

Samuel R. Marshall

PUBLIC HEARING OF THE HOUSE JUDICIARY COMMITTEE

SENATE BILL 307 (PRINTER'S NO. 1202)

**TESTIMONY OF THE INSURANCE FEDERATION
OF PENNSYLVANIA, INC.**

August 3, 1993

MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE, I AM SAMUEL R. MARSHALL, VICE PRESIDENT AND GENERAL COUNSEL OF THE INSURANCE FEDERATION OF PENNSYLVANIA. THE FEDERATION IS A TRADE ASSOCIATION WITH OVER TWO HUNDRED MEMBER INSURERS. OUR MEMBERSHIP CONSISTS OF DOMESTIC AND FOREIGN COMPANIES, AND THEY RANGE FROM INTERNATIONAL MULTI-LINE INSURERS TO LOCAL SINGLE-LINE INSURERS.

TODAY, I AM ASKING THIS COMMITTEE TO AMEND SENATE BILL 307 TO DELETE THE EXEMPTION OF NON-PROFIT HOSPITALS GRANTED IN SECTION 10(J) OF THE BILL. AS I UNDERSTAND THE PURPOSE OF THE EXEMPTION, IT IS MEANT TO ALLOW NON-PROFIT HOSPITALS TO COORDINATE AMONG THEMSELVES TO PRODUCE GREATER EFFICIENCIES. IN THE WORDS OF THE EXEMPTION, IT IS MEANT TO ALLOW "AGREEMENTS OR CONDUCT" THAT WILL "REDUCE HEALTH CARE COSTS OR IMPROVE THE QUALITY OF CARE."

THOSE OF US WHO PAY FOR AND RECEIVE HEALTH CARE FAVOR REDUCTIONS OF COST AND IMPROVED QUALITY OF CARE. AN EXEMPTION OF NON-PROFIT HOSPITALS FROM THIS ANTI-TRUST LAW, HOWEVER, WILL NOT PROMOTE THIS. IN FACT, IT OPENS THE DOOR TO JUST THE OPPOSITE.

1. **THE PROPOSED EXEMPTION WOULD ALLOW CONDUCT THAT RAISES, NOT LOWERS, HEALTH CARE COSTS**

THE MAJOR PROBLEM WITH THIS EXEMPTION IS THAT IT ALLOWS NON-PROFIT HOSPITALS TO REACH VERITABLY ANY AGREEMENT OR ENGAGE IN ANY CONDUCT WITH MINIMAL REGULATORY OVERSIGHT ON THE TRUE IMPACT ON COMPETITION, COST AND QUALITY OF CARE.

IT ALLOWS THESE HOSPITALS TO DO ANYTHING THAT IS "LIKELY TO REDUCE HEALTH CARE COSTS OR IMPROVE THE QUALITY OF PATIENT CARE." THE ONLY CHECK ON THIS IS IF THE DEPARTMENT OF HEALTH DETERMINES THAT THESE HOSPITALS ARE ACTING "INCONSISTENT WITH THE STATE HEALTH PLAN OF THE COMMONWEALTH."

THESE ARE STANDARDS THAT ARE IMPOSSIBLE TO DEFINE AND ENFORCE. FIRST, IF WE HAVE LEARNED ANYTHING FROM THE HEALTH CARE CRISIS FACING THIS COUNTRY, IT IS THE IMPOSSIBILITY OF DETERMINING WHAT IS "LIKELY" TO HAPPEN WHEN IT COMES TO THE COST AND QUALITY OF HEALTH CARE.

SECOND, THERE MAY BE A DIFFERENCE BETWEEN AGREEMENTS OR CONDUCT THAT ALLEGEDLY REDUCE COST AND THOSE THAT ALLEGEDLY IMPROVE THE QUALITY OF CARE. THE MEDICAL COMMUNITY ITSELF HIGHLIGHTED THIS DISPARITY THROUGH ITS OPPOSITION TO THE FEE CAPS IN THE AUTO AND WORKERS COMPENSATION LAWS. EVERYONE CONCEDES THAT THIS LOWERS THE COST OF CARE - BUT THE MEDICAL COMMUNITY CONTENDS THAT IT ALSO HURTS THE QUALITY OF CARE. HOW WOULD THE EXEMPTION HANDLE THIS; WHICH GOAL - LOWER COSTS OR IMPROVED QUALITY - WOULD TAKE PRECEDENCE?

