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Congress faces HMO showdown over new bipartisan patients' rights bill

by Linda Everett

When the U.S. Congress returns to Washington on Sept. 7, we can expect an all-out war against efforts to pass legislation that would hold murderous health maintenance organizations (HMOs) and managed care companies liable for witting policies that have maimed, harmed, and killed patients from among every socio-economic level of the population (see Linda Everett, "General Welfare Is Being Trampled by HMO Human Rights Violations," *EIR,* Aug. 13, 1999). As Democratic Presidential pre-candidate Lyndon LaRouche states in a July 31 release, "To defend the General Welfare of the U.S. Constitution, to defend the Constitution itself, the HMOs have got to be stopped."

But, despite mounting evidence of the HMOs' crimes against humanity, most members of the Republican majority in Congress are intent on protecting the insurers and their managed care companies at all costs—as they demonstrated by denying any debate on this issue in Congress last year, and again, so far, in this session.

The managed care industry, which has heretofore spent nearly $100 million to knock out the Democrats' Patients' Bill of Rights with its provision to allow legal suits against HMOs, has now mobilized its handmaidens in the GOP majority to block a new bipartisan consensus bill. The latter provides many of the same protections as the Democratic Patients' Bill of Rights and, most significantly, allows for a strong external appeals process and the ability to sue HMOs when they wrongfully deny patient care.

The bipartisan consensus bill, announced on Aug. 4, just hours before Congress broke for its August recess, was crafted by House members, led by John Dingell (D-Mich.); Charles Norwood (R-Ga.), a dentist; Greg Ganske (R-Iowa), a surgeon; and a group of GOP Representatives who are physicians in open rebellion against the House and Senate Republican leadership on this issue.

The consensus bill

The Bipartisan Consensus Managed Care Improvement Act of 1999 (H.R. 2723) combines elements of the Democrats' Patients' Bill of Rights (H.R. 358), sponsored by Dingell and House Minority Leader Richard Gephardt (D-Mo.), with proposals crafted by Norwood in conjunction with Tom Coburn (R-Okla.), Ganske, and John Shadegg (R-Ariz.).

Insurers seek expanded ERISA protections

To understand how critical ERISA is to insurers desiring to avoid legal action for denying patients medical care, consider this internal memo from one of the nation's largest insurers, Provident, which was made public by a judge in *Schneider v. Provident* (U.S. District Court for the Northern District of California C-97-4646C). Consumers for Quality Care, the group that released the memo, sent it to every U.S. Senator—which Senate Republicans ignored. The internal memo announces a taskforce "to initiate active measures to get new and existing policies covered by ERISA . . . in order to take advantage of the protection offered by ERISA." The memo continues, "While our objective is to pay all valid claims and deny invalid claims, there are gray areas, and ERISA applicability may influence our course of action"—which suggests that Provident won't pay costly claims if they are classified under ERISA.

The insurer says: "The advantages of ERISA coverage in litigious situations are enormous: state law is preempted by Federal law, there are no injury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of the benefit in question, and claims administrators may receive a deferential standard of review."

One of Provident's in-house supervisors, Jeff McCall, states in the memo, "The economic impact on Provident from having policies covered by ERISA could be significant." But, to take full advantage of ERISA, the McCall memo states, the insurer must "establish a formal appeal process for ERISA situations. When we deny a claim, we must include language that informs the claimant of the right to appeal within 60 days." McCall recommends himself as one of the people to sit on the appeals panel.

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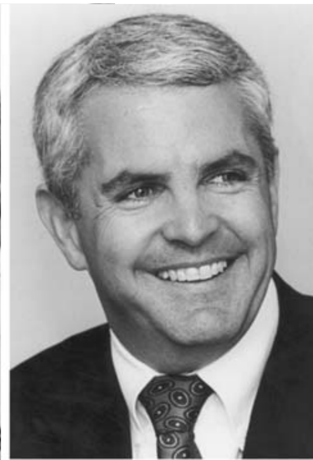

Rep. John Shadegg (R-Ariz.) (inset) and Sen. Bill Frist (R-Tenn.) (left) have led Republican efforts in Congress to defend HMOs and managed care plans, which wittingly maim and kill patients from every socio-economic stratum in America.

