, hopefully, very soon after passing the Patients' Bill of Rights we will address the access and cost of prescription drugs. There is no question that we have high costs. We have rising costs of health care. But when I talk to my doctors, my hospital administrators, and businesses, they tell me the insurance companies tell them it is going up because of the cost of prescription drugs.

We are talking about a difference of 23 cents a month per employee for the accountability provision in this bill. I go back to Sam Yamin from Birmingham, MI, an employer himself who today sits at home in pain with high, mounting health care bills because of the lack of accountability. I know that Mr. Yamin and the business community and the families I support think that this bill is worth it.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. GRAMM. Mr. President, I think maybe the distinguished majority whip has a unanimous consent request.

ORDER OF PROCEDURE

Mr. REID. Mr. President, I ask unanimous consent that the Senate resume consideration of S. 1052 on Monday, June 25, at 2 p.m. and that it be in order on Monday to debate concurrently both the Grassley motion and the Gramm amendment No. 810; further, that on Monday, Senator McCAIN or his designee be recognized to offer an amendment; further, when the Senate resumes consideration of S. 1052 on Tuesday, June 26, at 9:30 a.m. there be 2 hours for debate in relation to the Grassley motion and the Gramm amendment with the time for debate

equally divided in the usual form; further, at 11:30 on Tuesday, the Senate vote in relation to the Grassley motion, followed by a vote in relation to the Gramm amendment, with 2 minutes of closing debate prior to each rollcall vote, divided in the usual form, with no second-degree amendments or motions in order prior to the votes; further, that upon disposition of the McCain, or designee, amendment, Senator GREGG, the manager of the bill, or designee, would be recognized to offer an amendment.

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

Mr. REID. Thank you, Mr. President. I appreciate my friend's courtesy in yielding the floor.

The PRESIDING OFFICER. The Senator from Texas is recognized.

Mr. GRAMM. Mr. President, I am not going to get into a fight with our dear new colleague from Michigan. She has always been very sweet to me. I want to make a couple points that I think are very relevant to the issue before us. Let me make one thing clear. The bill that I cosponsored on the Patients' Bill of Rights last year with Senator NICKLES, Senator FRIST, and others, which passed the Senate by one vote, required that every HMO in America apply a prudent layperson standard in admitting people to emergency rooms. It is exactly the same language that is in the Democrat bill that is before us today. Basically, it says that if you are experiencing something that to a reasonable layperson would convince you that something bad is happening to you and it might hurt you or kill you, you can go to the emergency room.

So the issue before us has had absolutely nothing to do with the right of people to go to the emergency room. In the bill before us, that right is guaranteed. In the Republican bill that we passed last year, that right was guaranteed, and it was guaranteed in exactly the same language. Also, as good as it sounds to say that an employer might call the emergency room and say don't admit this employee of mine, A, I am not aware that any employer has ever done it; secondly, the emergency room doesn't work for the HMO. And in virtually every State in the Union it is illegal for them not to admit the patient and the HMO is going to pay for the care.

So it sounds like a good example, but it makes no sense, nor would an emergency room ever, based on an employer calling and saying "don't admit this person," fail to admit them when the emergency room is guaranteed that they are going to get paid and that the HMO is required by law to pay for the service they are going to provide.

Now, let me go back to the central issue here, which is not people being abused and not being admitted to the emergency room—that has never been an issue in this debate. Both parties

agree on that. That is part of about 90 percent of the provisions in both bills that are identical. What we are not debating here or what the majority side of the aisle, the Democrats, don't want to debate is suing employers. That is the issue that is before us.

The amendment that I proposed is an amendment from the Texas law, and we chose it because the proponents of this bill hold the Texas law up as an example of what they want to do. The Texas law is the result of the Texas Legislature looking at this problem and concluding that they wanted people to be able to sue their medical plan, they wanted people to be able to sue HMOs; but because your employer helped you buy health insurance, they didn't want to put the employer in harm's way, where your employer could be sued.

Why didn't they? For two reasons, really: One, the employer is the good guy here. Nobody makes them help you buy health insurance. They choose to do it. We didn't want them to choose not to do it. Secondly, we knew if we made it so you could sue employers for the simple act of doing something good for their employees that especially small businesses without deep pockets would be forced to cancel their health insurance.

So the Texas Legislature wrote their law, which proponents of this bill say is almost identical to the bill before us, which, as I will show, is not true. But the Texas Legislature basically said that this chapter, the provision of the bill, does not create any liability on the part of an employer or an employer group purchasing organization that purchases coverage or assumes risk on behalf of its employees. We are trying to exempt employers from lawsuits.

Mr. FRIST. Will the Senator yield on that?

Mr. GRAMM. I am happy to.

Mr. FRIST. It is clear that this whole issue of suing employers is critically important.

In debates, again and again we hear that the Kennedy bill does not allow employers to be sued. Yet if you read their bill, there are all these pages and pages of exceptions. I want to clarify, for my own use, the law in Texas. It says "does not create any liability on the part of an employer" and then there is a period. Does the Texas law have many exceptions after that?

Mr. GRAMM. The Texas law has no exceptions after that. There are no ifs, ands, or buts in the Texas law. You cannot sue an employer. They chose not to for two reasons. One, the employer is the guy helping buy the health insurance. Why would we sue the employer? And, two, they were very much afraid that if you let people sue their employer when they are in a dispute with their HMO, and not with their employer, that the employer, who is not required to buy health insurance, might stop offering health insurance.

Our colleagues who are for the bill before us say: In Texas, there have not been these rash of lawsuits. Part of the reason is, in Texas, you cannot sue the employer.

Let me explain what is different between the Texas law and the bill that is before us. Sure enough, the distinguished Senator from Michigan, as have many supporters of the bill, read us paragraph (A); in fact, the heading before paragraph (A) is very clear. It is a little tedious, but bear with me a second.

Their bill says in title (5):

Exclusion of Employers and Other Plan Sponsors.—

That sounds like they are excluding employers, right? Then they say in paragraph (A):

Causes of Action Against Employers and Plan Sponsors Precluded.—

If it had ended there, they would have been precluded, but they come down and say:

Subject to subparagraph (B)—

Remember that; it is always a dead give-away that things are not exactly as they say:

Subject to subparagraph (B), paragraph (1)(A) does not authorize a cause of action against an employer or other plan sponsor maintaining the plan (or against an employee of such an employer or sponsor acting within the scope of employment).

If they stopped right there, this would have been the equivalent of the Texas law.

When Democrats defend this bill and say we do not allow suing employers, that is generally where they stop, but their bill does not stop there. Their bill goes on to say in paragraph (B), which was already referred to previously, that:

Certain Causes of Action Permitted.—Notwithstanding subparagraph (A), a cause of action may arise against an employer or other plan sponsor. . . .

Then for 7 pages, they have all kinds of ifs, ands, or buts. Then they have little provisions that have little hooks in them. I want to explain one of them. There are a bunch of them, but I want to explain one of them.

They are saying conditions under which an employer can be sued, and then they use the following term. They say: "Failure described in . . . such paragraph, the actual making of such decision or the actual exercise of control in making such decision. . . ."

That does not sound too perilous until you realize that under ERISA, a Federal statute which governs all employee benefits in America, that the employer is always assumed to be exercising control. In fact, ERISA assumes or requires that the employer be bound to be 100-percent responsible and deemed to be in control of employee benefits.

The point I am making is, they have seven and a half pages of conditions

under which employers can be sued, including these little provisions that people reading it do not know refers back to law where the employer on employee benefits are always assumed to be in control. But the tell-tale sign comes at the end of the seven and a half pages. Here is what they do.

At the end of the seven and a half pages, they exclude physicians from being sued. They exclude hospitals from being sued, but then if you had any doubt in your mind, any question in your heart as to whether they intend to sue employers, look at the last little sentence in this seven and a half pages of ifs, ands, or buts, gobbledygook, legal reference. Let me just read it. They are talking about physicians:

(8) Rules of Construction Relating to Exclusion from Liability of Physicians, Health Care Professionals, and Hospitals.—

The heading sounds like it has nothing to do with employers, does it? But then it says:

Nothing in paragraph (6)—

And Paragraph (6) is the paragraph that says you cannot sue a physician—and nothing in paragraph (7)—

Which is the paragraph that says you cannot sue a hospital—

shall be construed to limit the liability (whether direct or vicarious) of the plan, the plan sponsor—

And who is the plan sponsor as required under ERISA? The plan sponsor is the employer.

or any health insurance issuer offering health insurance coverage in connection with a plan.

In other words, after seven and a half pages of conditions under which employers can be sued, including where they are deemed to be in control of employer benefits where ERISA requires they always be treated as in control, they then exempt doctors and hospitals. But just to be absolutely sure that employers were not exempt, they add the language that nothing in exempting the doctors and the hospitals would be construed as limiting the liability of the plan sponsor, which is the employer.

The plain truth is that this is confusing, but it is a classic bait and switch. It is a classic bait and switch when they say you cannot sue them, and then notwithstanding the paragraph that says you cannot sue them, which is subparagraph (A), they then go on to have a cause of action that may arise against an employer or other plan sponsor, and then they go on for seven and a half pages of where you can sue the employer. Then they decide: Gosh, it probably would be good politics right now to exclude physicians and hospitals who are involved in health care. And then so there is no doubt whatsoever, they come back and say: But in excluding doctors and hospitals, we are not excluding employers from being sued.

To suggest that in any shape, form, or fashion this language is equivalent to the language in Texas, which says you cannot sue an employer, is invalid. What does our amendment do?

Mr. FRIST. May I ask one more question? It really has to do with this subject. Madam President, may I address a question to the Senator from Texas?

The PRESIDING OFFICER (Mrs. LINCOLN). The Senator may ask a question.

Mr. FRIST. This is the Texas law. I want to make it clear, because the answer to my first question was that there are not five or six pages of exceptions in Texas law.

Mr. GRAMM. There are no exceptions in Texas.

Mr. FRIST. We have to make it clear because again and again during this debate the statement is being made that what the Kennedy bill does in terms of employers is exactly what the Texas law does. But with what the Senator from Texas has just gone through, that is simply not true.

Mr. GRAMM. That is right, there is no question about that. When the distinguished Senator from Michigan—and others have done it as well—say what if the employer called up the emergency room and said: Do not provide treatment to my employee, let my employee die—first, under all of the bills people are guaranteed admission to the emergency room. The first thing the attending physician—and the Senator from Tennessee has been there—the first thing the attending physician says to the employer is drop dead because the law guarantees the emergency room is going to be paid by the HMO.