THIRD, AGREEMENTS THAT IMPACT ON COST AND QUALITY OF CARE HAVE TO BE EVALUATED FOR BOTH SHORT- AND LONG-TERM EFFECTS. THIS EXEMPTION MAKES NO DISTINCTION BETWEEN THE TWO AND HAS NO MECHANISM FOR DOING SO.

FOURTH, THE EXEMPTION DOES NOT REQUIRE THAT THESE AGREEMENTS OR CONDUCT BE REVIEWED BY ANY REGULATORY BODY. INSTEAD, THE EXEMPTION PROVIDES ONLY A "CATCH AS CATCH CAN" LEVEL OF OVERSIGHT FROM THE HEALTH DEPARTMENT.

EVEN THEN, THE HEALTH DEPARTMENT'S STANDARD OF REVIEW IS TOOTHLESS. IT IS WITHOUT THE AUTHORITY TO QUESTION WHETHER THE HOSPITALS' CONDUCT ACTUALLY DOES REDUCE COSTS OR IMPROVE QUALITY - APPARENTLY, THE DEPARTMENT WOULD HAVE TO TAKE THE HOSPITALS' WORD ON THIS. FURTHER, IT IS LIMITED TO DETERMINING ONLY WHETHER THE HOSPITALS' CONDUCT IS "INCONSISTENT WITH" THE STATE HEALTH PLAN. THIS ESSENTIALLY MEANS THAT THE DEPARTMENT WOULD HAVE TO "PROVE THE NEGATIVE," AN ALMOST IMPOSSIBLE TASK.

THESE ARE NOT MERELY THEORETICAL OR ABSTRACT. LET ME GIVE YOU AN EXAMPLE. ALMOST ALL THE HOSPITALS IN MY PART OF SUBURBAN PHILADELPHIA ARE NON-PROFITS. THEY COULD JOINTLY AGREE TO RAISE THEIR PRICES TO A FIXED LEVEL. THEY COULD OFFER THE RATIONALE THAT THIS WOULD ENABLE THEM TO ATTRACT BETTER PHYSICIANS OR PURCHASE BETTER EQUIPMENT, AND THEREFORE ENABLE THEM TO IMPROVE THE QUALITY OF CARE. THERE WOULD BE NO REQUIREMENT THAT THE HEALTH DEPARTMENT - OR ANY OTHER REGULATORY BODY - REVIEWS THIS PRICE-FIXING AGREEMENT, AND I AM NOT SURE HOW IT WOULD BE DISCOVERED UNDER THIS EXEMPTION.

EVEN IF IT WERE DISCOVERED, THERE WOULD BE LITTLE THAT COULD BE DONE. THE STATE HEALTH PLAN DOES NOT COVER PRICE FIXING, SO THIS PROBABLY WOULD NOT BE CONSIDERED "INCONSISTENT" WITH IT - AND THAT IS THE ONLY THING THE DEPARTMENT OF HEALTH COULD EVEN QUESTION. INSTEAD, WE AS PAYORS AND CONSUMERS WOULD BE LEFT WITH A PRICE-FIXING AGREEMENT THAT PROBABLY WOULD REMAIN A SECRET AND WOULD RAISE THE COST OF HEALTH CARE ON AN UNFOUNDED "QUALITY OF CARE" CLAIM.

ONE OF THE BENEFITS OF BEING THE LAST STATE WITHOUT AN ANTI-TRUST LAW IS THAT WE HAVE THE BENEFIT OF LEARNING FROM OTHER STATES AND FROM THE FEDERAL LAW. ONE LESSON SHOULD BE APPLIED HERE:
* EXEMPTIONS SHOULD BE CAREFULLY AND CLEARLY CONSTRUCTED, WITH FULL CONSIDERATION OF THE RAMIFICATIONS ON CONSUMERS.

