



BRIEF ANALYSIS

No. 363

For immediate release:

Thursday, June 28, 2001

Fighting The Last War

By Greg Scandlen

Congress is considering several versions of a Patients' Bill of Rights. In the Senate, the "bipartisan" McCain-Kennedy-Edwards bill is going to duke it out with the "tripartisan" Breaux-Frist-Jeffords bill and perhaps others. In the House, Rep. Charlie Norwood (R-Ga.), declaring that he was tired of waiting for the White House to compromise, prepared to move ahead with his own legislation. Meanwhile, Andrew Card, the White House Chief of Staff, announced that the President will veto any legislation that goes too far.

Members of Congress, like old generals, keep fighting the last war. Most of the problems associated with managed care are well on their way to being fixed — not because of anything Congress has done, but because of the demands of the market, evolving case law and changing public perceptions.

The Kaiser Family Foundation (KFF) has just released a new survey that shows Americans are much less dissatisfied with their health plans today than they were three years ago when the Bill of Rights proposals got started. Further, even as Congress debates the right to sue HMOs, courts are already allowing malpractice suits. These developments have been largely ignored by both the politicians and the press, which are all so entrenched in their battle positions that they don't know when to declare victory and go home.

Sentiment toward Health Plans. The latest Kaiser survey, conducted in April, found that Americans are reporting far fewer problems with their health plans on every standard than they reported in a similar survey three years earlier. In some cases, as Table I shows, the number of people reporting problems fell by more than 40 percent.

KFF also discovered that, while Americans think many health care issues are "very important" for Congress and the president to deal with, they rank "protecting patients' rights" at the bottom of the list. [See Table II.] In the abstract, most people still favor a "Patients' Bill of Rights," according to the latest KFF survey.

- When asked if they favored or opposed it, 85 percent said they favored it and only 10 percent said they opposed it.
- But when asked if they still favored it if it raised premiums by \$20 a month, the level of support dropped to 60 percent in favor and 30 percent opposed.
- When asked if "it meant that some companies might stop offering health plans to their workers," only 41 percent continued to support it while 47 percent said they would oppose it.

The American people know better than most politicians that HMOs are changing their behavior and are fixing many of the problems that were identified in the mid-1990s. In part this is due to market demands and the resistance of the public to third-party rationing. But it is also the result of a growing number of court decisions that say HMOs are subject to malpractice litigation.

Suing HMOs. Although politicians continue to claim that HMOs are exempt from lawsuits, they are mistaken. Appearing on "Meet the Press" recently, former vice presidential candidate Sen. Joe Lieberman said, "If a decision is made on your health care by an HMO and you think it's resulted in your harm to you or even death, you don't actually have a right to sue." He repeated, "If you don't have a right to sue when you think somebody's made a decision that is really a life-or-death decision, then you don't have any rights at all." And again, "If those folks make a mistake that you think has hurt you, or even killed you, then you ought to have a right to sue them and get compensation for it."

TABLE I

Percent of Americans Who Say During the Past Few Years They or Someone They Know Has:

	1998	2001	Rate of Improvement
Had any problem	57%	48%	15.8%
Needed more information to choose between health plans	36%	32%	11.1%
Had difficulty getting an emergency room bill paid	30%	20%	33.3%
Had difficulty getting permission to see a specialist	26%	19%	26.9%
Wanted to appeal a denial	22%	15%	31.8%
Had difficulty getting permission to see a gynecologist	15%	9%	40.0%
Wanted to sue for malpractice	13%	7%	46.2%

But the fact is HMOs may be sued for malpractice when they make “life-or-death decisions.” In a landmark case decided last year (*Pegram v. Herdrich*) the U.S. Supreme Court ruled that HMOs are indeed subject to malpractice laws and may be sued in state court when they exercise medical judgment about the necessity of a proposed treatment. Disputes about a health plan’s contracts are still exempt from state action, but in those cases patients may bring suit in federal court.

A spokeswoman for the American Trial Lawyers Association testified before Congress in April of this year, “The courts have carved out an exception and have held that malpractice claims against an HMO are not preempted by ERISA (the Employee Retirement Income Security Act). ...In a series of decisions, the (Supreme) Court began to narrow and limit ERISA’s preemptive effect,” she said, citing a list going back to 1995.

HMOs are indeed being sued right and left. There is a legal newsletter devoted solely to these suits, *Mealey’s Managed Care Liability Report*. The industry publication, *Managed Care Week*, includes a regular column, “HMO Lawsuit Watch,” that tracks half a dozen new suits every issue. Law review journals are awash in articles reviewing new legal strategies and arguments. Sometimes these are individual suits resulting in multi-million dollar damages. Sometimes they are class action suits brought by well-financed medical societies. If there was ever a growth industry, suing HMOs is it.

The Changing Face of HMOs. These lawsuits, combined with a changing marketplace, have forced HMOs to back off from some of the more troublesome practices of the early 1990s. They are reducing their use of “gatekeepers” and “capitated” payments to physicians. They are dropping utilization review and

preadmission certification requirements. In many cases, they have stopped being HMOs at all, moving instead to become “point-of-service” plans or “preferred provider organizations.”

In a recent interview, Brandeis University health economics professor Stuart Altman, a former Clinton advisor, said, “Right now, we are moving back to letting medical professionals decide what is necessary with little or no budget constraints.” The removal of “budget constraints” is one of the factors driving up health care costs again. After several years of premium increases lower than the rate of inflation, premiums are rising again at three to four times the overall cost of living. Small employers are seeing rate hikes as high as 30 percent.

Paying Health Care Bills. The real issue in health care today is not whether you can sue your HMO, but whether you (or your employer) can afford health coverage at all. Yet the American people in general do not express alarm about rising costs. Two-thirds of us say the U.S. doesn’t spend enough money on health care. Fewer than 10 percent think we spend too much. We aren’t worried about health costs because so few of us pay the bills. We rely on em-

ployers, insurers or the government to pick up the tab for our health care services.

That is the real problem in health care — getting consumers to be sensitive to the costs of their treatment decisions. But Sen. Lieberman and his colleagues are fixated on a bygone issue. They have memorized the phrase, “you can’t sue your HMO,” and they keep repeating it, no matter how untrue or irrelevant it may be.

Greg Scandlen is a Senior Fellow in Health Policy with the National Center for Policy Analysis.

TABLE II

Which One of These (Issues) Would You Say is the MOST Important Health Care Issue?

Making Rx more affordable for people age 65 and older	22%
Increasing the numbers of Americans covered by health insurance	21%
Making Medicare more financially sound for future generations	18%
Helping families with the cost of caring for elderly or disabled family members who need long-term help	17%
The issue of abortion	10%
Protecting patients’ rights in HMOs and managed care plans	9%

Note: Nothing written here should be construed as necessarily reflecting the views of the National Center for Policy Analysis or as an attempt to aid or hinder the passage of any legislation.

The NCPA is a 501(c)(3) nonprofit public policy organization. We depend entirely on the financial support of individuals, corporations and foundations that believe in private sector solutions to public policy problems. You can contribute to our effort by mailing your donation to our Dallas headquarters or logging on to our website at www.ncpa.org and clicking “An Invitation to Support Us.”