In Texas, they didn't conclude that there may not be employers that try to do bad things. What they concluded was the following: First, there are checks and balances. If an employer tries to interfere in anybody getting health care, how does this bill work? How does the Texas plan work? If I think I need health care and I don't get it, I can ask for internal review. There is an internal review. If I don't believe I have been treated fairly, I can ask for an external review. That is guaranteed. The external review is made up of a panel of physicians who don't work for the HMO and who are not hired by the employer. How does the employer exert any control over this final decision-maker, which is this external review panel? The employer can exert no control over the external review panel.

Now what our Democrat colleagues have said is, there may be some circumstance where employers could do something bad. The point is, not that there might not be an employer that tried to do something bad, but the whole bill is set up to produce checks and balances.

When the Texas Legislature decided to exempt employers, they were not as-

suming employers were all well intended. They were not assuming that something bad couldn't happen because of something an employer did. They simply looked at the cost and the benefits. They concluded, with all the checks and balances they had in their bill, which are in the bill before the Senate, we are pretty well protected from employers doing bad things because of internal and external review and the right to go to court. You can always sue the HMO.

They decided if you get into these provisions, as this bill does, of when you can sue the employer, that you are going to create so much uncertainty, so many unintended consequences where maybe your objective was good but you are going to create unintended consequences where an employer could be sued when they were not trying to do anything wrong, that the Texas Legislature was deathly afraid of people losing their health insurance because you are not required to provide health insurance as an employer.

So they decided, looking at the whole picture, that thanks to the checks and balances of internal and external review, the safest thing to do if you don't want people to lose their health insurance, is exempt the employer. You can say there is something to be gained by not exempting the employer, by having seven pages of ifs, ands, or buts, but if that induces the employer to drop your health issue, what good does it do you?

Let me conclude with the following two charts.

Mr. FRIST. Will the Senator yield?

Mr. GRAMM. I am happy to yield.

Mr. FRIST. Please state what your amendment does. Clearly, you can sue your employer. The McCain-Edwards-Kennedy bill says you can sue the employer. How do you fix this? We clearly have to fix it. The trial lawyer makes 40 cents on the dollar and, in a \$1 million suit, that puts \$400,000 in their pocket. Only 33 percent goes to the patient and the rest to the lawyer and the system. Clearly, the lawyer has incentive to sue.

You can sue the HMO, the doctor, the hospital, the plan administrator, and the employer. They tried to take care of the doctor and the hospital. You can sue the HMO. How do you fix this? Clearly, the lawyer will go for the employer. How will it be fixed by your amendment?

Mr. GRAMM. The amendment mirrors Texas law that says nothing in the bill creates any liability on the part of the employer or an employer group purchasing organization, that purchases coverage or assumes risk on behalf of its employees. No ifs, ands, or buts, no modifying clauses, no seven and a half pages of exceptions. You simply cannot sue the employer.

Those who support S. 1052 unamended, despite all their efforts to the contrary, are creating numerous

loopholes that will force small businesses in your hometown and my hometown to look at this and say, I don't know if I can be sued. They will go to lawyers, and the lawyers will say it will depend on a jury, it will depend on the court, it will depend on how good that plaintiff's attorney is.

You need to recognize there are seven and a half pages in this bill of circumstances under which you can be sued. When you relate this language to other laws like ERISA, it sure looks as if you can be sued.

I am afraid for little employers in Arkansas, Tennessee, Texas, and everywhere else. I often talk about my friend Dicky Flatt who has 10 employees. I can envision Dicky Flatt getting together with his employees and saying: Look, with this new law, I cannot be sure that I can't be sued if you have a bad experience in our health plan. While I love you all and while we built this business together, I can't let the work of my foreman, my work, my mother's, my wife's work, and our children's work be put in jeopardy. So I will have to stop providing health coverage.

That is what will happen. The only way to guarantee it will not happen is to do what the Texas Legislature did.

The proponents of this bill say: Look at how great it has worked in Texas. If you want it to work as it has worked in Texas, do it the way they did it in Texas. Exempt the employer. So for every small business in Arkansas, every small business in Tennessee, every Dicky Flatt, there will be things they are uncertain about in the bill, but the one thing they know is: You cannot sue me because I cared enough about my employees to buy them health insurance. You cannot do it. You can sue the HMO. You can sue the health care provider if they didn't do a good job. But you can't sue me because I negotiated the plan, because I am responsible for it under ERISA, because I picked two employees to represent all of us in interfacing with this HMO, with this insurance company. You cannot sue me for that.

Why is that so important? There are a lot of Americans who still don't have health insurance and who are losing health insurance every day. When we debated the Clinton health care bill, there were 33 million Americans who didn't have health insurance. Today, there are 42.6 million Americans who don't have health insurance. Shouldn't we be concerned about a bill that could add millions to this number?

I remind my colleagues, the Congressional Budget Office, in looking at this bill, concluded it would drive up insurance by more than 4 percentage points in cost. The estimate that is normally used is 300,000 people lose their health insurance for every 1 percent increase in cost. So at a minimum, we are looking at 1.2 million people losing their health insurance.

But there is one other thing. In looking at that number, did CBO look at the fact that employers could be sued? Or did they just look at the first paragraph that said they couldn't be sued? Nothing in CBO's estimate seems to take into account that employers can be sued under this bill.

The final reason that goes beyond health insurance goes to something more important to your health than whether you have health insurance or not.

What is that? It is the right to choose your freedom because we are the only developed country in the world where people still have freedom to choose their own health care and their own health care providers.

It is pretty startling when you think about it. I have listed the richest, most developed countries in the world. These are the so-called G-7 countries. Every time we have a meeting of the G-7, these are the countries that are at that meeting. They are the countries that are rich, like we are—Canada, Italy, Japan, the United Kingdom, France, Germany, and the United States of America. Those are the richest countries in the world.

In Canada, 100 percent of health care is dominated by the Government. In Canada, a famous cancer doctor said as he left the system a week or so ago, that I have patients dying of cancer in Canada who could be treated. But they have a Government-run system. They have lost something more important than their health insurance in Canada. They have lost their freedom.

In Italy, a 100-percent Government system;

In Japan, a 100-percent Government system;

In the United Kingdom, everybody has to be a member of the Government system. They have a loophole for very rich people. They can go outside the system and get treatment from the doctor independently of the system. They have to pay for it twice. But only rich people can afford to pay for it twice.

In France, 99 percent of health care is controlled by Government; in Germany, 92 percent.

Then we come to the United States of America. Sixty-seven percent of Americans have the right to choose. They are free to choose their health care. Obviously, they are concerned about losing their health insurance. That is why I don't want people to sue employers. But there is something bigger you can lose. You can lose your freedom.

I know my Democrat colleagues get mad when I keep going back to the Clinton debate, but it is relevant on this one point. I will make it and then stop.

In 1994, when President Clinton proposed we take everybody out of private health care and force everybody to buy health care through the Government,

in that plan, if your doctor thought you needed health care that was not prescribed by the health care purchasing cooperative in your region, and your doctor went ahead and gave it to you anyway, your doctor could be fined \$10,000.

If you thought your baby was dying, and you went to the doctor and said, look, I know this treatment is not prescribed by this health care purchasing cooperative, and I know the Government won't pay for it, but I will pay for it; can you provide the care, under the Clinton bill, the doctor would be sent to prison for 5 years for providing the care.

What was the argument for this bill? The argument for this bill was that 33 million people were uninsured and that was the price we had to pay to cover them.

Today we have 42.6 million people uninsured. If we pass a bill letting people sue employers and employers dropped their health coverage, won't the same people who were for this plan 7 years ago be back here saying now it is not 33 million who are uninsured, but it is 50 million? They are not going to tell you their plan produced the 50 million. They are not going to tell you that suing employers caused small and medium sized and large businesses to drop health insurance. They are just going to say: Look. The time has come to now have the Government take over health care. Look. Shouldn't we be doing it? Everybody else in the developed world is doing it, and America is out of step. And what we need to do to get people coverage is to have one Government plan.

My colleagues, I simply urge that before we do something as harmful—such as letting people sue the employer for helping them buy health insurance—let's think about what that is going to do to employers dropping health insurance.

I hope everybody understands that you don't have to provide health insurance. No employer is required by law to provide health insurance. They do it because they think it is good business, and they do it because they love the people who work for them. But if you put the business at risk, they will stop providing health insurance. This number is going to go up and then we are going to start having a system such as Canada, Italy, Japan, the United Kingdom, France, and Germany.

If anyone wants to know why I am so concerned about this bill, it is because I am not going to lose my health insurance. I have the standard option Blue Cross/Blue Shield. In fact, under this plan, if I needed some health care, this external review process can deem that Blue Cross/Blue Shield has to give it to me, even if they specifically preclude it in the contract. I bought the standard option, but I am going to get the high option under this bill.

What is going to happen to my health insurance costs? It is going to go up. I am not going to lose my health insurance, but there are a lot of Americans who may. If they lose their health insurance, the people who are blessed, such as I and every Member of the Senate is, may not lose our health insurance. But we could ultimately lose our freedom. I want to ask people to think about that as we cast this vote.

The Texas Legislature did not conclude that every employer was the same. They did not conclude that there might not be bad actors out there. They concluded that this bill, as our bill, gives real protections against that, but, in the end, they concluded that if you let people sue the employer because of a dispute with an HMO or health care provider, you are going to end up having people drop their health insurance.

We need to do the right thing in this bill. There are too many ifs, ands, and buts. There are 7½ pages of exceptions. If you want to be able to go home and say to the small mom-and-pop businesses, under the bill I voted for you cannot sue an employer, then you are going to have to vote for this amendment, or else you are not going to be able to say it.

I thank Senator and Dr. FRIST for his great leadership on this issue. The amazing thing is we agree on 90 percent of this bill. The amazing thing is if we could take about six or seven issues, and fix them, we would get 90 votes, maybe 100 votes on this bill. One of those has to be you can't sue the employer. Another has to be that when Blue Cross/Blue Shield signs a contract with me, I can't come back after the fact and say: Well, now I only paid for 60 days in the hospital for mental care, but I need more. If I needed it, I should have bought the high option. If they give it to me, they are going to have to charge me for what the high option would have been. This has to be fixed.