THE PROPOSED EXEMPTION OF NON-PROFIT HOSPITALS FAILS ON THESE COUNTS. WHATEVER THE MERITS OF ITS GOAL, IT IS NEITHER CAREFUL NOR CLEAR. BECAUSE OF THAT, IT THREATENS PAYORS AND USERS OF HEALTH CARE WITH UNSUPERVISED PRICE FIXING AND AGREEMENTS TO LIMIT COMPETITION AMONG HOSPITALS. GIVEN THE HEALTH CARE CRISIS FACING PENNSYLVANIA, AND THE IMPORTANCE OF GOVERNMENT IN CRAFTING A SOLUTION, THIS IS A PARTICULARLY DANGEROUS TIME TO GRANT SUCH A POORLY CRAFTED EXEMPTION FOR HOSPITALS FROM REGULATORY OVERSIGHT.

2. THE ANTI-TRUST MEASURES IN THIS BILL DO NOT CONFLICT WITH THE GOAL OF INCREASED EFFICIENCY AMONG NON-PROFIT HOSPITALS

EVEN IF THE LANGUAGE IN THE PROPOSED EXEMPTION OF NON-PROFITS CAN BE REMEDIED, THIS COMMITTEE IS STILL LEFT WITH THE KEY QUESTION TO THIS ISSUE: WHETHER NON-PROFIT HOSPITALS NEED TO BE EXEMPT FROM THIS BILL TO MEET THE GOAL OF IMPROVED EFFICIENCIES.

WE AGAIN HAVE THE BENEFIT OF BEING "BEHIND THE CURVE" IN THE AREA OF ANTI-TRUST. WE ARE CONSIDERING A STANDARD THAT PARALLELS FEDERAL LAW. I AM JOINED TODAY BY GEORGE ADAMS WITH CIGNA CORPORATION, AN EXPERT ON FEDERAL ANTI-TRUST DEVELOPMENTS. AS GEORGE WILL MORE FULLY EXPLAIN, FEDERAL REGULATORS - BOTH IN THE JUSTICE DEPARTMENT AND THE FEDERAL TRADE COMMISSION - HAVE ALREADY STUDIED THIS ISSUE. THEY HAVE DETERMINED THAT NOTHING IN THE ANTI-TRUST LAWS PREVENTS NON-PROFIT HOSPITALS (OR ANY OTHER GROUP OF PROVIDERS) FROM JOINING TOGETHER TO ACHIEVE GREATER EFFICIENCIES.

THE FEDERAL REGULATORS GO ONE STEP FURTHER. THEY NOTE THAT PROVIDER CONDUCT SHOULD REMAIN SUBJECT TO THE ANTI-TRUST LAWS TO MAKE SURE THAT ANY AGREEMENTS AMONG PROVIDERS PROMOTE IMPROVED EFFICIENCY AND CONSUMER SAVINGS, NOT THE CORNERING OF PROFITS THAT MIGHT RESULT FROM A NON-COMPETITIVE MARKET.

IN ESSENCE, THE FEDERAL REGULATORS POINT OUT THAT THE GOAL OF IMPROVED EFFICIENCY AMONG HOSPITALS IS BEST MET BY KEEPING THEM SUBJECT TO THE ANTI-TRUST LAWS, NOT BY EXEMPTING THEM.

3. THE GOAL OF IMPROVED EFFICIENCY SHOULD BE ADDRESSED THROUGH THE HEALTH CARE FACILITIES ACT

THE EXEMPTION AND ITS LOFTY LANGUAGE OBSCURE THE FACT THAT PENNSYLVANIA HAS A HEALTH CARE FACILITIES ACT, WITH ITS STATE HEALTH PLAN AND CERTIFICATE OF NEED PROGRAM, THAT IS ALREADY WORKING TO ACHIEVE THE GOAL OF IMPROVED PROVIDER EFFICIENCIES. THE ACT WAS JUST AMENDED LAST SESSION THROUGH ACT 149 OF 1992.

THE GOAL HERE - IMPROVED EFFICIENCY AMONG HOSPITALS - IS BEST PURSUED THROUGH THAT ACT AND THE CERTIFICATE OF NEED PROGRAM. THAT IS WHERE THERE IS A BODY OF EXPERTISE AND REGULATORY OVERSIGHT, TO MAKE SURE THAT THE GOAL IS PURSUED BUT WITH THE SAFEGUARDING OF CONSUMERS. INSTEAD, THE HOSPITALS WANT TO PURSUE THIS GOAL THROUGH A BLANKET EXEMPTION THAT WILL ENABLE THEM TO ENGAGE, UNCHALLENGED, IN MONOPOLISTIC PRACTICES AND UNREASONABLE RESTRAINTS OF TRADE. THIS MAKES NO SENSE.

