THE INSURANCE FEDERATION OF PENNSYLVANIA, INC.

Public Testimony

prepared for

HOUSE JUDICIARY COMMITTEE

on

HOUSE BILL 2122

July 09, 1996

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MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

GOOD AFTERNOON. THANK YOU FOR THE OPPORTUNITY TO TESTIFY TODAY ON HOUSE BILL 2122 SUBSTANTIALLY REVISING MEDICAL MALPRACTICE STANDARDS AND CLAIMS PRACTICE IN THE COMMONWEALTH UNDER THE HEALTH CARE SERVICES MALPRACTICE ACT. I AM HENRY G. HAGER, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF THE INSURANCE FEDERATION OF PENNSYLVANIA.

THE INSURANCE FEDERATION IS A NON-PROFIT TRADE ASSOCIATION WITH OFFICES IN PHILADELPHIA AND HARRISBURG REPRESENTING OVER 200 COMMERCIAL INSURERS. OUR MEMBERS INCLUDE A BROAD SEGMENT OF ALL TYPES OF INSURERS, INCLUDING THOSE WRITING MEDICAL MALPRACTICE INSURANCE.

ON SEPTEMBER 20, 1995, I TESTIFIED BEFORE THE SENATE BANKING AND INSURANCE COMMITTEE ON A BILL DESIGNED TO BOLSTER THE SOLVENCY OF THE MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND CREATED UNDER ARTICLE VII OF THIS SAME ACT. I NOTED THEN THAT AS A MEMBER OF THE SENATE IN 1974 AND 1975 I PARTICIPATED IN THE FORMULATION OF THIS ACT, INCLUDING ITS EFFORT AT REFORMING MEDICAL MALPRACTICE ACTIONS BY REQUIRING THEIR MANDATORY SUBMISSION TO KNOWLEDGEABLE ARBITRATION PANELS. THIS EFFORT CAME TO NOUGHT WHEN VARIOUS FEATURES OF THAT ARBITRATION SYSTEM WERE RULED UNCONSTITUTIONAL BY THE PENNSYLVANIA SUPREME COURT.

IT IS GRATIFYING TO SEE THAT THE BIPARTISAN SPONSORS OF THIS BILL INTRODUCED BY REPRESENTATIVE SCOT CHADWICK HAVE TACKLED MEDICAL MALPRACTICE REFORM BY REPLACING THE FIVE ARTICLES OF THE ORIGINAL ACT (ARTICLES II THROUGH VII) WITH SIX ARTICLES MAKING BOTH SUBSTANTIVE AND PROCEDURAL MEDICAL MALPRACTICE REFORMS. THE INSURANCE FEDERATION IS ENTHUSIASTIC ABOUT MANY OF THOSE CHANGES.

HOWEVER, THE FEDERATION OPPOSES, FOR OPEN MARKET REASONS, THE MANDATORY RATE ROLLBACK PROVISIONS IN SECTION 7 OF THIS BILL.

ALLOW ME TO COMMENT BRIEFLY ON BOTH THESE ASPECTS OF THE BILL IN THE TIME REMAINING TO ME.

1. MEDICAL MALPRACTICE REFORM

THE FIRST OF THE NEW ARTICLES PROPOSED TO BE ADDED TO THE HEALTH CARE SERVICES MALPRACTICE ACT, II-A, GOVERNS INFORMED CONSENT, WARRANTIES, COLLATERAL SOURCES, PUNITIVE DAMAGES, STATUTES OF LIMITATION AND FRIVOLOUS FILINGS. ALL OF THESE ISSUES BEARING ON THE STANDARDS TO BE APPLIED TO MALPRACTICE CLAIMS PRESENT ATTEMPTS TO BALANCE THE RIGHTS OF CLAIMANTS AGAINST THE RIGHTS OF THE MEDICAL SERVICE PROVIDERS WHICH, ALLEGEDLY, HAVE HARMED THEM, AND THE RIGHTS OF THOSE FOOTING THE COSTS OF THE SYSTEM (VIRTUALLY ALL OF THE REST OF US). THIS LAST GROUP, IN ESSENCE, THE PUBLIC, HAS THE RIGHT TO REASONABLE RESTRAINTS AGAINST THE CLAIM SYSTEM RUNNING AMOK AND CONTORTING THE PRACTICES AND COSTS WITHIN IT. THOSE LATTER COSTS ARE OFTEN POORLY UNDERSTOOD BY THE PUBLIC AND THE MEDIA AND, MOREOVER, ARE OFTEN OVERLOOKED IN THE POLITICS OF SUCH DEBATES BECAUSE NO PARTICULAR INTEREST GROUP, EXCEPT INSURERS WHO HAVE THEIR OWN PROBLEMS IN THE LEGISLATURE, REPRESENTS THAT VIEW.