We also have to have some reason and responsibility on lawsuits. When is the last time anybody was healed in a courtroom? I have seen people healed in the emergency room, in doctor's offices, outpatient clinics, hospitals, and even as a little boy with my grandmother, I have seen people healed in revival tents. But I have never seen anybody healed in a courtroom.

Our Democrat colleagues say: Look. We have these rights to sue. Great. But if my child is sick, I don't want to sue. I want health care. After my baby is dead, I am not interested in going to the courthouse and suing somebody. I want my child to have health care.

We have agreed on internal and external reviews. We have said that anybody can go to the emergency room. We have set up systems on which we agree. But we don't agree on these endless lawsuits that can destroy access to health care. What good is the right to

sue a plan if I am not a member of the plan because I lost my health insurance?

If we could work out those five or six issues, we would have a bill that everybody could be for. But don't think for a minute that those issues are not critical to health care and critical to America. That is what this fight is about.

I ask my colleagues on the Democrat side of the aisle and some of my colleagues over here that are for this bill: Do you really believe that this matches what Moses brought down from Mount Sinai?

Is this really the embodiment of perfection? Do you have every good idea that was ever had in history? Could it be that it could be improved? Could it be that some reason and compromise might actually make the bill better? My guess is it could be; and I hope they will consider it possible.

I yield the floor.

The PRESIDING OFFICER. The Senator from Tennessee.

Mr. FRIST. Madam President, I thank the Senator from Texas because the discussion over the last 20 minutes makes it crystal clear—walking step by step through the bill—that employers, under the Kennedy bill, can be sued. The amendment of the Senator from Texas basically says: Let's take the words of the Texas law and pass them in this Senate Chamber. It will make it crystal clear, with no exceptions, that employers cannot be sued.

The chart that has been shown by the Senator from Texas is the Texas law verbatim. It is interesting. The Senator from Texas took the exact words in the Texas law and put them in his amendment.

I have just asked to have the chart brought down a little bit closer so I can walk through it because this chart is a little bit different than the one we showed earlier. It is the actual picture of the page of the Texas law.

The amendment of the Senator from Texas is several pages in terms of the explanation and the definition, but the words that are actually used in the amendment are "does not create any liability on the part of an employer or other plan sponsor (or on the part of an employee of such an employer or sponsor acting within the scope of employment)."

He took the words exactly from the Texas law, which are: "does not create any liability on the part of an employer." That is crystal clear. In the rest of it there are no exceptions. In the McCain-Edwards-Kennedy bill, there is page after page of exceptions.

I am very glad this amendment is being considered in this Chamber today because we have an opportunity—through this afternoon, and tomorrow, and the next day—for our colleagues to go back and actually read the bill. We can debate in this Chamber and on the

television shows and we can read in the newspapers about the question of whether or not you can sue an employer. Now I believe it is crystal clear, after the debate, that you can sue employers under the Kennedy bill. Therefore, all the employers of the 170 million people in this country who voluntarily receive their insurance through their employers—that is just about everybody in the gallery and those watching on C-SPAN and everyone else who does not have Medicare or Medicaid—can be sued under the McCain-Edwards-Kennedy bill.

When you go around the water fountain on Monday—or if you are working on the weekend, or have a shift later tonight—turn to your employer and say: Do you mean to say, if this McCain-Edwards-Kennedy bill passes, you can be sued for voluntarily providing health insurance? This applies to unions as well. I want to talk about that because that is actually addressed, and the Senator from Texas did not mention it. All the union members should listen to this.

You cannot right now. You cannot under the proposal of the Senator from Texas. You cannot under the Frist-Breaux-Jeffords plan. Under the McCain-Edwards-Kennedy plan, you can be sued. If this bill were passed tomorrow, your employer could be sued the next day.

I hope those 170 million people are listening and do pay attention to this amendment. Again, the Gramm amendment says: This bill "does not create any liability on the part of an employer. . . ."

Let me show, first, what the Texas law is. This is an actual picture of the page itself. It says:

This chapter does not create any liability on the part of an employer—

Do those words sound familiar? They should. What I am showing you is a blown up picture of the law Texas passed in 1997 that has been very successful. Again, this is from the State of our current President of the United States, who, as Governor, signed this law. The words: "does not create any liability on the part of an employer"—if that sounds familiar, it should, because those are the exact words that are in the Gramm amendment: "does not create any liability on the part of an employer". But those words are not in the underlying McCain-Edwards-Kennedy bill.

I posed the question to the Senator from Texas: Are there exceptions in here? As you look through it, no there are not exceptions. There is a period. There is a period under the Texas law. As you look at the amendment by the Senator from Texas, there is a period after "employment." Again, there are no exceptions.

If you look at the McCain-Edwards-Kennedy bill—I do not have it right in front of me—but there are pages and

pages of exceptions. The Senator from Texas very eloquently went through those exceptions.

So that is the amendment—a simple amendment—which crystallizes, for me, many of the arguments. I am glad we got to that amendment because it is important to address the big issues of the bill. The Senator from Texas again outlined very well years of work—and the Senator from Massachusetts has been involved for years and has initiated much of the discussion on Patients' Bill of Rights. I think he needs to be commended for that. The Senator from Massachusetts and I, and the Senator from Texas, spent much of last year debating these same issues around a table, in this Chamber, and also in what we call a markup in committee in a room back behind this Chamber.

So we have come to this general agreement on, say, 90 percent of the bill; but the 10 percent we do not agree on has the potential for threatening the health care of millions and millions and millions of people who get their health care through union-sponsored plans and employer-sponsored plans.

So, yes, we have come to all this agreement on 90 percent of it. It is this little 10 percent we have to address. We have to address it as we are doing, up front, with debate. We need to hear from people around the country. Is it real? Is it bad to allow employers to be sued? In a little bit I will refer to some of the people in Tennessee in relation to what they have told me about this risk of being sued, what it means to them, what it means to their employees.

Much of the debate on the Kennedy bill does come to this issue of opening the floodgates to a wave of frivolous lawsuits, lawsuits that are uncapped, subject to runaway costs, because that does translate, ultimately, down to the 170 million people paying a lot more for their health care insurance. It translates to the working poor not being able to afford insurance and thus having to say: I just can't afford my insurance anymore. I have to put food on the table. I have to put clothes on my children. I just can't afford putting money into frivolous lawsuits and the pockets of trial lawyers. That does nothing, as the Senator from Texas said, to address the issue of getting the care to people when they need it.

A lot of people do not realize that the average malpractice case is not settled for 3 years. If you need care, you deserve that care. We have to fix the system with patient protection, strong internal appeals, strong external appeals, and strong patient protections. That is what you do to fix the system to get the care when you need it; it is not to run to a courtroom and wait, on average, 3 years for a malpractice case. If you take your child to the emergency room, or go for a referral for appendi-

citis, or treatment of heart disease, 3 years later means very little.

We talked a little bit about the lawyers. We rely on the legal system again in terms of holding plans accountable. If there is a wrong or an injury, we hold HMOs accountable. We hold them accountable.

For economic damages, that can be millions and millions of dollars. Under the Frist-Breaux-Jeffords proposal, the trial lawyers can sue for millions and millions of dollars of economic damages. We do not allow you to sue for punitive damages. Suing for punitive damages does not fix the system. We say let's save the millions of dollars on punitive damages. Let's invest in the system through internal and external appeals and strong patient protections. That is the way you fix the system. You do not want money that should be spent taking care of patients and delivering care put it into the courts and into the trial lawyers' pockets. This takes money out of the system, away from the delivery of health care, and away from the doctor-patient relationship.

Nobody has unlimited money. This money is not just going to fall from the sky. You are taking money out of the system through increased premiums paid from the pockets of the union workers and the employees enrolled in these plans, and you put it into the pockets of the trial lawyers.

I mention all this because where are the trial lawyers going to go? You can sue a doctor. You should, if there is malpractice. You should. If there are economic damages and noneconomic damages, that is the right thing to do. If a hospital was involved in the injury, you should be able to sue a hospital, if that hospital really did commit malpractice. HMOs, you should be able to sue. You have to be able to hold them accountable if there is harm or injury.

What about an agent of the plan? The McCain-Edwards-Kennedy bill says you can sue an agent of the plan, an agent of the HMO. Who is that?

It was interesting. I talked to doctors, to members of the AMA. I asked: How can you support a bill when you are for tort reform? The American Medical Association for years has been in favor of tort reform, malpractice reform, modernizing the system. How can you support a bill that has the opportunity for unlimited runaway lawsuits, multiple causes of action, travel from State court to Federal court, back and forth forum shopping—how can you do that? And they say: because we can be sued. If we can be sued, we ought to be able to sue everybody.

I am not sure that is the correct answer. Several of my colleagues and I sent a letter to the medical profession asking, what if we reform the overall system, have tort reform on the doctors as well as adequate tort reform and construction of a common ground

between suing doctors as well as suing HMOs? We haven't heard back yet. Reform of the overall system is one way to address the issue.

The trial lawyer will go after the doctor, the hospital, the agent of the plan, the plan, or the employer. He or she will go after whoever he or she can, if there is injury or harm.

It is interesting because for the last three years the bill that Senator KENNEDY has been on and has proposed—or at least the first few months of this year—said that you can sue the plan or you can sue an agent of the plan. I think it was in last year's bill. The physicians hadn't caught that. Then they caught it a few days ago and said: You shouldn't be going after doctors. You should go after the HMO, the plan.

For the first time, in the rewrite of the bill submitted last Thursday there is the exclusion that the Senator from Texas just explained. You can sue the plan and you can sue an agent of the plan, but you can't sue the treating doctor. That little loophole was closed.

Also in this new McCain-Edwards-Kennedy bill from last Thursday, unlike the bill from last Wednesday and the one from months before, it appeared you can not sue the hospital. The trial lawyer must be sitting back: I could sue everybody before. Now I can't sue the doctor or the hospital. Now whom can I go after? The HMO, which is appropriate. I can go after an agent of the HMO. Is that the clerk, is that the secretary who called to arrange the plan? I am not sure. We have to look at that loophole. There is a huge loophole right now that the trial lawyer can examine.

Where are the deep pockets? The HMO, appropriately so; the agent of the plan, I am not sure. No, you cannot sue the doctors anymore. That was rewritten and taken out of the bill introduced last Thursday. You cannot sue the hospital because that was taken out of the bill last Thursday. You have the employer. In the McCain-Edwards-Kennedy bill the trial lawyer, who has a financial incentive for personal gain—I am not questioning the ethics of the trial lawyers, I am saying there is a financial incentive there—if there is an injury, is going to go after all the pockets of money out there. Potentially, the biggest pocket, in terms of assets, is the employer.