PROponents OF THIS EXEMPTION ARGUE THAT THE CERTIFICATE OF NEED PROGRAM AND THE STATE HEALTH PLAN IN THE HEALTH CARE FACILITIES ACT ARE NOT UP TO THE TASK OF MEETING THE GOAL OF IMPROVED EFFICIENCY AMONG HOSPITALS. THE ANSWER TO THIS IS THAT THEY SHOULD RECOMMEND CHANGES TO THE ACT, NOT SEEK A "BACK DOOR" ESCAPE HATCH FROM REGULATORY OVERSIGHT.

IN TRUTH, THE HEALTH CARE FACILITIES ACT ILLUSTRATES THE PROBLEM WITH THE EXEMPTION. YES, WE ALL WANT IMPROVED EFFICIENCY AMONG

HOSPITALS. HOWEVER, WE CANNOT DO THIS BY EXEMPTING THEM FROM ANY ACCOUNTABILITY TO GOVERNMENT, PAYORS AND CONSUMERS - AS THAT INVITES PROBLEMS AS WELL AS SOLUTIONS.

4. THE EXEMPTION UNDERMINES THE GOAL OF ENHANCED COMPETITION AMONG PROVIDERS AS A MEANS OF BRINGING BETTER, MORE AFFORDABLE CARE TO PENNSYLVANIA

THIS COMMONWEALTH HAS ALREADY RECOGNIZED THAT COMPETITION AMONG PROVIDERS IS ESSENTIAL TO IMPROVING THE AFFORDABILITY AND AVAILABILITY OF HEALTH CARE. THAT IS THE PURPOSE OF RECENT LAWS ESTABLISHING HMO'S AND PPO'S - THAT PAYORS OF HEALTH CARE GO OUT AND NEGOTIATE WITH PROVIDERS. THE THEORY - AND, THE RECORD SHOWS, THE REALITY - IS THAT COMPETITION AMONG PROVIDERS WILL PRODUCE LOWER COSTS AND WILL FORCE PROVIDERS TO BETTER MEET THE NEEDS OF CONSUMERS.

TO EXEMPT NON-PROFIT HOSPITALS FROM THIS ANTI-TRUST LAW TAKES A LONG STEP IN THE OPPOSITE DIRECTION. INSURERS AND OTHER PAYORS FOR HEALTH CARE WILL BE HURT IN NEGOTIATING THE BEST POSSIBLE RATES AND THE BEST POSSIBLE SERVICES, AS THESE HOSPITALS WILL BE ABLE TO BAND TOGETHER TO AVOID THE MARKETPLACE COMPETITION THAT ALLOWS THESE NEGOTIATIONS TO WORK.

IN THE END, THE REAL VICTIM OF THIS WILL BE THE CONSUMER - HE IS THE ONE WHO WILL ULTIMATELY PAY THE PRICE OF A SYSTEM WITHOUT COMPETITION AND WITHOUT MEANINGFUL REGULATORY OVERSIGHT. THE FACT IS, COMPETITION AMONG PROVIDERS - INCLUDING NON-PROFIT HOSPITALS -

HAS PRODUCED SAVINGS FOR CONSUMERS. THIS EXEMPTION THREATENS TO TAKE THOSE SAVINGS AWAY AND MUST BE REJECTED.

THIS COMMITTEE SHOULD ALSO TAKE NOTE THAT THE SLOWLY EMERGING CONSENSUS ON HEALTH REFORM AT THE NATIONAL LEVEL FEATURES COMPETITION AMONG PROVIDERS AND INSURERS AS A KEY COMPONENT. GEORGE ADAMS WILL GIVE YOU MORE DETAIL ON THAT. I WANT TO POINT OUT THAT THIS EMPHASIS ON COMPETITION IS ALSO A CORNERSTONE OF GOVERNOR CASEY'S HEALTH REFORM BILL - HENCE ITS LABEL OF "MANAGED COMPETITION" - AND SIMILAR REFORMS ALREADY ENACTED IN SUCH STATES AS CALIFORNIA, FLORIDA AND NORTH CAROLINA.