While no single bill can stop the managed-care wrecking operation against the nation's health care system, the consensus bill may at least deter managed care's harmful delays or denials of treatment. Its most contentious, but sorely needed provision, focusses on protecting patients in managed care plans and HMOs that are immune from lawsuits under the 1974 Federal law, the Employee Retirement Income Security Act (ERISA).

ERISA was passed to provide uniform Federal protection to employee benefit and health plans, exempting them from state liability laws. For decades, managed care companies have misused the law to get away with murder, because patients can only sue an HMO for the costs of the denied treatment, not for the loss of life or livelihood, or costs of a lifetime of disability caused by the HMO (see box). Under the consensus bill, if patients in ERISA-protected managed care plans are injured as a result of a benefit that is wrongfully denied or delayed, patients can sue in state court for damages. If the HMO refuses to comply with an independent, external review decision to provide treatment, the HMO can be held liable for punitive damages as well (but any state limits on damage awards would still apply). While the managed care lobby and Senate Republicans lied openly about whether employers would be held liable when their group HMO was sued, this bill clearly states that it protects employers from liability when they were not involved in the decision to delay or deny necessary treatment.

Under the consensus bill, if a patient is denied a medical benefit, but suffers no injury, he can sue his plan in Federal court for $750 a day for every day that care is denied, up to $250,000, plus the cost of care and legal costs. The bill gives patients the right to independent external appeals whenever a benefit is denied, based on a decision that the care is not medically necessary or medically appropriate, is investigational or experimental, or where the issue of whether a benefit is covered involves a medical judgment.

The consensus bill, as in the Democratic Patients' Bill of Rights, assures access to the nearest emergency room without having to call the HMO first, and access to out-of-network specialists if they are not provided for by the plan, and without extra costs. As is critical for chronically ill or disabled individuals, specialists can be their primary care doctors, and patients have standing referrals to specialists (without asking HMO permission for each visit). It assures that women would have direct access to obstetricians and gynecologists, and that patients have direct access to the medications that doctors prescribe. A doctor's decision for medically necessary treatment or surgery prevails over the HMO's decision, if the external review by specialists agrees with the patient's doctor.

The consensus bill is expected to "draw an overwhelming majority of House votes," according to Norwood, who said, "It is a tremendous positive step for both patient rights and the democratic process. . . . We hope that with this agreement, the American public will not only see a good bill signed into law this year, but also have some faith restored that their elected representatives still hold their constituents above the needs of partisan politics. We now have a bill that isn't Republican or Democratic—it belongs entirely to the people."

House Minority Leader Gephardt said, "Americans have waited two full years for Congress to act on this issue. I hope

that the new bipartisan consensus will help guarantee that their voice will be heard. The Republican House leadership needs to end their obstruction and allow a vote on this bill immediately upon our return in September so the President can sign it into law early this fall."

Insurers throw up opposition

Heretofore, House Speaker Dennis Hastert (R-Ill.) has consistently blocked any and all action on bills—even those from his own party—that include any right-to-sue provisions. He got plenty of help from other Republican members who also oppose any such provision, including Tom "The Exterminator" DeLay (Tex.), the Conservative Revolution's Majority Leader Dick Armey (Tex.), Bill Thomas (Calif.), and Education and Workforce Committee Chairman William F. Goodling (Pa.). John Boehner (Ohio) led GOP attempts to defuse support for bills from his own party that incorporated provisions allowing suits against HMOs. Helping his efforts were Kay Granger (Tex.), Fred Upton (Mich.), Sue Kelly (N.Y.), Don Sherwood (Pa.), Patrick Toomey (Pa.), Ernest Fletcher (Ky.), and James Talent (Mo.).