We just walked through the bill that says you can sue the employer. If you are a trial lawyer worth your salt, you will say: OK, you have gone down the aisle and the sponsors of the McCain-Edwards-Kennedy bill changed the bill, in a positive direction, and took the doctors and hospitals out. What they have not done is take out the employers. The Gramm amendment does this in crystal-clear terms it takes out the employers. It leaves the HMO.

The employers are out there voluntarily trying to do what is best for

their employees. If you are running a business and you have a product and you are dependent upon your workforce, you want to pay them as well as you can. You want to give them all the benefits you can. And the benefit that is most challenging today is health care, because of escalating costs across the board and because today people need health insurance in order to access the system. Having this huge loophole where you can sue employers means that employers are going to drop that health care coverage. They are not going to be able to afford that exposure.

If you are sitting there with a small business of 25 employees and a group of 18 or 19 convenience stores, making margins of 2 or 3 percent, and you are not subjected to lawsuits today, and tomorrow you are going to be subjected to this unlimited liability when all you are doing is trying to help your employees by paying for part of their premiums and voluntarily giving them their health insurance, you will simply say: I can't do it anymore. I will walk away.

What do those employees do? Well, they will probably say: Give me some money, the money you are spending, and I will go out and try to find a policy. They may not be able to find a policy. One hundred seventy million people are in union plans and in employer-sponsored plans today. As we uncover what is in this bill, they have to be asking themselves: Can I afford to keep offering health insurance for my employees? Unfortunately, the answer in many cases is going to be, no, I simply cannot.

I know this is the case because when I got home the other day from one of the television shows my wife said: This sure is confusing to me. You say you cannot sue employers. Your colleague, your good friend who favors the McCain-Edwards-Kennedy bill, says very specifically you cannot sue employers. It is confusing to everybody in this room.

I know it has to be confusing to the millions of people who are out there. Whom do you believe? What does the bill really say? That is why I have so much respect for the Senator from Texas, because he really does go back and read every line of these bills. It is something that I both admire and I try to do, and that is what it is going to take to really settle this question of what is in the bill.

What does "direct participation" actually mean?—the words in the bill.

A number of people have gone out and looked at the very specific language in the bill outside of this body. I would like to enter into the RECORD shortly, but first let me quote from a letter sent to the Honorable TOM DASCHLE, our majority leader, and to the Honorable TRENT LOTT, minority leader, dated June 15, 2001. I will quote

from the letter just what their interpretation is on this whole issue of employers. A lot of points are made in the letter. I think in a very concise way, these people, who represent millions of people, state their interpretation of this issue of being able to sue the employer.

Before I read it, let me tell you who these groups of people in the letter are.

I ask unanimous consent to print in the RECORD this letter.

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

JUNE 15, 2001.

HON. THOMAS DASCHLE,
Majority Leader, U.S. Senate, Washington, DC.

HON. TRENT LOTT,
Minority Leader, U.S. Senate, Washington, DC.

DEAR SENATOR DASCHLE AND SENATOR LOTT: With the Senate poised to consider the Kennedy-McCain patients' bill of rights, we are writing to express our serious concerns with this dangerous and extreme legislation. This bill would allow costly and unlimited lawsuits against employers, would add to already skyrocketing health care costs, and would put at risk the health insurance of millions of Americans. For these reasons, we urge Congress to oppose this legislation and avoid the dire consequences it would have on our employer-based health care system.

Employers are not protected from liability under the Kennedy-McCain bill, and lawsuits are allowed in both state and federal courts for the same incident under different causes of action. Further, the legislation's \$5 million dollar cap on punitive damages in federal court is really no cap at all. Employers would still be subject to unlimited liability in at least five other ways in state and federal courts. Finally, lawsuits could be filed against employers before an independent external review is completed. If faced with such liability, many employers—especially small employers—will have no choice but to stop offering coverage altogether.

Employers today are already struggling to cope with skyrocketing health care costs, especially in the midst of a dramatically slowing economy. This year, costs are up an average 13 percent—the seventh annual increase in a row. Health care costs for many small employers are even higher, up more than 20 percent. The Kennedy-McCain bill will make health care coverage even more expensive. The Congressional Budget Office found the bill would increase costs an additional 4.2 percent. With many employers already being forced to pass these rising costs on to their workers, even more employees will be unable to afford coverage. Especially vulnerable will be America's working poor, many of whom can barely afford coverage now.

More than 172 million Americans rely on health care coverage voluntarily offered to them by their employers, but the unlimited liability and higher costs that would result from the Kennedy-McCain patients' bill of rights would undoubtedly put their coverage at risk. We firmly believe you can't sue your way to better health care, and a recent poll shows voters agree. Only 19 percent of those polled supported the kind of unlimited liability found in the Kennedy-McCain bill. In today's slowing economy, the last thing Congress should do is consider legislation that would discourage employers from offering health care coverage and make coverage more difficult for workers to afford.

Sincerely,
National Federation of Independent Business.

National Association of Manufacturers.
U.S. Chamber of Commerce.
National Retail Federation.
Printing Industries of America.
Rubber Manufacturers Association.
The ERISA Industry Committee.
National Employee Benefits Institute.
Food Marketing Institute.
Food Distributors International.
The Business Roundtable.
American Benefits Council.
National Association of Wholesaler-Distributors.
National Restaurant Association.
Associated Builders and Contractors.
International Mass Retail Association.
National Association of Convenience Stores.
Society for Human Resource Management.
Associated General Contractors of America.

Mr. FRIST. I thank the Chair.

The groups I will quote from have examined the legislation. It is in their interest to really read through the bill and not just the rhetoric. They include the National Federation of Independent Business, the National Association of Manufacturers, the U.S. Chamber of Commerce, the National Retail Federation, the Printing Industries of America, the Rubber Manufacturers Association, the National Employee Benefits Institute—the whole institute—the Food Marketing Institute, the Food Distributors International, the American Benefits Council, the National Association of Wholesalers Distributors, the National Restaurant Association, the Associated Builders and Contractors, the International Mass Retail Association, the National Association of Convenience Stores, the Society for Human Resource Management, the Associated General Contractors of America. All of those associations and others are on here; but you get the message when you are talking about hundreds of millions of people. They wrote, after looking at the specifics of the legislation, the following:

Employers are not protected from liability—

As an aside, those six words are underlined in the letter by the authors, referring to the McCain-Edwards-Kennedy Patients' Bill of Rights in the first paragraph. They are talking about skyrocketing health costs.

Employers are not protected from liability under the McCain-Edwards-Kennedy bill, and lawsuits are allowed in both State and Federal courts for the same incident under different causes of action. Employers would still be subject to unlimited liability in at least five other ways in State and Federal courts.

Finally, lawsuits could be filed against employers before an independent external review is complete. If faced with such liability, many employers, especially small employers, would have no choice but to stop offering coverage altogether.

That captures it. Again, this is not a Senator who has a vested interest because he, with Senators JEFFORDS and

BREAUX, wrote a bill—it is not me or the Republicans or the Democrats. These are the associations that represent scores of millions of people—I don't know exactly how many. You heard the list. That is their interpretation of what is written in this bill. This simple amendment put forth by Senator GRAMM addresses the issue of whether or not you can sue your employer in the most direct, clear-cut way, taking the exact language out of the Texas State law and putting it into Federal law, using the exact same words.

It is hard to say the other side of the aisle because Senator MCCAIN is a Republican on their bill, and on our bill we have a Republican, a Democrat and an Independent. But, for the most part, their bill is the Democratic bill and our bill is supported and endorsed by the President of the United States and is consistent with his principles.

The President has said that he will veto the McCain-Edwards-Kennedy bill unless it is substantially altered. This is one of the areas I know. I have some correspondence from the President and the opportunity to sue employers is one of the things that has to be changed in that bill. You just can't go out and sue employers in an indiscriminate way, as you can in their bill. From the other side of the aisle, they have said, "First of all, we specifically protect employers from lawsuits." I think, clearly, we have just debunked that in the last hour and a half.

Another quote taken from one of the Sunday shows last week is:

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

"Our bill," meaning the McCain-Edwards-Kennedy bill, "is almost identical to Texas law," they said. We need to settle that. I have not addressed it, but some of my colleagues have addressed it. That is absolutely not true. The Kennedy bill is not similar to, not identical to, not even consistent with Texas law, period. So when we hear it rhetorically, it sounds good because they are trying to jab the President a little, saying, why do we not federalize the Texas law and make it the law of the land; that is what our bill does and therefore the President has to come on board or there is incongruity to the argument. Well, it is incongruous because the assumption that McCain-Edwards-Kennedy is consistent with Texas law is totally false. The McCain-Edwards-Kennedy bill is inconsistent with Texas law.

How? Right here. Right here is where you can start. Texas law explicitly does not create any liability on the part of an employer, and there are no exceptions. That is the No. 1 difference. S. 1052, the McCain-Edwards-Kennedy

bill, explicitly authorizes lawsuits against employers. Again, Senator GRAMM from Texas went through the bill line by line.

The second difference is that the Texas law caps damages in State lawsuits. S. 1052 does not. Texas law does not authorize lawsuits for nonmedically reviewable coverage decisions. The Kennedy bill does. That is the third difference. Let me explain that, because it will help with the understanding of the overall bill.

The sort of decisions that you can sue for can be broken down into two categories. One is treatment decisions and the other is coverage decisions. The McCain-Edwards-Kennedy bill applies to both treatment decisions as well as coverage decisions. Texas law has a much narrower scope. Texas law applies only to treatment decisions and does not apply to coverage decisions.

Again, when people say there are so few lawsuits at the end of the appeals process in Texas and our bill is like the Texas bill, therefore, we are not going to see lawsuits, go back to the basic assumption. The other side of the aisle is basically saying we are going to be like Texas, you are not going to see any lawsuits. They are not like Texas. No. 1, Employers can be sued. No. 2, they have caps in Texas. No. 3, this whole issue of Texas scope is much narrower than the scope in the Kennedy bill.

The McCain-Edwards-Kennedy bill involves treatment decisions. What are they? They are quality-of-care issues, malpractice, holding a plan accountable in a vicarious liability way. Those treatment decisions Texas applies to also. What Texas does not include that the Kennedy bill does are the coverage decisions. If you listen to the debate on the floor, that has been what most of the debate has been all about. If you are an individual, the question is, Did your plan cover your cardiac catheterization? If they say they did not and you were hurt because you did not get a catheterization so you could be treated, you could go through an internal and external appeals process and sue. All that decisionmaking is addressed in the McCain-Edwards-Kennedy bill—and inadequately, I might say. It is addressed in our bill, I believe, in a much more responsible way.