CONSISTENT WITH ITS TRADITIONAL TACTIC (REFLECTIVE OF AN ACTUAL BELIEF OR NOT) THAT INSURERS REPRESENT AN ANTAGONISTIC POSITION VIS A VIS THEIR POLICYHOLDERS AND ALL INDIVIDUAL CLAIMANTS, CLAIMANT ADVOCATES HAVE AVERRED THAT INSURERS ARE THE LAST GROUP IN THE WORLD WHICH SHOULD BE LISTENED TO ABOUT THIS BALANCING. BUT THAT IS SHORTSIGHTED. BECAUSE OF RATE SETTING MECHANISMS AND THE FREEDOM TO CHOOSE COVERAGES AND MARKETS, INSURERS THEMSELVES ARE NOT THE PRIMARY VICTIMS OF EXCESSES IN THE TORT SYSTEM, MEDICAL MALPRACTICE OR OTHERWISE. INSURANCE POLICYHOLDERS IN ALL TYPES OF COVERAGES ARE. THIS MEANS THAT IT IS THE RESPONSIBLE CITIZENS OF THE COMMONWEALTH WHO BEAR THE COSTS OF ANY ABUSES OR IMBALANCES. THESE COME IN THE FORM OF HIGHER COSTS FOR BUSINESSES AND CONSUMERS, MORE

EXPENSIVE INSURANCE COVERAGES, NONCOMPETITIVENESS OF THE PENNSYLVANIA (AND U.S.) ECONOMIES AND ULTIMATELY A LOWERED STANDARD OF LIVING. SAVINGS IN THIS SYSTEM, AFTER ALL, ARE AVAILABLE FOR MANY THINGS INCLUDING, PERHAPS, CREATING NEW JOBS AND NEW OPPORTUNITIES.

IN ANY EVENT, WHILE LAWMAKERS PROPERLY WILL, AND INSURERS WILL NOT, BE THE FINAL ARBITER OF THE EQUITY OF THESE BALANCES, THE NEW STANDARDS IN ARTICLE II-A GOVERNING PROFESSIONAL LIABILITY CLAIMS CERTAINLY STRIKE A MORE REASONABLE BALANCE. IT IS HARD TO ARGUE THAT A HEALTH CARE PROVIDER SHOULD BE A GUARANTOR OF A CURE ABSENT A WRITTEN CONTRACT TO THAT EFFECT. LIKEWISE, WITH THE EXCEPTION FOR MINORS AND FOREIGN OBJECTS LEFT IN SOMEONE'S BODY, IT ALSO SEEMS REASONABLE TO CLOSE CLAIMS AT THE EARLIER OF TWO YEARS AFTER A PERSON KNOWS ABOUT THE INJURY OR FOUR YEARS AFTER THE BREACH OF DUTY WHICH GAVE RISE TO AN INJURY.

MANY OF THE BALANCING DECISIONS IN THIS FIRST NEW ARTICLE ARE MORE DIFFICULT. IS IT REASONABLE TO LIMIT PUNITIVE DAMAGES TO 200% OF COMPENSATORY DAMAGES AT THE SAME TIME AS STANDARDS FOR THEIR IMPOSITION ARE STIFFENED? WE THINK SO, BUT DOUBT THAT THE TRIAL BAR WILL.