Now, the American Association of Health Plans, an HMO trade group which represents more than 1,000 HMOs and other managed-care plans, is targetting 60 Congressional districts across the country to stop this consensus bill, while the National Association of Manufacturers has unleashed its campaign of letter-writing with the lie that the new patient protection bill will cause insurance costs to rise. NAM characterized the bill as "a no-holds-barred assault on the employer-provided health care system." Patrick Clearly, NAM's vice-

Coburn, Shadegg seek to sabotage bipartisan bill

On Aug. 20, House Speaker Dennis Hastert (R-Ill.) announced a GOP alternative plan to the Dingell-Norwood bipartisan consensus legislation. After 21 House Republicans co-sponsored the Dingell-Norwood bill (H.R. 2723), Hastert had Tom Coburn (R-Okla.) and John Shadegg (R-Ariz.) produce a more limited bill. Hastert claims the Coburn-Shadegg alternative provides many of the protections that patients want. That's an outright lie, as a look at just one of the provisions in its summary demonstrates (the legislative language is not yet available).

The Coburn-Shadegg proposal claims that patients who are harmed by their HMO can sue the HMO or insurer in Federal court—not state court. But, there are years of backlogs of criminal cases in the Federal courts—and, that backlog is growing, because the Senate GOP majority refuses to approve Clinton appointees to the courts, and over the last decade, Congress has "federalized" many crimes (such as drug-related ones) that are not Federal in nature (such as killing a postal worker). These criminal cases must be heard first, because the Fifth Amendment imposes the defendant's right to speedy trial. In some districts, Federal judges hear only criminal cases—never civil cases. This means that the suits by those patients who are injured, or by their families, in the event of a patient's death due a managed care plan's denial of care, would never be heard.

The most egregious provision of the Coburn-Shadegg proposal eliminates the patient's Constitutional right to a jury trial. The provision states that before a patient can take an HMO or plan to court for malpractice, the insurer or plan can, at their own expense, seek "certification of an injury" from an external appeals panel. If that panel rules that there was no injury, this precludes all liability by the HMO. So, an appeals panel—which is not even a quasi-governmental body—can deny you your Constitutional right to trial. Further, how can such a panel define injury, when an HMO denies treatment for a physically or developmentally disabled child or a mentally ill individual? It takes consistent oversight to assure a child's appropriate developmental progress. Coburn claims this limit on the right to trial is necesssary to prevent frivolous lawsuits.

Shadegg backs privatized Medicare

Last year, Coburn and Shadegg promoted their "ultimate patient protection plan" as a "free-market health care plan," in which the goal was to eliminate the role of employers altogether in the health care system. Shadegg, whose Congressional campaign was backed by major insurance companies, wants total privatization of Medicare, the Federal health insurance program credited with protecting the lives of older and disabled Americans, and Medicaid, which provides for the health care needs of elderly, disabled, and indigent individuals who, studies show, have a greater need for health care, and are more likely to be in poor health, have more disabling conditions, and have higher mortality rates than other, higher-income Americans. According to Shadegg's perspective, the "General Welfare" clause of the Constitution doesn't exist.

Shadegg is also the founding director of the Goldwater Institute for Public Policy, a front-group for the British monarchy's feudalist Mont Pelerin Society, from which the Conservative Revolution sprang. This gang of House extremists is sabotaging efforts within the Republican Party to provide decent patient protections against HMOs' mass murderous policies.

president for human resources policy, calls the Norwood-Dingell bill a "major threat to the future of employer-based health care," and lies that "it is so flawed that it will only result in the loss of health care for millions of employees. The net result of this bill will be to shake our health care system to its very foundation."