The point is that Texas does not involve any coverage decisions. That is way beyond the scope. So when people say there are so few lawsuits in Texas, therefore, we will make Texas law Federal law and we are not going to see the lawsuits, that may or may not be true. But the McCain-Edwards-Kennedy bill does not make Texas law the law of the land because of the employers' lawsuits and the caps.

What has the President of the United States said? We have been through some of the statements. Again, I think it is important to see how other people are viewing the underlying legislation,

other than just Senators coming to the floor engaging in debate. I went through and circled several of the areas where employers are mentioned in the Statement of Administration Policy, issued June 21, 2001, a statement that came from the Executive Office of the President. Again, it is pertinent to the underlying amendment. First of all, in a paragraph on page 2 it says:

The President will veto the bill unless significant changes are made to address his major concerns.

Then under that, where he mentions employers, it says:

S. 1052 jeopardizes health care coverage for workers and their families by failing to avoid costly litigation. S. 1052 overturns more than 25 years of Federal law that provides uniformity and certainty for employers who voluntarily offer health care benefits for millions of Americans across the country. The liability provisions of S. 1052 would, for the first time, expose employers and unions to at least 50 different inconsistent State law standards.

Further down in this Statement of Administration Policy it says:

S. 1052 also would allow causes of action in Federal court for a violation of any duty under the plan, creating open-ended and unpredictable lawsuits against employers for administrative errors.

A little bit later in this statement from the administration it says:

Moreover, S. 1052 would subject employers and unions to frequent litigation in State and Federal court under a vague "direct participation" standard, which would require employers and unions to defend themselves in court in virtually every case against allegations that they "directly participated" in a denial of benefits decision.

These statements are from the administration and the attorneys who have advised them.

What about people back home? Again, a number of people have recited remarks from people across the country. I will quote from a couple of letters from Tennessee.

I ask unanimous consent that three letters from which I will read be printed in the RECORD.

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

BILLY ROGERS PLGB, HTG, & A/C, INC.,
Dyersburg, Tennessee, June 7, 2001.

Senator FRIST,
U.S. Senate,
Washington, DC.

DEAR SENATOR FRIST: I am writing you in regards to the proposed Patients' Bill of Rights being proposed by Senator Kennedy. I am very much opposed to S. 283.

Our Company provides Health Coverage to all of our employees that wish or can afford to enroll. We presently have (6) families enrolled and (3) individuals at an astronomical annual cost of \$55,000.00.

Our Company pays approximately 80% of the total cost of the annual premiums. Our Company, this year, experienced an increase of approximately 35% in which was totally absorbed by the Company. If we are confronted with an increase of this magnitude in the upcoming new year, I strongly believe

that our Company will have to pass on tremendous increases to our employees or even drop our program altogether. Please do what ever is necessary to see that this Bill does not pass.

Sincerely,
BILLY G. ROGERS, JR. (VP)

DILLARD DOOR & SPECIALTY CO., INC.,
Memphis, TN, June 7, 2001.

Hon. BILL FRIST,
U.S. Senate,
Washington, DC.

DEAR SENATOR FRIST: As the president of a small business with 17 employees, I am concerned over the cost of our company's medical insurance. Under our medical plan, we pay the premiums for our employees, and they pay for their dependents. Our carrier increased the charges over 15% this year, and did approximately the same last year. Our company absorbed these additional costs, but we did raise our deductibles (if we hadn't, the increase would have been much greater). Should premiums continue to increase in such a manner, we will be forced to discontinue or drastically alter our plan. Being such a small company, we are at a disadvantage when it comes to rates, and current laws do not allow us to seek coverage through any of the associations to which we belong.

We also are concerned over any aspects of a future Patients' Bill of Rights that would allow employees to sue our company for alleged deficiencies in coverage. If such suits were allowed, we would most certainly discontinue coverage for our employees, as I'm sure almost all small business owners would. What would probably happen is that we would raise our employees' salaries enough to cover their medical coverage at our current rate, and they would purchase coverage personally (if they could). Such wage increases would, of course, be taxable, so they would have even less to pay for a plan.

The situation is already a most serious one, and if any more burdens are placed on the backs of small businesses for medical costs than currently exist, I believe the rolls of the non-insured will swell beyond belief. Your efforts in doing anything to not only improve the situation, but also to prevent any future changes that would have a burdensome effect would be greatly appreciated.

Sincerely yours,
JOHN W. DILLARD, JR.,
President.

HERNDON & MERRY, INC.,
Nashville, TN, June 7, 2001.

Senator BILL FRIST,
U.S. Senate,
Washington, DC.

DEAR SENATOR FRIST: My letter today is to share with you my concerns about the potential of a "Patients' Bill of Rights" coming out of a newly Democratic controlled senate.

Our company has been in business for 42 years and over that time we have been able to provide, at differing levels, health care coverage to our employees. This experience gives me some footing to address this issue. We currently have 22 employees and most of these participate in our insurance program of which the corporation pays 85%. In past years we paid 100% of the premium and paid for family coverage. However, due to cost increases that in some years were 30 to 40% we were unable to continue to either absorb this cost or to pass it on in price increases to our customers. So, we scaled back coverage and required employees to pay a portion of the premium. The real question is why such dra-

matic increase in the first place? I think the answer is painfully clear—government meddling. The more government meddles in the free market, no matter what kind of market, the greater the cost. Just ask Californians what government price controls have done for the availability and the REAL cost of power. While all of the increase in the cost of health care cannot be laid at the feet of both state and federal mandates, it is surely at the root of those increases. The proof lies in how both the federal government and the state of Tennessee exempt themselves from most of the mandates because they know how expensive they really are.

I urge you to fight to the last man against S. 283. If my employees will have the right to sue me because I am paying a portion of their health care then you can be assured they will no longer receive this benefit from my company. They will be left out in the cold. But I fear that that is exactly what Senator Kennedy and those on the left would like. Then they can reintroduce Hilliary care and come to the "rescue"

Your Friend,
BILL MERRY, JR.

Mr. FRIST. The first one is from Billy Rogers. He is in Dyersburg, TN. He is a small businessperson:

DEAR SENATOR FRIST: Our Company provides Health Coverage to all our employees that wish or can afford to enroll. . . .

Our Company pays approximately 80 percent of the total cost of the annual premiums. . . .

I strongly believe that our Company will have to pass on tremendous increases to our employees or even drop our program altogether. Please do whatever is necessary to see that this Bill does not pass.

The second letter is from John Dillard, who is president of Dillard Door, a door speciality company in Memphis, TN:

DEAR SENATOR FRIST: We also are concerned over any aspects of a future Patients' Bill of Rights that would allow employees to sue our company for alleged deficiencies in coverage. If such suits were allowed, we would most certainly discontinue coverage for our employees, as I'm sure almost all small business owners would. What would probably happen is that we would raise our employees' salaries enough to cover the medical coverage at our current rate, and they would purchase coverage personally (if they could). Such wage increases would, of course, be taxable, so they would have even less to pay for a plan.

The last letter I entered into the RECORD is from Herndon & Merry, Inc., in Nashville, TN. The last paragraph says:

I urge you to fight to the last man against S. 283.

Which is the predecessor Kennedy bill.

If my employees will have the right to sue me because I am paying a portion of their health care, then you can be assured they will no longer receive this benefit from my company. They will be left out in the cold. But I fear this is exactly what Senator Kennedy and those on the left would like. Then they can reintroduce Hilliary care and come to the "rescue."

Your friend, Bill Merry.

I wanted to give some perspective from outside the Senate and the White House.

I ask unanimous consent that a four-page letter that was just sent today from Margaret LaMontagne be printed in the RECORD.

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

THE WHITE HOUSE,
Washington, June 22, 2001.

DEAR MR. LEADER: Thank you for your inquiry regarding the Texas Patients' Bill of Rights. Numerous questions have been raised about the substance of that legislation. I am happy for the opportunity to clear up any confusion. As you may know, I was a policy advisor to then Governor Bush during his tenure as Governor and currently serve as Assistant to the President for Domestic Policy. I would be delighted to provide any additional information that would be helpful to Congress during this important debate.

History of Texas Patients' Bill of Rights

As Governor, President Bush signed five patient protection bills and allowed a sixth to become law without his signature. Throughout the legislative debate, he strongly supported efforts to provide patients with comprehensive patient protections and access to a strong independent review procedure. Governor Bush focused on the goal of providing quality care to patients by ensuring timely and independent medical review of HMO decisions. He stressed that legislation should focus on protecting patients, not trial lawyers. And he emphasized that, while patients should be able to hold HMOs liable in court, liability provisions should be drawn narrowly to ensure that they do not cause large increases in premiums or raise the number of uninsured.

When, in 1995, the Texas Legislature sent Governor Bush a Patients' Bill of Rights that created loopholes and exempted a major HMO from its provisions, Governor Bush vetoed the legislation, stating that he would not sign a bill that favored special interests over patients. He then worked with the Texas Commissioner of Insurance to draft strong patient protection regulations that formed the model for the bills he signed into law the next biennial legislative session.

The Patients' Bill of Rights Governor Bush signed in Texas in 1997 has been widely regarded as among the strongest in the country. Patients in Texas now have comprehensive patient protections, and Texas independent review organizations have considered claims by roughly 1400 patients, approximately half of which have resulted in partial or complete reversals of the health plan's decision. Perhaps because of the success of the Texas legislation, some of the Congressional sponsors of legislation have insisted that their bills most closely resemble, and give the greatest deference to, the Texas Patients' Bill of Rights. In particular, some supporters of the bill offered by Senators McCain, Kennedy and Edwards have argued that their bill, S. 1052, would adopt, roughly, Texas law. We strongly disagree.

S. 1052 departs fundamentally from the model adopted in Texas. S. 1052 would threaten to preempt the strong patient protections adopted in states like Texas, would allow causes of action in state and federal court much broader than those authorized in Texas, and would threaten to upset the careful safeguards imposed by the Texas legislature regarding employer protections and caps on liability.