THE FEDERATION HAS ALWAYS FAVORED A COLLATERAL SOURCE RULE AND SECTION 203-A CERTAINLY SEEMS A REASONABLE ONE. IT IS LONG SINCE TIME TO LIMIT OUR TORT SYSTEM TO REDRESS THOSE UNFORTUNATE ENOUGH TO BE INJURED BY THE NEGLIGENCE OF OTHERS AND WEEDING OUT ELEMENTS WHICH EXIST PRIMARILY TO ENRICH CLAIMANTS AND SUBSIDIZE UNREASONABLE CLAIMS.

ARTICLES III AND IV REPRESENT CHANGES IN PRETRIAL AND TRIAL PROCEDURES WHICH HAVE BEEN FOUND IN MANY TORT REFORM EFFORTS OVER THE PAST DECADE. THERE SEEMS TO BE DEVELOPING BOTH IN THE COMMONWEALTH AND ACROSS THE COUNTRY A CONSENSUS THAT: ATTORNEYS SHOULD BE HELD ACCOUNTABLE FOR GOOD FAITH IN THEIR PLEADINGS;

EXPERTS SHOULD BE EXPERTS; THOSE WITHOUT ANY SUBSTANTIAL INVOLVEMENT IN A CLAIM SHOULD NOT BE DRAGGED THROUGH ONE; AND, DISCOVERY AND PRETRIAL PROCEDURES SHOULD BE UTILIZED TO EXPEDITE CLAIM RESOLUTIONS, NOT DELAY THEM AND PROVIDE A MEANS OF OPPRESSION FOR CLAIMANTS OR DEFENDANTS.

ARTICLE VI-A CREATES AN ALTERNATE DISPUTE RESOLUTION SYSTEM THOUGH THE VOLUNTARY USE OF ARBITRATION. THE PLAN IS CLEARLY VOLUNTARY, CAN BE CANCELED AT WILL WITHIN 30 DAYS OF EXECUTION AND INVALID AFTER THREE YEARS. IT IS AN ATTEMPT TO INTRODUCE A.D.R. TO AN AREA TO WHICH IT SEEMS PARTICULARLY SUITED. THERE IS NO ATTEMPT TO LOAD UP THE THREE PERSON PANEL ABSENT A CONTRARY ARRANGEMENT FOR A DIFFERENT NUMBER OF ARBITRATORS. THE MEDICAL COMMUNITY'S DESIRE TO TEST THESE PROCEDURES TO RESOLVE CLAIMS OF THOSE LIKEWISE WILLING TO ABIDE BY A.D.R. SHOULD BE ENACTED.

IN SUMMARY, THE INSURANCE FEDERATION SUPPORTS THE TORT REFORMS CONTAINED IN **HOUSE BILL 2122**. PENNSYLVANIA NEEDS TO BE IN THE FOREFRONT OF STATES IMPLEMENTING EFFORTS TO CONTROL THE TOTAL COSTS OF ITS HEALTH CARE SYSTEM. AS A STATE KNOWN FOR ITS MEDICAL FACILITIES, MEDICAL SCHOOLS AND HOSPITALS, PENNSYLVANIA SENDS A POSITIVE MESSAGE TO COMMERCE AND MEDICINE BY TAKING FIRM CONTROL OVER THE MECHANISMS AWARDING REDRESS FOR THAT SYSTEM'S FAILURES. BY MAKING SURE THAT PROMPT, FAIR AND ADEQUATE COMPENSATION IS THE GOAL OF THE SYSTEM, PENNSYLVANIA WILL PROTECT ITS POSITION AS A LEADING CENTER OF A PROFESSION, INDUSTRY AND EDUCATION WHICH OTHER STATES, UNDERSTANDABLY, COVET.

2. RATE ROLLBACK PROVISION

NOW, WITH YOUR PERMISSION, I WOULD LIKE TO TALK WITH YOU ABOUT THE RATE ROLL-BACK PROVISION INCLUDED IN THIS BILL FOUND IN SECTIONS 1007.3 AND 1007.4, ON PAGES 24 AND 25.

