Testimony on Workplace Liability
House Bill 1012 (P.N. 1154) and House Bill 1013 (P.N. 1155)

before

Judiciary Committee and Labor Relations Committee
Pennsylvania House of Representatives

Presented by

HENRY G. HAGER
President & Chief Executive Officer
The Insurance Federation of Pennsylvania, Inc.
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MY NAME IS HENRY G. HAGER AND I AM PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE INSURANCE FEDERATION OF PENNSYLVANIA, INC. THE INSURANCE FEDERATION REPRESENTS MORE THAN 200 INSURANCE COMPANIES, DOMESTIC AND FOREIGN, OFFERING ALL LINES OF LIFE, HEALTH, PROPERTY AND CASUALTY INSURANCE IN PENNSYLVANIA. INCLUDED AMONG OUR MEMBER COMPANIES ARE THOSE OFFERING WORKERS COMPENSATION INSURANCE AND GENERAL COMMERCIAL LIABILITY INSURANCE. I AM THANKFUL TO THE CHAIRMEN OF THE COMMITTEES, REPRESENTATIVE THOMAS R. CALTAGIRONE AND MARK B. COHEN, FOR AFFORDING ME THE OPPORTUNITY TO COMMENT BRIEFLY ON THE WORKPLACE LIABILITY LEGISLATION.

THE PURPOSE OF MY TESTIMONY IS TO SUGGEST THE ADVERSE INSURANCE-RELATED IMPLICATIONS OF SUCH LEGISLATION RATHER THAN OFFER SUBSTANTIVE COMMENTARY ON THE LANGUAGE.

I AM INFORMED BY THE NATIONAL COUNCIL OF COMPENSATION INSURERS AND THE NATIONAL TRADE ASSOCIATION FOR WORKERS COMPENSATION INSURERS, THAT NO OTHER STATE HAS ENACTED LEGISLATION ALLOWING AN EMPLOYEE TO ELECT TO ACCEPT A CIVIL ACTION ("TORT") JUDGEMENT IN LIEU OF OR IN ADDITION TO A WORKERS COMPENSATION AWARD, AS WOULD BE THE CASE UNDER THE TWO BILLS IN QUESTION. THERE HAVE, HOWEVER, BEEN UNSUCCESSFUL EFFORTS IN PENNSYLVANIA[1] AND IN OTHER JURISDICTIONS TO EXPAND WORKPLACE LIABILITY. NONETHELESS, THE NOVELTY OF THE

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[1] Poyser v. Newman & Company, Inc., 514 Pa. 32, 522 A. 2d 548 (1987) and Barber, et al. v. Pittsburgh Corning Corporation, 365 Pa. Super. 247, 529 A. 2d 491 (1987) rejected attempts to expand workplace liability.

PROPOSAL MAKES IT DIFFICULT TO DEFINITIVELY ASSESS THE IMPACT ON WORKERS COMPENSATION AND GENERAL LIABILITY COVERAGES.

AT FIRST, LOGIC WOULD SUGGEST THAT ONE POSSIBLE IMPACT ON WORKERS COMPENSATION WOULD BE LOWER COSTS AS A RESULT OF THE TORT JUDGEMENT BEING SELECTED. THIS IS NOT THE CASE BECAUSE THE BILL PROVIDES THAT THE WORKERS COMPENSATION BENEFITS PAID PRIOR TO JUDGEMENT ARE TO BE APPLIED TO SATISFY THE TORT RECOVERY. AS A RESULT, THERE WILL BE NO SAVINGS ON THE WORKERS COMPENSATION COST OF EMPLOYERS. INDEED, RATHER THAN COSTS GOING DOWN, THE LURE OF A TORT RECOVERY WILL PROVIDE A POWERFUL INCENTIVE TO A CLAIMANT TO FULLY EXPLOIT WORKERS COMPENSATION BENEFITS PRIOR TO SEEKING A TORT RECOVERY. PROVIDING THE TORT RECOVERY OPTION WILL, THEREFORE, PROBABLY INCREASE WORKERS COMPENSATION CLAIM COSTS AND, IN TURN, EMPLOYER WORKERS COMPENSATION PREMIUMS.

BECAUSE OF THE CURRENT FORM OF THE WORKERS COMPENSATION LAW, A TYPICAL EMPLOYER'S GENERAL LIABILITY COVERAGE IS INTENDED TO "DOVE-TAIL" WITH THE WORKERS COMPENSATION COVERAGE. THAT IS TO SAY, THE GENERAL LIABILITY COVERAGE ENDS WHERE THE WORKERS COMPENSATION COVERAGE BEGINS, AND VICE VERSA. THEREFORE, THE TORT LIABILITY CREATED BY THE TWO BILLS IS NOT AN INSURABLE EVENT UNDER GENERAL LIABILITY INSURANCE AS THAT COVERAGE IS NOW PROVIDED.

THIS LEADS TO THE QUESTION: WILL GENERAL LIABILITY INSURERS CHOOSE TO AMEND THEIR COVERAGE TO INCLUDE THIS NEWLY CREATED LIABILITY

EXPOSURE? BECAUSE OF THE CONSTRAINTS OF THE ANTI-TRUST LAWS[2], WHICH DO APPLY TO INSURERS AND THEIR TRADE ASSOCIATIONS, I AM NOT ABLE TO REPORT WHAT THE PRESENT INTENTION OF INSURERS MIGHT BE. NONETHELESS, IT STANDS TO REASON THAT PROVIDING THE "ADD-ON" COVERAGE HAS NEVER BEEN ATTRACTIVE TO INSURERS. GENERAL LIABILITY INSURERS WOULD CONFRONT ESSENTIALLY THE SAME PROBLEM WHICH AFFLICTS THE AUTOMOBILE INSURER. THE CLAIMANT IN BOTH WOULD BE ABLE TO "BUILD" THEIR SPECIAL DAMAGES (MEDICAL EXPENSES AND WAGE LOSS) ON THEIR NO-FAULT BENEFITS (AUTO OR WORKERS COMPENSATION) AND THEN CLAIM GENERAL DAMAGES FOR NON-ECONOMIC LOSS ("PAIN AND SUFFERING") IN A LIABILITY ACTION.

GIVEN AUTO INSURERS' OFTEN STATED PREFERENCE FOR A FIRST PARTY AUTO INSURANCE SYSTEM, I MUST INFER THAT IN THE SHORT TERM THERE MAY BE <u>NO</u> INSURER WILLING TO MAKE A MARKET FOR AN EXTENDED GENERAL LIABILITY COVERAGE INCLUDING WORKPLACE LIABILITY. AS A RESULT, EMPLOYERS WILL HAVE TO SELF-INSURE AGAINST THAT WHICH THE INSURANCE INDUSTRY FINDS AN UNINSURABLE RISK. THIS WILL PLACE PENNSYLVANIA EMPLOYERS AT AN INTOLERABLE COMPETITIVE DISADVANTAGE. WHEN ACTING, AS LEGISLATORS MUST, FOR THE COMMON GOOD, YOU SHOULD WEIGH THIS DISADVANTAGE HEAVILY AGAINST ADOPTING AN EXPANSION OF WORKPLACE LIABILITY.

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[2]The Sherman Act prohibits insurers from engaging in, among other things, acts of boycott. Surveying insurers to ask them whether they would offer such coverage and compiling such information could be misconstrued to be useful for purposes of boycott.