Preempting Texas Patient Protections

The bill sponsored by Senators McCain, Kennedy and Edwards, far from protecting

good state laws like those in Texas, threatens to override them by imposing a preemption standard that gives virtually no deference to states. The bill does not allow states to apply their own strong patient protections even when the protections they offer are consistent with federal law. Rather, S. 1052 would require that each state requirement be "at least substantially equivalent to and as effective as" each federal requirement, without requiring the Department of Health and Human Services to give deference to the need for flexibility or the state's determination that its standards best protect its citizens. We believe that this provision in S. 1052 would give the federal government too much latitude to override state law and undo the good work of states like Texas.

Cause of Action

Another key difference between Texas law and S. 1052 relates to the breadth of the cause of action. The legislation enacted in Texas created a narrow cause of action against HMOs for any wrongful "health care treatment decision," defined by the Texas legislature as "a determination made when medical services are actually provided by the health care plan and a decision which affects the quality of the diagnosis, care, or treatment provided to the plan's insureds or enrollees." Tex. Civ. Prac. & Rem. Code §88.001. This language has been interpreted to apply only to claims alleging wrongful delivery of medical care, as opposed to decisions by an HMO regarding benefit determinations. As the United States Court of Appeals for the Fifth Circuit stated last year, the Texas liability provisions: "impose liability for a limited universe of events. The provisions do not encompass claims based on a managed care entity's denial of coverage for a medical service recommended by the treating physician: that dispute is one over coverage, specifically excluded by the Act. Rather, the Act would allow suit for claims that a treating physician was negligent in delivering medical services, and it imposes vicarious liability on managed care entities for that negligence." *Corporate Health Inc., Inc. v. Tex. Dept. of Ins.*, 215 F.3d 526, 534 (5th Cir. 2000).

Unlike the narrow cause of action provided in Texas, S. 1052 allows expansive causes of action in both state and federal court. Under S. 1052, state courts would consider sweeping lawsuits related to denials of claims for benefits, while federal courts would hear cases related to violations of administrative duties under the plan. Neither cause of action is currently available in Texas state court. And, as drafted, both are excessively broad and would invite frequent and costly litigation.

Employer Protections

Another fundamental difference between Texas law and S. 1052 relates to the treatment of employers. When the Patients' Bill of Rights was debated in Texas, the legislature acted decisively to protect employers—and their employees—from costly litigation by prohibiting lawsuits against employers. The Texas statute clearly states: "This chapter does not create any liability on the part of an employer." Tex. Civ. Prac. & Rem. Code §88.002(e). This protection was considered essential, by the Texas legislature and by Governor Bush, to ensuring that the new liability provisions did not create an incentive for employers to drop health coverage altogether.

Conversely, S. 1052 invites frequent litigation against employers by subjecting them to liability under a vague "direct participa-

tion" standard. Under this standard, employers can be held liable for "the actual making of [a] decision or the actual exercise of control in making [a] decision." Because the question whether an employer "exercised control" in a decision is inherently fact-based, employers will be forced to defend at trial in virtually every case alleging a wrongful denial decision. Moreover, the interpretation of "direct participation" will differ in the various state courts, forcing employers to comply with different standards throughout the country.

This treatment of employers is a radical departure from the approach adopted in Texas and will create incentives for employers to drop employee health coverage entirely, further increasing the number of uninsured.

Additional Protections

Texas adopted numerous other protections to ensure that lawsuits benefit patients and not trial lawyers. For example, as Governor, President Bush signed legislation that limits punitive damages to the greater of \$200,000 or two times economic damages plus non-economic damages of no more than \$750,000. Tex. Civ. Prac. and Remedies 41,007. S. 1052, conversely, allows for unlimited non-economic and punitive damages in state courts, imposes no limitation on non-economic damages in federal court, and limits punitive damages in federal court to the excessively high figure of \$5 million. Further, it is not clear that the new state causes of action under S. 1052, which will no doubt include physicians in many cases, would be subject to the various state medical malpractice caps.

Finally, Texas law discourages patients from bringing frivolous claims by requiring that when a patient files suit he must submit either a written report by a medical expert that supports his case or must file a bond. Tex. Civ. Prac. & Rem. Code §88.002. S. 1052 has no procedural requirements to ensure that patients bring only medically meritorious claims to court. Indeed, that legislation would allow a patient to bring suit even if a panel of independent medical experts concludes that his claim is meritless.

Summary

Supporters of S. 1052 have made much of the fact that few lawsuits have been filed under the Texas Patients' Bill of Rights. We believe that this fact is attributable to the emphasis in Texas on quality of care and strong independent review, the careful drafting of the Texas liability provisions, the protections provided to employers, the exhaustion requirement, and the imposition of caps and other limitations to discourage frivolous suits. We strongly believe that the success in Texas will not be mirrored on the federal level unless substantial changes are made to the liability provisions of S. 1052.

We urge Congress to send a strong and effective Patients' Bill of Rights—one that meets the President's principles—to the President's desk.

Sincerely,

MARGARET LAMONTAGNE,
*Assistant to the President
for Domestic Policy.*

Mr. FRIST. This is a letter that I hope will be distributed and read, but I will read what this letter says about employer protections. It is talking about the difference between the Texas law and the proposal by Senator KENNEDY before us.

Under employer protections:

Another fundamental difference between Texas law and S. 1052 relates to the treatment of employers. When the Patients' Bill of Rights was debated in Texas, the legislature acted decisively to protect employers—and their employees—from costly litigation by prohibiting lawsuits against employers. . . .

Conversely, S. 1052 invites frequent litigation against employers by subjecting them to liability under a vague "direct participation" standard. Under this standard, employers can be held liable for "the actual making of [a] decision or the actual exercise of control in making [a] decision." Because the question whether an employer "exercised control" in a decision is inherently fact-based, employers will be forced to defend at trial in virtually every case alleging a wrongful denial decision. Moreover, the interpretation of "direct participation" will differ in the various state courts, forcing employers to comply with different standards throughout the country.

This treatment of employers is a radical departure from the approach adopted in Texas and will create incentives for employers to drop employee health coverage entirely, further increasing the number of uninsured.

Again, people can read this letter from Margaret LaMontagne in the RECORD. She was policy adviser to then-Governor Bush during his tenure as Governor and currently serves as Assistant to the President for Domestic Policy. She clearly was involved in the formulation of the Texas legislation and has had the opportunity to examine the legislation introduced by Senator KENNEDY.

I close by saying I am delighted to support the amendment as proposed by the Senator from Texas. It makes it crystal clear that you cannot sue employers, and it will eliminate this potentially huge source of funding for litigators. But, it will do absolutely nothing for patients to get the care they need in a timely way, in a way of high quality, and in a way that can be respected.

I yield the floor.

The PRESIDING OFFICER (Mr. MURKOWSKI). The Senator from North Dakota.

Mr. DORGAN. Mr. President, I have been closely listening to the debate this morning. I presided over the Senate for an hour this morning and was listening for that time to the debate with respect to the Patients' Bill of Rights. It reminded me of a story about the great debates between Lincoln and Douglas. I have mentioned this story on a previous occasion.

Apparently during those debates, Lincoln and Douglas were having difficulty understanding each other's point. Lincoln finally said to Douglas: Well, tell me, how many legs does a cow have?

Douglas said: Why, four, of course.

Lincoln said: Well, now, if you call a tail a leg, how many legs would a cow have?

Douglas said: Five.

Lincoln said: No, that is where you are wrong. Just because you call a tail a leg doesn't make it a leg.

What I have seen today is interesting. They have taken a tail, called it a leg, and spent 4 hours describing this new leg. There is nothing in the Patients' Bill of Rights or the Patient Protection Act that is designed to subject employers to lawsuits or to liability. In fact, this act, as described, specifically protects employers from the kind of suits that have been described for the last 4 hours.

It is, I suppose, a classic response to something you do not like to try to change the subject, and that is what this amendment is all about, changing the subject.

The central feature of the patient protection legislation is very simple. This legislation is about empowering patients who are confronted with a challenge too often in this country. That challenge is of large managed care organizations that in too many cases will not provide the treatment patients expect to have covered under their health plan. Under this act managed care organizations would be required to provide that treatment.

We believe a patient has a right to know all of their medical options for treatment, not just the cheapest option. We believe a patient has that right.

We believe a patient has the right to go to an emergency room and get emergency treatment if they have an emergency. Do you think every patient has that opportunity now? The answer is no. We believe a patient ought to have the right to see a specialist when they need to. That is not a right that exists today.

Yes, we believe a patient ought to be able to hold their HMO or managed care plan accountable. Does that mean being able to sue? We are not interested in lawsuits. We are interested in accountability.

If an HMO decides it is not going to provide the treatment that is necessary, then should someone be able to hold them accountable and take them to court? The answer is, you bet. I have spoken about Christopher Roe on a couple of occasions. Let me do it again because it is important in the context of the patient rights we talk about. Christopher died on his 16th birthday. He fought cancer and had to fight his managed care organization at the same time. That is not a fair fight. This young boy, according to his mother who testified at a hearing I chaired, waged a courageous fight against cancer but didn't get the care he needed or the treatment he needed to give him a shot at beating his cancer. He looked up from his bed and asked his mother: "Mom, how can they do this to a kid?" He died on his 16th birthday.

It shouldn't happen. It need not happen. All too often in this country, for-profit managed care organizations have viewed a patient's care through the lens of how that care will affect their

profit and loss. Is this something we are willing to stand for? No. We believe it is important to put into law a set of patient protections or patient rights to change that.

It is interesting to listen to discussions about Dicky Flatt. It is interesting to hear letters from people who say if employees are allowed to sue employers, they will no longer have health care. The fact is, this legislation will not allow employees to sue employers. It is a classic opportunity to divert attention. That is what is happening with the current amendment on the Floor, offered by Senator GRAMM. There are people who have never wanted a Patient's Bill of Rights enacted. When it comes time to answer the question of who they stand with, these people stand with the insurance companies and managed care organizations. They do not stand with nurses and doctors, all of whom support this legislation. They say they stand on the other side because they don't like this legislation.

That is fine. That is all right. Everyone has a right to oppose this legislation. But there is not an inherent right to misrepresent what this legislation does. And this legislation does not allow wholesale opportunity for people to sue their employers who offer health insurance to their employees. That is not what this legislation is about. This legislation contains specific protections against that very thing.

My hope is we will find substantial common ground in the coming week or so and be able to pass a Patient's Bill of Rights by a week from today. This bipartisan legislation has been 4 years in the making. I find it interesting to hear people say this has not been the subject of hearings. My Lord, we have had this piece of legislation or legislation like it on the floor of the Senate time after time after time. It has been around for 4 years. If one cannot read that fast, one can employ someone else to read that fast. This is not new legislation. The only problem is we have people who dig their heels in and do not want to deal with it.

