Swords Drawn in Patients' Welfare Battle Against 'Southern Strategy' HMOs

by Linda Everett

Even before Congressional debate began on the Kennedy-McCain "Bipartisan Patient Protection Act of 2001," which provides basic protections to 190 million Americans in private insurance or managed-care plans and health maintenance organizations (HMOs), President George W. Bush vowed, on June 13, to veto it. The bill (S 283/HR 526)—the fight for which can't be separated from the battle to save the District of Columbia General Hospital—simply makes HMOs and insurers accountable for the consequences of their decisions to deny or delay medical treatment when it results in injury, disability, or death.

At present, health plans deny or delay medical treatment to almost 50,000 people a day, according to the consumer group, Families USA. The predictable, actuarial results of these denials, like the closing of D.C. General and other public hospitals in major metropolitan areas, include growing numbers of unnecessary deaths of patients. Kennedy-McCain would make health plans accountable, in the same way that companies that produce unsafe tires or dangerous vehicles are. Yet, when the bill was first brought to the Senate floor for debate on June 19, Republicans began their delaying tactics, forcing Senate Majority Leader Tom Daschle (D-S.D.) to threaten to keep the Senate in session through the July 4 recess to complete a vote on the bill.

The managed-care lobbyists, in conjunction with major pharmaceutical lobby groups, are spending millions of dollars to derail any regulation of health plans and their murderous policies.

In this critical battle for the General Welfare, President Bush has come out swinging to protect the predatory HMOs and their Wall Street and London financier backers, just as he protects his energy cronies, such as Enron, as they loot tens of billions from the national economy.

Getting Away with Murder

The struggle to pass a patients' bill of rights, to allow court challenges to denial of medical care, has been going on since 1996. As a deluge of documented HMO-inflicted injuries, disabilities, and deaths came to light, Congressional Democrats and a growing number of Republicans sought—sometimes fiercely—to establish some uniform Federal protections for patients. Until now, the Republican leadership has used every device to block the proposals—even when 68 House Republicans helped pass such a measure in 1999 by a 277-151 vote.

Although states have passed a patchwork of patient protection laws during the same period, addressing specific issues such as "drive-by deliveries," in which HMOs forced hospitals to discharge new mothers within hours of giving birth, as they did with women having mastectomies, the crux of the problem is how HMOs intentionally misuse a 1974 Federal law as a shield against liability for their actions. The Employee Retirement Income Security Act (ERISA) established uniform national standards to ensure that workers receive employee benefits. ERISA supersedes or preempts state regulations that "relate to" employer-sponsored benefit plans. ERISA was never meant to regulate health insurance or medical decisions, but HMOs, since their inception in the 1970s, misused it to escape state regulatory oversight of their medically negligent treatment policies.

One class-action suit revealed that insurance giant Aetna explicitly directed its employees to deny services to patients in ERISA plans, where Aetna had total immunity from liability. Patients harmed by ERISA-protected health plans can sue in Federal court, but only to recover the cost of services denied, not for their real losses, including economic losses, aggravated medical crises, death, or permanent disability. Here are examples from court evidence:

- A California woman died after her HMO refused to authorize cancer treatment. Her husband sued the HMO for causing her death; but the court found his claim was preempted by ERISA (*Turner v. Fallon Community Health Plan*).
- An osteoporotic woman's deteriorating facial bones prevented her from eating, which could only be relieved by surgery, replacing her facial bone with bone from her hip. Her medical plan, which fully covered all medical conditions but dental-related ones, denied the surgery, by claiming it was "dental." She had no claim under ERISA (*Udom v. Department Store Division of Dayton Hudson Corp.*).

• A man hospitalized in May 1991 for physical and mental disorders, was ordered released by an Aetna managed-care nurse. Less than two weeks later, he committed suicide. ERISA preempted any claims (*Baily Gates v. Aetna life Insurance Co.*).

• A man who had been treated by his cardiologist for angina, was assured by an HMO that he could continue with his care and be treated by his doctors. But, once he enrolled in the HMO, the primary doctor refused to refer him to his former cardiologist. The patient died, and ERISA denied the claim for damages (*Nealy v. U.S. Healthcare HMO*).