SECTION 1007.3 IS A NOVEL ONE WHICH GROWS OUT OF THE FRUSTRATION TARGETS OF LAWSUITS EXPERIENCE WHEN THE COMPANY WHICH INSURES THEM, AND, THUS, IS LIABLE FOR THE PAYMENT OF LEGAL COSTS AND THE POSSIBILITY OF A RUNAWAY VERDICT, DECIDES THAT IT IS WISE, ECONOMICALLY, TO SETTLE THE CASE RATHER THAN CONTINUE THE COSTS AND RISK THE LARGE VERDICT.

THE TARGET BELIEVES, AND OFTEN CORRECTLY, THAT "I DIDN'T DO ANYTHING WRONG."

THOSE EVALUATING THE CASE FOR TRIAL KNOW THAT, GIVEN THE PRESENT STATE OF OUR LIABILITY SYSTEM, A JURY IS LIABLE TO DISAGREE, AND, EVEN IF THEY DON'T, STILL AWARD THE PLAINTIFF A VERDICT FOR ALL OF THE WELL-CHRONICALLED REASONS - SYMPATHY, INSURER DEEP POCKETS, ETC.

INSISTING, BY STATUTE, THAT INSURERS CAN BE HANDCUFFED BY THOSE THEY INSURE, AND WHOSE ASSESSMENT OF THEIR OWN LEGAL LIABILITIES MAY BE SKEWED BY LACK OF OBJECTIVITY AND BY UNFAMILIARITY WITH WHAT CAN HAPPEN IN THE COURTS IS, GENERALLY, A BAD IDEA. BUT, SPECIFICALLY, IT IS ABSOLUTELY UNNECESSARY IN PENNSYLVANIA WHERE ALL MEDICAL PROFESSIONAL LIABILITY INSURANCE POLICIES INCLUDE A CONSENT TO SETTLE CLAUSE.

MY OBJECTION TO THE STATUTORY IMPOSITION OF SUCH A CONTRACT CLAUSE IS THE MIGRATORY NATURE OF SUCH LANGUAGE. IF YOU MANDATE IT FOR PHYSICIANS, WHY NOT FOR ALL OTHERS INCLUDING, FOR INSTANCE, AUTOMOBILE DRIVERS?

IF THE MARKET HAS ARRIVED, BY ITSELF, AT THIS AGREEMENT, WHAT GREAT VACUUM DEMANDS THE RUSH OF STATUTE TO FILL A NON-EXISTENT HOLE IN THE LAW? PERHAPS IT IS TO JUSTIFY THE BILL'S MANDATED REDUCTION OF 5% IN PREMIUM IF SUCH A CONSENT TO SETTLE CLAUSE IS NOT PART OF THE CONTRACT. WELL, AS I HAVE JUST POINTED OUT, THERE APPEARS TO BE NO

SUCH MALPRACTICE INSURANCE CONTRACT IN PENNSYLVANIA. FURTHER, THE 5% REDUCTION IN PREMIUM WAS NOT SCIENTIFICALLY NOR ACTUARIALLY ARRIVED AT. IT IS PURELY ARBITRARY.

THAT BRINGS US TO THE MANDATED 10% ROLL-BACK AS OF THE EFFECTIVE DATE OF THE ACT, WHICH IS SET AT SIXTY DAYS AFTER SIGNING.
ALL OF THE PROVISIONS OF THE ACT PRIOR TO SECTIONS 1007.3 AND 1007.4 ARE DESIGNED TO AND WILL OPEN UP THE MEDICAL MALPRACTICE INSURANCE MARKET IN PENNSYLVANIA AND BRING DOWN ITS COSTS. IN AN UNDISTORTED MARKET, RATES WILL FOLLOW COSTS. HIGH COSTS WILL FORCE HIGH RATES AND LOW COSTS WILL BE FOLLOWED BY LOW RATES.