THERE IS NO GUARANTEE AS TO WHAT SHAPE HEALTH REFORM HERE OR NATIONALLY WILL ULTIMATELY TAKE - I CANNOT HIDE BEHIND THE "LIKELY" STANDARD THE HOSPITALS WANT IN THEIR EXEMPTION. HOWEVER, BASED ON WHAT IS NOW ON THE DRAWING BOARD, IT IS OBVIOUS THAT COMPETITION AMONG PROVIDERS WILL PLAY A LARGE PART. IT MAKES NO SENSE TO DO SOMETHING IN THIS BILL THAT UNDERCUTS THIS DIRECTION.

5. THE BILL'S EXEMPTION OF INSURERS DEMONSTRATES THE DIFFERENCE BETWEEN A REASONED AND A POORLY CONSTRUCTED EXEMPTION

I RECOGNIZE THAT THE BUSINESS OF INSURANCE IS ALSO EXEMPT FROM THIS BILL, AND SOME MIGHT QUESTION WHY IT DESERVES DIFFERENT TREATMENT THAN NON-PROFIT HOSPITALS.

THE FACT IS, THE INSURANCE EXEMPTION IS A LIMITED ONE. IT EXTENDS TO BUSINESS THAT IS ALREADY REGULATED BY THE INSURANCE COMMISSIONER AND DOES NOT CONSTITUTE A BOYCOTT, COERCION OR INTIMIDATION OR AN AGREEMENT TO DO THESE. THE REASON FOR THE EXEMPTION IS THAT INSURANCE IS ALREADY SUBJECT TO THE SAME STANDARDS PROPOSED IN THIS ACT THROUGH THE UNFAIR INSURANCE PRACTICES ACT. SECTION 5A OF ACT

THUS, INSURERS CANNOT ENGAGE IN ANY OF THE CONDUCT PROHIBITED BY THIS ACT. IF THEY DO, THEY FACE PENALTIES MORE DRACONIAN THAN THOSE HERE - NAMELY, REGULATORY SANCTIONS THAT INCLUDE BEING PUT OUT OF BUSINESS. FURTHER, THEY ARE REGULATED BY A DEPARTMENT WITH SPECIFIC EXPERTISE IN INSURANCE AND WITH INVESTIGATORY POWERS THAT GO BEYOND THOSE GIVEN TO THE ATTORNEY GENERAL UNDER THIS ACT.

THE EXEMPTION FOR NON-PROFIT HOSPITALS HAS NONE OF THESE BALANCING SAFEGUARDS. IT IS PURE EXEMPTION, MEANING THAT THESE HOSPITALS CAN ENGAGE IN THE CONDUCT PROHIBITED BY THIS ACT - UNREASONABLE RESTRAINTS OF TRADE AND MONOPOLISTIC CONSPIRACIES - WITHOUT ANY GOVERNMENT AGENCY ABLE TO PUT A STOP TO IT.

I APPRECIATE THE HOSPITALS' CLAIM THAT THEY WILL NOT DO THIS, THAT THEY WILL ONLY USE THE EXEMPTION TO IMPROVE EFFICIENCY. HOWEVER, THE EXEMPTION GOES WELL BEYOND THIS. UNLIKE THE EXEMPTION OF INSURANCE, IT DOES NOT ADDRESS THE POTENTIAL HARMS IT CREATES. THAT IS WHY THIS EXEMPTION SHOULD BE LABELED "NOT READY FOR PRIME TIME" AND SHOULD BE TAKEN OUT OF SENATE BILL 307 BY THIS COMMITTEE.

THANK YOU FOR THE OPPORTUNITY TO SHARE THESE VIEWS. I AM HAPPY TO ANSWER ANY QUESTIONS AND HAPPY TO INTRODUCE GEORGE ADAMS OF CIGNA CORPORATION TO BRIEFLY FILL IN DETAILS ON THE FEDERAL LEVEL, BOTH IN THE AREAS OF ANTI-TRUST AND MANAGED COMPETITION.