



June 21, 2001

From the Congressional Record

Senator Gregg on S. 1052's Liability Provisions

Here's what HELP Committee Ranking Member Judd Gregg (R-NH) had to say about the McCain-Edwards-Kennedy bill as it relates to employer liability [as printed in the *Congressional Record* of June 19, 2001]:

One of the big issues in relation to what is in [S. 1052] is what effect this will have on employers. I think the language is unequivocal on that point. The language in section (B), as I cited before, 144, says: "A cause of action may arise against an employer." Sure they have the nice title, "Exclusion of Employers," but they wipe out that language with the language which says: Notwithstanding anything in subparagraph (A) – that is the one with the nice title on it, "Exclusion of Employers" – "a cause of action may arise against an employer or other plan sponsor" – and then it lists why.

One of the standards here is if the employer had direct participation. And "direct participation" has become a term of art that is incredibly broad. "Direct participation" just means an employer had to maybe wink at his employee, as he headed off to his doctor's office, and say: Hope you get better.

As a practical matter, today direct participation essentially brings in every employer in this country that has a plan. That is why a lot of employers are going to drop their plans. That is why no employer group supports the McCain bill – none – because it is an attack on employers, as versus a legitimate effort to try to get at malfeasance, misfeasance, and negligence in the areas of HMOs.

We all want to make sure that people who are poorly treated by their HMO have a right for recovery. We put together proposals which accomplish that. But let's not draw all the employers into the process and stick them with lawyers running around them in circles, suing them like crazy, shooting arrows at them, trying to recover from them because then we will drive the employers out of the insurance market, and more people will be uninsured. That is why it is projected that this bill will increase the number of uninsured by over 1.2 million people.

I am a little surprised that some of the sponsors of this bill want to expand the number of uninsured in this country. I think some supporters of this bill may want to because there is, I believe, a belief that nationalization of the health care system is a good idea, and one way to energize support for nationalization is to have a lot of uninsured.

But I am hopeful some of the other folks who look at this bill and are supportive will say: Hold it. That was not our intent. We didn't want to drive employers out of the business of insuring and cause more people to be uninsured. We wanted to do just the opposite.

So this language is extremely broad, extremely pervasive, and will attack the employers of America – small employers, employers with 10 employees, with 5 employees, with 25 employees, with 50 employees. There is no exemption in this bill.

Then there is other language in this bill. This bill creates a whole new cause of action against employers that has never been seen before, a whole new Federal cause of action. And it is a biggy. This is one where lawyers can really have a good time because, under this bill, it makes the employers responsible for the performance of the duties under the terms and conditions of the plan. This is a brand new concept under Federal law.

It defines the people responsible, as I said earlier, as plan sponsors. Plan sponsors, under ERISA, are defined as employers. It brings in the employers. We went through the different obligations under a plan that an insurance company has that offers that plan and which are enforceable, not today by the individual but by a variety of different processes. We calculate that there are potentially 200 new opportunities for private causes of action against employers as a result of this language.

There are a lot of lawsuits because there are a lot of lawyers who can take those 200 opportunities and multiply them. That is one of those factors which has an infinity symbol beside it as to the number of potential lawsuits, that little circle you learned in eighth grade when you took physics, a little infinity circle connecting the lawyers to lawsuits as a result of this language.

I would rename this bill “The Lawyers Who Want to Be a Millionaire Act” because that is essentially what it is. This representation that employers are not subject to liability is absolutely inaccurate. Under the clear terms of the bill itself, it is absolutely inaccurate.