PLEASE REMEMBER THAT THERE ARE TWO CHECKS AGAINST UNJUSTIFIED HIGH RATES: PRIOR APPROVAL, BASED UPON ECONOMIC ANALYSIS, BY THE INSURANCE COMMISSIONER, AND COMPETITION FOR BUSINESS IN THE MARKETPLACE.
ALL OF THAT IS PREDICATED UPON AN UNDISTORTED MARKET.

MOST OF THE PROVISIONS OF HB 2122 WILL HAVE A COST LOWERING EFFECT. THE PROVISIONS REGARDING COLLATERAL SOURCE, PUNITIVE DAMAGES, TRIAL BIFURCATION, STANDARDS OF EVIDENCE AND STANDARDS OF EXPERT TESTIMONY,STATUTES OF LIMITATIONS, FRIVOLOUS LAWSUITS, PERIODIC PAYMENTS AND ARBITRATION WILL, IF ENACTED, CAUSE COMPANIES TO RE-FIGURE THEIR RATES AND WILL, I BELIEVE, LEAD TO LOWER INSURANCE PREMIUMS.

BUT, AND IT IS A BIG BUT, I CAN'T, YOU CAN'T AND NOBODY ELSE CAN PRICE THEM AT TEN PER CENT NOW AND AN ADDITIONAL FIVE PER CENT FIVE YEARS DOWN THE ROAD. LET ME MODIFY THAT: <u>YOU</u> CAN, BY LEGISLATIVE FIAT, <u>BUT</u> YOU CAN'T FORCE A COMPETITIVE MARKETPLACE.
MY WAGER WOULD BE THAT IF YOU INCLUDE SUCH A MANDATE, YOU WILL SEVERELY RESTRICT- IF NOT SHUT DOWN - THAT MARKETPLACE.

THE LAST TIME IT WAS DONE HERE IN PENNSYLVANIA WAS IN ACT 6, AUTOMOBILE INSURANCE. I REMEMBER THE RESULT. MANY COMPANIES

STOPPED WRITING, THE ASSIGNED RISK PLAN GREW BY THE THOUSANDS MONTHLY AND TENS OF COMPANIES WERE GIVEN "EXTRAORDINARY CIRCUMSTANCE" RATE RELIEF BY GOVERNOR CASEY'S INSURANCE COMMISSIONER. IT WAS MORE THAN A YEAR BEFORE THE MARKET SETTLED DOWN. INTERESTINGLY ENOUGH, IT WAS ONLY AFTER THE MANDATORY RATE ROLLBACK PERIOD EXPIRED THAT THE MARKETPLACE BEGAN TO OPEN UP AGAIN AND RATES HAVE STABILIZED. WHY? NOT BECAUSE OF THE ROLL-BACK, BUT BECAUSE THE MEDICAL COST CONTAINMENT PROVISIONS OF THE ACT HAVE WORKED.

THE CASEY ADMINISTRATION PRICED THE "REFORMS" IN THE BILL. A LOOK AT THE RECORD WILL CLEARLY SHOW THAT, WITHIN THE FILINGS, THE ONLY COSTS AND RATES WHICH REDUCED WERE DUE TO MEDICAL COST CONTAINMENT, NOT TO THE OTHER PROVISIONS OF THE BILL.

NOW, IN AN OPEN MARKET, RUNAWAY COSTS HAVE BEEN BRIDLED, THE ASSIGNED RISK POOL IS SHRINKING MONTH AFTER MONTH AND THERE ARE NEW INSURERS IN THE MARKET. BUT THOSE SALUTARY RESULTS COME NOT FROM THE RATE ROLL-BACK, BUT FROM LOWERED MEDICAL COSTS TO INSURERS AND REAL COMPETITION BETWEEN THEM.