Besides the loss of life among the workforce caused by managed care, it is clear that NAM is ignoring managed care's overall takedown of our health care system. Consider that just in August, Children's Hospital of Philadelphia, which serves the region's sickest children, is in crisis directly due to managed care company policies, especially Independence Blue Cross, denying payments for services provided, significant paperwork and time in approval/appeal processes, and delayed payments.

House Speaker Hastert, who had threatened to bring the Senate GOP-passed bill to the House floor for a vote, now claims, after 21 House Republican members have already signed on to the consensus bill with its HMO suit provision, that he will allow the issue to come to the floor for debate as soon as Congress returns in September. But, he's made such vague promises before to stave off effective legislative action—with the result being that thousands more patients have suffered or died because of HMO human rights violations.

It's no surpise who is blocking effective reforms: the GOP Conservative Revolution fanatics. In the Senate (see box), these include Majority Leader Trent Lott (Miss.), Phil Gramm (Tex.), Bill Frist (Tenn.), and Don Nickles (Okla.). The consensus bill must pass through this gauntlet, if it is approved by the House. Remember, that the entire Republican Senate, with the exception of John Chaffee (R.I.) and Peter Fitzgerald (Ill.), killed any chance of legal redress that patients had against wrongful actions by their HMOs (see Linda Everett, "Senate GOP Backs HMOs, Defeats Patients' Rights," *EIR*, July 30, 1999).

The cruel irony here is that these GOP extremists have thoroughly exposed themselves as traitors to the very concept of the "General Welfare" clause of the U.S. Constitution. One of the provisions of the Confederate Constitution of 1861 that devotees of the point to with pride, is the removal of the "General Welfare" clause, which, these Confederates denounce as "an open door for government intervention." So, when it comes to protecting children, the elderly, and the mentally and physically disabled citizens of our nation—those who need protection the most—these Confederates in Congress wash their hands.

Frist: the only physician in the Senate

Among the defenders of HMOs, is Sen. Bill Frist, who, because he is the only physician in the Senate, was trotted out regularly as an authority on the issue during the Senate travesty—called a debate—between the Democrats' Patients' Bill of Rights and the Republicans' counterfeit bill of rights. Frist routinely lied about the GOP's counterfeit bill and its "protections." Frist said that the GOP bill "empowers" 113 million consumers by providing them with "timely and inexpensive appeals procedures" when HMOs deny them treatment. He intoned, "We feel that medical decisions are best left in the hands of doctors—not trial lawyers."

In fact, in the GOP bill, it is the HMO bureaucrats—not physicians—who call the shots about what a patient needs. In fact, when a patient is denied care and tries to appeal the decision, the Senate GOP bill lets the HMO that denied the care choose the "expert" whom it will pay to hear the appeal. The "expert" effectively works for the HMO, because he is under contract with the HMO, and must base his review of the HMO's treatment decision on the HMO's own arbitrary definition of what is "medically necessary" care! One HMO defines medically necessary care as "the shortest, least expensive or least intense level of treatment as determined by the plan." So, the HMOs, as the American Medical Association said, "can still hide behind their secret definitions that keep patients from getting medically necessary care. The special terms and definitions the Senate granted the insurance industry will make it virtually impossible for a patient to obtain a fair and independent external review of health plan decisions."

So, whom does Senator Frist represent in this debate, if not patients? Consider his ties to the Nashville, Tennessee-based Columbia-HCA Healthcare Corp., the world's largest

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for-profit hospital cartel, now under multiple investigations for defrauding the government's Medicare program. Frist's father founded Hospital Corporation of America (HCA) in 1968. By 1973, it had 50 hospitals; by 1983, it owned 376 hospitals in the United States and internationally. In 1994, when HCA merged with Columbia Hospital Corp., among its shareholders was newly elected Senator Frist, who reportedly used millions from his significant holdings in the company to fund his Senate campaign.