That is a classic response that has come to all changes that have made this a better and better country. Every single thing we have done to advance interests in this country has been opposed by those who do not want to do something for the first time. I understand that.

There is the story of the old codger, 85, 90 years old, interviewed by the radio station announcer, who said: You must have seen a lot of changes.

He said: Yep, and I've been against every one of them.

We have people like that who serve in public life, too. That is just fine, except this change is necessary. This change is important. This change empowers patients and does not injure employers. It contains protections to make sure

employers are not going to be subject to lawsuits.

We will have more discussion about the protections for employers in the coming days, especially next week. I hope we can keep our eye on the ball and pass a patient protection act that offers protections that I think are needed and should be offered in this country.

I yield the floor.

Mr. NICKLES. Mr. President, I compliment the Senator from Texas, Mr. GRAMM, for offering this amendment, as well as Senator THOMPSON. I compliment Senator FRIST for his comments and work and leadership on this bill in general, as well as Senator GREGG. People are becoming more familiar with the bill before the Senate, S. 1052, the McCain-Edwards-Kennedy bill.

I have heard sponsors of the bill say employers cannot be sued under this bill. I believe that is a direct quote. That is not factually correct. Under this bill, on page 144, is language that deals with this. It says:

(A) Causes Of Action Against Employers And Plan Sponsors Precluded.

That sounds really good. But that is paragraph (A).

Paragraph (B) on page 145 says:

Certain Causes Of Action Permitted.—Notwithstanding subparagraph (A), a cause of action may arise against an employer or other plan sponsor.

(A) says you cannot sue an employer and (B) says notwithstanding (A) you can sue an employer.

It goes on for several pages, whether an employer had direct participation or not. But as an employer, if you have to comply with ERISA, you do a lot of things other than the exemptions provided in the legislation. In other words, under this bill, you can be sued.

Some say that is not true, that is not what we meant. If it is there, we will fix it.

We have a chance to fix it and we can adopt this language. This is language that says employers shall not be held liable under this law. We ought to pass it.

Some have said liability is not such a problem because Texas has not had many claims—other States have not had many claims.

We are looking at the Texas law which says employers shall not be liable. If we are going to say it on the floor, if we say employers are not going to be hit, let's protect them. We protected doctors in this bill, we protected hospitals in this bill. That was a change made last Thursday night. This bill has evolved and changed significantly from the bill we were considering. The original bill was Senate bill 872 and did not have that fix. We fixed it for doctors and some hospitals. Now we have a new bill S. 1052 and it did not fix it for employers.

As a matter of fact, employers get more than "fixed" in this bill. Employers, beware. If we don't pass this

amendment or something close to it, employers, beware. The majority leader says to pass it next week. I would love to conclude this debate by next week. But if you make all employers liable for unlimited damages, there are a lot of employers that would rather have Members stay and debate a bill than pass a bill that says we are sorry you provide health care for your employees. You don't have to provide your employees with healthcare, but for doing that good service for your employees, you can be sued for everything you have, maybe for everything you ever will have. There is no limit on damages.

Somebody said under McCain-Kennedy there is a \$5 million cap on punitive damages. There should not be punitive damages in this bill in the first place. I thought the purpose of this bill was to protect patients, not to enrich attorneys. Why are punitive damages in if you are trying to protect patients? They don't belong. That \$5 million cap on punitive damages is a cap in Federal court, not in State court.

There is no cap on noneconomic damages. What are those? That is pain and suffering. You get in front of a sympathetic jury, get a good trial lawyer—if you have a great big company, why not just sue for the world? If you are going to sue for a million dollars, why not make it \$100 million, or make it hundreds of millions of dollars? If you do a real job on the jury, you might win. It is a little bit of a lottery. You might win the golden jackpot. You might win several hundred millions of dollars. We have seen cases recently from some juries that are in the billions of dollars.

Now we are flirting with the survival of big companies. I am not so worried about the big companies, but I am worried about a lot of small companies that are struggling to survive who are providing health care for their employees because they want to—not, frankly, because it is appreciated. I will tell you as a former employer that most employers pay a lot more for health care than their employees realize. Even though you might tell them every once in a while, they don't appreciate the money being spent. If you gave employees the option, they would probably rather have the cash and risk not buying health insurance so they could have more disposable income. Those are just the facts. That is the case in many areas.

Why not just do that? If we pass the McCain-Kennedy bill that is what a lot of employers will do. They will say, I don't have to provide this benefit. It is not appreciated as much as it probably should be. And now, now not only do I have to pay thousands of dollars per year to provide health care, but I can be sued for everything. Maybe this company has been going for 40, 50, or 60 years. It may be a bank. It may be a manufacturing company. A good attorney

will say: Wow, no limit on pain and suffering. We had a problem. I know you didn't really have anything to do with it. But you hired this big insurance company, and they hired their doctor. That doctor wasn't very competent. Something bad happened. Somebody died. Therefore, we are going to sue you for what you have because you hired the company that hired the doctor. You are liable. You are involved. You had a direct participation. Therefore, you are liable.

All of a sudden, you are going to go bankrupt. Not only do you lose health care and your health care costs go up, but you may lose your company. The employees may lose their jobs.

That could easily happen under this bill.

Again, I know, I have heard the sponsors of this legislation say, oh, no; that is not our intention. We are not going after employers. We are going after those big bad HMOs.

If we are not going after employers, let's exempt them. We have exempted physicians and hospitals. Let's exempt employers. That is what Texas did. That probably enabled them to pass their bill. Let's exempt employers under this bill. That is one clear-cut way of not trying to define if they participated in the decision.

I challenge anyone. Start reading through the definition of direct participation. Then tell me if an employer in carrying out their fiduciary duties in providing health care for their employees—including plan determinations, reporting, enrolling people, choosing plans, maybe an optional plan, and so on—tell me they do not do more than what the exemptions are here. They are not complying with the law.

This list is written basically saying, employers, you are covered. You can be sued. You can be held liable.

It says Patients' Bill of Rights. It should say beware, employers. We are getting ready to come after you. Trial lawyers are looking out for themselves—not for patients. If you want to look out for patients, we could pass a bill tomorrow that will give every patient in America—external and internal review—a place where they can get a benefit determination. If they were denied, it could be overturned. At least, it could be reviewed by medical doctors—an independent panel. That could be binding. We can do that. We can pass that overnight. They would have new, needed additional protections.

No; we want to go a lot further than that. We want to be able to take not only the HMOs but also take employers to court and be able to sue them for everything they have with no limit, and no caps. As a matter of fact, we want to be able to choose under this bill between Federal court and State court, whichever is best, with no caps. We might be able to do pretty well.

I urge people and employers, if you are concerned about this bill, please contact Members of the Senate because we will be voting on this amendment sometime Tuesday. There is a chance that we can fix employer liability once and for all—very clean, no exemptions, no exceptions.

There is one other comment I wanted to make. I heard our colleague, the junior Senator from Missouri, say, well, Missouri passed a good patients' bill of rights. She was very proud of that. I compliment Missouri. I don't know what is in Missouri's law. But I compliment the State of Missouri for passing a good patients' bill of rights.

I do not know if Senators are aware, but in the bill that we are passing, the patient protections are going to supersede whatever the State of Missouri did—as a matter of fact, whatever any State has done. There are over 1,100 patient protections that different States have passed. No matter what your State has done, we are getting ready to pass a bill which says that may not be good enough because if the State of Missouri or Oklahoma or Alaska didn't pass patient protection that is substantially equivalent and as effective as we have proposed under this bill, then you are in trouble. It doesn't qualify. It is not good enough. It is going to be replaced with this.

As a matter of fact, you almost have to have identical language in this bill for the State protections to apply.

Another way of saying it is the State has to adopt what we are passing. You might say that is fine. I am sure we are passing good protections here. Maybe we are. Maybe they are better. Maybe they are not.

Who will be determining if these protections are better, or if the State protections are better than these? The Government is. Somebody elected? No. It would be a bureaucrat over at the offices of the Health Care Finance Administration, HCFA. They will determine whether or not State law which was probably negotiated with the State legislature and with the Governor, or maybe the State insurance commissioner, possibly with a lot of input from the participants, beneficiaries, plans, possibly with years of experience—hey, in this plan, does this benefit work? Is this excessive in cost? Is it overutilized or underutilized? They have experience. They determine if they can afford this patient protection or they can't. They made modifications. We say we don't care what your case history is, or what your State history is. We are going to replace your patient protections with one that Senator KENNEDY, Senator MCCAIN, and Senator EDWARDS have decided is in your best interests.

I negotiated with Senator KENNEDY on patient protections last year. But I refused to go along with saying that what we have done is better than what

the States have done. I don't think that these protections should supersede what the States have done.

That is what we are doing in this bill. This language says you have to have substantially equivalent patient protections that are at least as effective as what we have. Nobody knows how effective these are. These are not law. They have never been tried. They have never been tested. They have never been analyzed. They have never been in the real market. No one really has any idea about how much they really cost.

We are saying to the State, whatever you have, it has to be as effective as these, even though we don't know if these are effective or not.

Talk about a bad example of government knows best, that is exactly what we are doing in this bill. We will have an amendment that addresses that in the course of the debate next week.

One other comment I want to make deals with the issue of coverage. I have kind of alluded to it. This bill says it covers all Americans. I have heard several people say that. But if they say that this bill covers all Americans, I assume they are not very knowledgeable about the bill. This bill doesn't cover all Americans. We had a conference this morning. One of my colleagues hit his head. I said: Be careful. You can't sue. You can't sue the Federal Government.

We are getting ready to mandate on the private sector rights and privileges that we don't have as Senators or as Federal employees.

If we took a poll amongst Federal employees and asked "Do you believe your health care is pretty good?"—my guess is most people would say yes. We get to choose from a lot of health plans.

Guess what. You can't sue your employer. This bill doesn't say the Federal Government can be sued by employees. Fine. Private sector, go out and sue your employer. Sue your HMO. Can you sue your HMO if you are a Federal employee? No. You cannot. You can sue to get a covered benefit. You can do that in the private sector right now. Some people say you can't sue your HMO. But you can sue to get a covered benefit.

What people want is to get into a lawsuit lottery where they can go for millions of dollars of excess covered benefits. You can say, I sue. If you want to have coverage for a benefit that you think you are rightly entitled to, you can sue for that today. This bill doesn't cover Federal employees.