I KNOW THAT THE MEDICAL SOCIETY'S DESIRE FOR THE RATE ROLL-BACK IS BASED UPON A NEED FOR ASSURANCE THAT THIS ATTEMPT AT REFORM WILL WORK. WE HEAR THE CALL FROM THE BUSINESS COMMUNITY IN THE EFFORT TO REDUCE THE COSTS OF WORKERS COMPENSATION. IT IS NATURAL AND IT IS EASILY UNDERSTOOD. WHAT IS NOT SO EASILY UNDERSTOOD, APPARENTLY, IS THAT ATTEMPTS TO MANIPULATE THE MARKETPLACE **ALWAYS** RESTRICT THE MARKETPLACE. WHAT GOOD ARE LOWER PRICES FOR A PRODUCT IF YOU CAN'T BUY THE PRODUCT? THE GOOD NEWS IS THAT INSURANCE COSTS LESS. THE BAD NEWS IS THAT NOBODY SEEMS TO BE SELLING IT. OR, IF THEY ARE, THEY ARE BEING EXTRA CAREFUL ABOUT WHICH PROVIDERS ARE ABLE TO GET IT.

IF THIS LEGISLATURE PROVIDES THE COST SAVINGS, THE INDUSTRY WILL RESPOND. THERE IS REAL COMPETITION OUT THERE RIGHT NOW. THE COSTS

ARE TOO HIGH, YES. IF YOU DO NOT DESTROY IT BY ARBITRARY RATE ROLL-BACKS, THAT COMPETITION WILL BE THERE PROVIDING LOWER RATES BASED UPON LOWER COSTS. AND, I BELIEVE THAT THE MARKET WILL CONTINUE TO IMPROVE. IT IS NOT POSSIBLE TO PRICE "SOFT" REFORMS. SOME OF THE REFORMS INCLUDED IN THIS BILL ARE SUBJECTIVE, INDEED. WHO CAN TELL HOW MUCH WILL BE SAVED BY DIFFERENT STANDARDS OF EVIDENCE OR DIFFERENT STANDARDS FOR JUDGING AN EXPERT? AFTER EXPERIENCE IN THE SYSTEM, IF THERE ARE UNPREDICTABLE COST SAVINGS, THOSE SAVINGS WILL BE REFLECTED IN EVEN LOWER RATES.

YOU JUST ARE REQUIRED TO HAVE FAITH IN THE FREE MARKET SYSTEM AND IN THE INSURANCE DEPARTMENT TO ASSURE THAT RATES ARE "NEITHER INADEQUATE, EXCESSIVE NOR UNFAIRLY DISCRIMINATORY," AND THAT IS ALL.

LOWER THE COSTS AND RATES WILL COME DOWN. RATE SUPPRESSION NEVER WORKS FOR VERY LONG. HOWEVER, YOU CAN ENCOURAGE A LOWER COST, COMPETITIVE MARKETPLACE. THE DANGER OF MANDATED RATE ROLLBACKS ISN'T CONFINED TO THEIR ARBITRARY NATURE. WHO KNOWS WHETHER THE COST SAVINGS BUILT INTO THIS BILL ARE WORTH LESS- OR MORE- THAN 10%? ANOTHER 5% IN FIVE YEARS IS EVEN A WILDER GUESS NOW FOR ALL OF THE MUNDANE REASONS SUCH AS INFLATION AND CHANGES IN MEDICAL PROCEDURES.

BUT, WHO AMONG YOU CAN GUARANTEE WHICH, IF ANY, OF THE COST SAVING MEASURES NOW CONTAINED IN THE BILL WILL REMAIN THERE THROUGHOUT THE LEGISLATIVE PROCESS? WITH ALL DUE RESPECT, THE ANSWER TO THAT IS NONE OF YOU. FURTHER, NONE OF YOU CAN REALISTICALLY PROMISE THAT IF THOSE COST SAVING MEASURES ARE REDUCED, SO WILL BE THE RATE ROLLBACK.

THE WISER COURSE MAY WELL BE TO INCLUDE A CLAUSE REQUIRING A NEW RATE FILING BASED UPON THE CHANGES WHICH BECOME LAW WITH THE PASSAGE OF THE FINAL FORM OF THIS BILL. THAT LANGUAGE I COULD SUPPORT ENTHUSIASTICALLY.