Columbia-HCA built its strategy by buying up hospitals in a community, then shutting some of them down, and forcing business into their remaining hospitals; it also made sure no "competing" hospitals were established in the area. The company aggressively marketed its services at bargain rates to HMOs. Columbia-HCA moved to become part of the managed care field and profited by Senator Frist's role in legislation that allowed hospitals and doctors to form networks to compete for millions of Medicare patients—which represented 35% of Columbia-HCA's revenues in 1998.

But, the glaring conflicts of interest don't end there. At about the same time, Frist was appointed by Majority Leader Lott to the Bipartisan Medicare Commission, where he and others pushed to open Medicare up to even more "competition" among players for Medicare patients, which would also benefit Columbia-HCA.

In 1997, Mark Gardiner, former vice-president of Sunrise Hospital, Columbia-HCA's flagship hospital, in Los Angeles, California, says that the chain routinely broke the law, and did whatever it took to make profits. The company policy was to pay doctors production bonuses of $150,000 a year to perform more operations and to funnel illegal financial inducements of $40,000 a month to physicians to refer their patients to Columbia HCA hospitals.

At the time, the Columbia-HCA hospital chain, which was the seventh-largest employer in the nation, also boosted profits by slashing the number of employees and refusing to treat uninsured patients. The number of registered nurses was cut radically, because the hospital corporation considered nurses to be its largest operating expense. In some hospitals, cases of infection among critically ill infants in neonatal intensive care units soared after staff cuts were made. Among nine Columbia-HCA nurses interviewed, all said that patients' lives were put at risk, and some patients died and others went into cardiac arrest, due to staff shortages. One nurse was told to keep track of cardiac patients by observing their 72 monitors—all at once. All of the Columbia-HCA nurses said that they would send family members to other hospitals than those where they worked. Gardiner said that the situation was so bad, that he and his wife had a plan, in the event that she should become ill and need hospitalization, he was to take her across town to another hospital—not the one where he worked.

Accomplices to murder

The following Republican Senators protected the HMOs and the HMOs' human rights violations. They are as guilty of murder as the HMOs themselves, and they should be politically finished off and driven from office.—*Linda Everett*

Spencer Abraham (Michigan)
Wayne Allard (Colorado)
John Ashcroft (Missouri)
Robert Bennett (Utah)
Kit Bond (Missouri)
Sam Brownback (Kansas)
Jim Bunning (Kentucky)
Conrad Burns (Montana)
Ben Campbell (Colorado)
Thad Cochran (Mississippi)
Susan Collins (Maine)
Paul Coverdell (Georgia)
Larry Craig (Idaho)
Michael Crapo (Idaho)
Mike DeWine (Ohio)
Pete Domenici (New Mexico)
Michael Enzi (Wyoming)
Bill Frist (Tennessee)
Slade Gorton (Washington)
Phil Gramm (Texas)
Rod Grams (Minnesota)
Charles Grassley (Iowa)
Judd Gregg (New Hampshire)
Chuck Hagel (Nebraska)
Orrin Hatch (Utah)
Jesse Helms (North Carolina)
Tim Hutchinson (Arkansas)
Kay Hutchison (Texas)
James Inhofe (Oklahoma)
Jim Jeffords (Vermont)
Jon Kyl (Arizona)
Trent Lott (Mississippi)
Richard Lugar (Indiana)
Connie Mack (Florida)
John McCain (Arizona)
Mitch McConnell (Kentucky)
Frank Murkowski (Alaska)
Don Nickles (Oklahoma)
Pat Roberts (Kansas)
William Roth (Delaware)
Rick Santorum (Pennsylvania)
Jeff Sessions (Alabama)
Richard Shelby (Alabama)
Robert Smith (New Hampshire)
Gordon Smith (Oregon)
Olympia Snowe (Maine)
Arlen Specter (Pennsylvania)
Ted Stevens (Alaska)
Craig Thomas (Wyoming)
Fred Thompson (Tennessee)
Strom Thurmond (South Carolina)
George Voinovich (Ohio)
John Warner (Virginia)