Stops Short of Abolishing HMOs

Now, a bipartisan group in Congress has again targetted health plans for systemic policies that harm, maim, and kill patients; although the only sure way to stop such crimes is to altogether abolish the HMOs, which were were first allowed to operate by Federal law created by the Nixon Administration's budget cutters in 1973. The new Bipartisan Patient Protection Act of 2001, sponsored by Sens. Edward Kennedy (D-Mass.), John McCain (R-Ariz.), and John Edwards (D-N.C.), and by Reps. Greg Ganske (R-Iowa), John Dingell (D-Mich.), and Charles Norwood (R-Ga.), ensures that patients have legal recourse.

If medical treatment is denied or delayed by their HMOs, patients must first appeal the decision to an independent external review board with no relation to the HMO. Some 40 states now have various forms of external review. In the event of personal injury or death caused by an HMO's negligent decision, the bill allows suits against the HMO in state court, and all damages—economic, non-economic, and punitive—are limited by state law. If the dispute with the health plan involves administrative or contract (non-medical) issues, the HMOs can be sued in Federal court, carrying unlimited economic and non-economic damages. Civil punitive damages are allowed in only the most egregious cases of flagrant misconduct by the HMO. This bifurcation of liability has been upheld by several Federal courts. Over 600 medical groups, including the American Medical Association and consumer organizations, support the bill. Recent polls indicate that 60% of Americans support the right to sue HMOs, even if it raises the cost of premuims.

Backed by millions of dollars from the Health Insurance Association of America (HIAA) and the American Association of Health Plans, Senate Republicans such as Assistant Minority Leader Sen. Don Nickles (R-Okla.) are calling the lawsuit "a knife to the throat of American business." HIAA claims that the bill will allow suits against health insurers, employers, plan sponsors, even unions. In fact, only if any of these entities were *directly involved* in a medical decision causing death, disability, or injury, are they liable.

The lie that the bill would raise insurance premiums and cause employers to drop insurance benefits, is disproven by Bush's own state of Texas. The Bipartisan Patient Protection Act of 2001 is modelled on a Texas law, passed in 1997 (against the wishes of then-Gov. George W. Bush), which allows both independent appeals and suits against HMOs. In nearly four years, only 17 lawsuits have been filed and 200 disputes have been in independent review.

The HMOs Counterattack

Bush backs a bill that protects the HMO racketeers. The bill (S 889) is sponsored by Sen. Bill Frist (R-Tenn.), of the same Frist family behind the notorious Columbia/HCA for-profit hospital chain that just settled a $460 million Federal complaint for bilking Medicaid and Medicare. It is co-sponsored by Sens. Jim Jeffords (I-Vt.) and John Breaux (D-La.). Frist's bill is titled the "Bipartisan Patients Bill of Rights of 2001," using the name of the Norwood-Dingell bill *killed* by Senate Majority Leader Trent Lott's (R-Miss.) Republican leadership last year. Under it, patients must appeal their HMOs' negligent medical decisions to a reviewer hand-picked, and paid, by the same HMO that denied them care! This appeals panel can deny the patient the right to go to state court, leaving them only costly and time-consuming recourse to Federal court. And, the bill sets up many hurdles to get there. Worse, the Frist bill contains a deadly "nullification provision" similar to the "poison pills" used against patients' rights in Congress since 1996, which provides that, if Federal courts find *any part* of the bill unconstitutional, *all* of its legal remedies are to be nullified.

While Kennedy-McCain and the Frist farce share some of the same protections, the Frist bill is riddled with disastrous provisions. HMOs could still pay doctors to deny or limit treatment and health plans could still compensate employees for denial of care. It also lets the HMOs decide if a patient can see a specialist outside the plan, if that plan does not have a specialist available. For instance, if the plan doesn't have a pediatric oncologist, the insurer can still refuse to cover the child who needs one outside the plan.

The Frist protection of HMOs is all the more heinous, as evidence of their egregious decisions mounts. In Illinois, the Blue Cross Blue Shield plans routinely deny children who are born with serious skull malformations, treatment by dynamic orthotic cranioplasty bands. Without them, the children are forced to undergo painful, costly surgeries. PacifiCare of Colorado routinely refuses to pay for skilled pediatric nursing home care and life-saving medical equipment, such as ventilators, for critically ill babies who are unable to breathe or swallow on their own.

The lives lost by this disastrous legacy of the Nixon "Southern Strategy" have risen to the point, that if Congress, and especially the new Senate leadership, does not win this battle now, Americans are not likely to give them another chance. Bush's Republican allies began his term, by killing the protection against workplace injuries; the White House should learn that the time for such arrogant abuse of power has passed it by.