This bill doesn't cover the lowest income Americans. What did you say? I said this bill that we have before us doesn't cover the lowest income Americans. It doesn't cover Medicaid.

Think about that. We have a Federal insurance program called Medicaid. This bill doesn't apply to Medicaid. We don't care about low-income Americans

with all of these patient protections that we are saying are so magnificent. We are giving these to the private sector, and they won't cost anything? So we are going to have this mandate on the private sector, including liability, but we do not have it for low-income people? Does that make sense?

We love seniors, so I am sure this benefit applies to seniors. I read through the bill and, much to my chagrin, this bill does not apply to Medicare. Wow. I know I heard President Clinton say we are going to make these patient protections apply to Medicare. These protections do not apply to Medicare. Somebody in Medicare cannot sue the Federal Government. Somebody in Medicare cannot sue for unlimited damages through their employer.

I know I heard President Clinton say I already instituted an executive order that applies these patient protections to Federal employees in Medicare, but it did not happen. He did a little something, but it did not apply anything like this bill. It was not nearly as extensive or expensive.

So if we are trying to apply these patient protections to all Americans, we sort of left out a few people. We left out Federal employees. That is interesting. Employees in the State of Alaska, the Governor of Alaska, the State legislature, they have to comply. These benefits must apply to State employees in every State of the Union but not to Federal employees. Wow. We have a heck of a deal.

And, oh, yes, they have to apply to every health care plan in America, every private-sector health care plan in America but not the VA. These benefits do not apply to veterans in our hospitals. These benefits do not apply to Indians in the Indian Health Service. These benefits do not apply to Federal employees. They do not apply to Medicare. They do not apply to Medicaid, to low-income people. So when my colleagues say we want these to apply to all Americans, they have not read their bill.

Guess what. They do not apply to union members either, not for the duration of their contract. If you renegotiate your contract by next summer—and it could be a 10-year contract—you would not be covered in this bill for 11 years. We are going to apply it to everybody else in the private sector, but we are going to have an exemption for our friends in the unions. Wow. That is interesting. So I just make that comment.

I think this bill is aimed, like a gun, at the heads of employers. Private sector, look out. Trial lawyers are after you. They are not just after the HMOs, they are after employers as well. We can fix that by adopting the Gramm amendment. We can exempt employers and make it nice, clean, and straightforward. If you want to exempt employers, vote for this amendment.

Employers, if you want your Members of the Senate to exempt you, if you do not want to be strapped with this unlimited liability, I would urge you to contact your Senators between now and Tuesday and say: Please pass the Gramm amendment. It will have a real effect. It will duplicate the Texas law that exempts employers. So we can make a difference.

Also, if seniors think all these great patient protections we are lauding so much are very good things, you might ask them: Why are you left out of this bill? If this is so good for the private sector, why don't we do it for the public sector as well? It seems like we have a little habit around here, every once in a while, of saying: It is just fine to sue the private sector. We can put all kinds of mandates on them. So what. Oh, but we will not do that to us. I am not sure I agree with that. We may have to have an amendment to clarify that as well.

This bill, in my opinion, is fatally flawed. We are going to try to amend it to improve it. I very much want to put a bill on the President's desk in the not-too-distant future that he can sign and that we will be proud of. Maybe Senator KENNEDY and I can be shaking hands behind him saying we have a good bill that really does protect patients but in the process does not threaten and scare employers.

I think that is possible. I do not think it is in this bill. I think President Bush is exactly right in saying this bill would cost too much. The cost of this bill could increase health care costs 8 or 9 percent over and above inflation in health care, which right now is 13 percent nationally. That is about 22 percent for small business. Businesses and employees cannot afford another 8 or 9 percent on top of already very high medical costs.

So this bill needs to be fixed. It needs to be improved. One giant step toward doing that would be the approval of the pending amendment that we will be voting on some time Tuesday.

So I urge my colleagues to support the underlying amendment. We will come up with additional amendments to improve this bill in relation to liability and scope and contracts. This bill just happens to have a section that says you shall not be bound by the contract. That is interesting. It means it is totally unlimited in what this bill may cover, what somebody may have to pay for, whether it is contractual or not. We will try to fix that as well.

Hopefully, we will improve this bill to the extent that it will be a good bill worthy of the President's signature and one where we can say we did a good job and passed a real bipartisan bill that will improve patient protections for all Americans.

Mr. President, I yield the floor.

I suggest the absence of a quorum.

Mr. MURKOWSKI addressed the Chair.

The PRESIDING OFFICER (Mr. STEVENS). Will the Senator withhold that request?

Mr. NICKLES. I withhold it.

The PRESIDING OFFICER. The Senator from Alaska.

Mr. MURKOWSKI. I thank the Chair.

Mr. President, I would like to follow on the comments made by my good friend, the senior Senator from Oklahoma, relative to the bill before this body.

I come to this Chamber as a Senator that represents a State that does not have a single HMO. As a consequence, with our small population, spread over a large land mass, I do not expect to see many HMOs moving into Alaska anytime soon. But I think this fact has led me to perhaps have an objective view, to look at this legislation with more neutral eyes. And what I see troubles me. I think it should trouble all Americans.

We do have a crisis in our health care system. Right now, there are 42.6 million Americans who are uninsured. These individuals lack even the most basic coverage and must continually worry about how they will pay for health care services.

Will they become sick and fall into a situation where they fail to receive proper medical attention? Will they become hospitalized but have their hospital bills drive them into bankruptcy? Should they pay their doctor bills or pay their rent? Which is it? These are the real concerns facing 1 out of every 6 Americans.

With such a staggering number of uninsured, and such real difficulties they could face, why have the proponents of the bill so cavalierly shrugged off the additional costs of this Patients' Bill of Rights? For every 1 percent increase in premiums, 300,000 more Americans will be faced with the reality of being uninsured. That is 300,000. The Congressional Budget Office has estimated that the McCain-Kennedy bill will increase health care premiums by 4.2 percent.

I think Americans need to know more about this matter. Further, more than 1 million people will lose their health care coverage because of this pending bill. Who is going to protect their right to even be a patient? Who will ensure that they will even have access to a doctor? How are they going to have direct access to a hospital or, for that matter, an emergency room? What new rights will 1 million newly uninsured individuals have in this country?

That is the real problem. And there is real concern for all of us. And don't think there won't be a cost for those who are still lucky enough to retain health care insurance. There would be a cost.

Last year, the average family spent \$6,351 on health care expenses. That payment is expected to now go up 13 percent to more than \$7,000, even without the McCain-Kennedy bill. If it is

enacted as it is currently drafted, those families would have to take on even more financial burdens. Newly uninsured individuals will still receive some modest level of care through expensive emergency room visits or hospitalizations. If they are unable to pay, however, this bad debt will be passed on to those among us, and, as a consequence, the Federal Government will also pick up a significant share. We will all pay more when more and more care is delivered to uninsured individuals.

I have talked to some of my constituents in Alaska. One thing is perfectly clear. They want quality health care for their families, not a prime slot on the local court's docket.

Let's not be coy about who is really pushing this legislation. It is the trial lawyers, and the trial lawyers smell blood in the water.

I applaud Senator FRIST and Senator BREAUX, and others, for putting forward a more well-thought-out Patients' Bill of Rights. They have this part right: Americans want to see their doctor and their specialist in a timely and appropriate manner; they do not want to see their employer, who has gone the extra mile to offer health care benefits, dragged into court.

Under the McCain-Kennedy bill, an employer could be subjected to unlimited economic damages, unlimited non-economic damages, and up to \$5 million in punitive damages.

I have served in this body for a little over 20 years. During that time, I have worked to strengthen and support America's small businesses.

I firmly believe that small businesses are the backbone of our economy and represent the ideals that form this great Nation. Those are the folks who take the real risks. The individuals who start a small business are the risk takers. Obviously, it is a very tough process. They have to be the bookkeeper, the timekeeper. They have to be the first aid master. Anything imaginable you have to do yourself in a small business. You don't have a clinic to go to. You don't have all the assets that a large corporation has almost within house.

That any American could work hard, open a business, create hope and opportunity for their families is what small businesses are all about. When they succeed, of course, they hire employees and eventually offer health care benefits. We should not punish them just because they offer these benefits.

The bottom line effect of this legislation is to force employers to either drastically rewrite their health insurance plans or drop coverage altogether. Whose rights are served then?

While McCain-Kennedy may claim to have a copyright on the so-called Patients' Bill of Rights, I think nothing could be further from the truth. Rather, I think we must all understand that

the Frist-Breaux package contains comprehensive patient protections, all without threatening employers. These include:

Guaranteed access to emergency care: As such, a patient can go to the nearest hospital emergency room regardless of whether the emergency room is in their health care plan network or not;

Direct access to OB/GYN care: If OB/GYN care is offered, women can directly access that care;

Direct access to pediatricians: All Americans can choose a pediatrician as their child's primary care doctor;

Access to valuable and beneficial prescription drugs: Physicians and pharmacists will work to develop appropriate drug formulas;

Timely access to specialty care: If a plan lacks a specialist, the patient can go outside the network for no additional cost.

What better protections and rights than access to quality care? Quality care that the more than a million newly uninsured individuals will never, ever receive?

I am grateful that we are debating this bill. I am also grateful that this bill will be subjected to an amendment process. We have a lot of work to do. The first thing we should do is to make sure that employers are not subject to liability simply because they want to care for their employees. Together we can make this a true Patients' Bill of Rights bill. I am committed to having a solid piece of legislation sent to our President for his signature.

NOMINATION OF J. STEVEN GRILES

Mr. MURKOWSKI. Mr. President, I am very concerned. The Energy and Natural Resources Committee has oversight of the Department of the Interior. As a consequence, we have had the responsibility of holding hearings on the nomination of various individuals for the Department of the Interior.

It is rather ironic that the only individual at the Department of the Interior who has been cleared by the Senate in its entirety is Secretary of the Interior Gale Norton. We have had a situation with regard to the Deputy Secretary, Mr. Steven Griles, that deserves some examination by this body.

Mr. Griles was nominated on March 9 by our President. Hearings were held on May 16, as I chaired the Energy and Natural Resources Committee. He was reported favorably out of the committee by a vote of 18-4 on May 23 of this year. All this was prior to the switch by Senator JEFFORDS who made his announcement on May 24. At that time, we immediately began to try to move the nomination. The minority also tried to get a time agreement.

According to the information we have from the floor staff, Griles was