THE INSURANCE FEDERATION OF PENNSYLVANIA, INC.

Public Testimony

prepared for the

HOUSE JUDICIARY COMMITTEE

on

HOUSE BILL 1190

December 4, 1997

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MR. CHAIRMAN AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

GOOD MORNING. THANK YOU FOR THE OPPORTUNITY TO TESTIFY ON HOUSE BILL 1190. I AM JOHN DOUBMAN, SECRETARY AND COUNSEL OF THE INSURANCE FEDERATION OF PENNSYLVANIA.

THE INSURANCE FEDERATION IS A NON-PROFIT TRADE ASSOCIATION REPRESENTING OVER 200 COMMERCIAL INSURERS WITH OFFICES IN PHILADELPHIA AND HARRISBURG. OUR MEMBERS INCLUDE ALL TYPES OF INSURERS, INCLUDING THE LARGEST WRITERS OF AUTOMOBILE INSURANCE IN THE COMMONWEALTH. THE FEDERATION REPRESENTS THESE MEMBERS IN PENNSYLVANIA LEGISLATIVE AND REGULATORY MATTERS.

IN ITS BROADEST AND MOST LOGICAL READING, HOUSE BILL 1190 PROVIDES THAT WHERE A CLAIMANT IS UNABLE TO RECOVER AGAINST ANOTHER DRIVER BECAUSE THE LATTER IS FOUND NON-NEGLIGENT DUE TO THE "SUDDEN EMERGENCY" OR "SUDDEN ILLNESS" DOCTRINES, THE CLAIMANT CAN RECOVER AGAINST HIS OWN INSURER. THE INSURANCE FEDERATION OPPOSES HOUSE BILL 1190. IT INTRODUCES CONFUSION INTO, AND SIGNIFICANTLY UNDERMINES, THE CHANGES IN THE AUTOMOBILE REPARATIONS SYSTEM ESTABLISHED BY ACT 6 WHICH, ALTHOUGH UNDER CONSTANT AND CONTINUING ATTACK, HAVE BEEN EFFECTIVE IN MODERATING AUTO INSURANCE RATES. THE BILL SIGNIFICANTLY EXPANDS THE FORTUITOUS EVENTS FOR WHICH AUTO INSURANCE ANSWERS TO INCLUDE A NEW CATEGORY OF RISK NOT HERETOFORE RECOGNIZED.

LET US SPEND A MOMENT CONSIDERING WHAT THE BILL PROVIDES TO SEE THE DIFFICULTIES INHERENT IN THIS NO FAULT INNOVATION.

1. REQUIRING A FACT FINDER TO DETERMINE LEGALLY UNRECOGNIZABLE DAMAGES.

TO BEGIN WITH, THE BILL REQUIRES THE TRIER OF FACT, WHETHER A COURT OR ARBITRATION PANEL, TO FIND THE "DAMAGES" OF A CLAIMANT WHEN THE DEFENDANT HAS BEEN FOUND NOT LIABLE AS A RESULT OF ONE OR MORE SPECIFIC DEFENSES. IN LEGAL THEORY AT LEAST, THE TRIER OF FACT CANNOT FIND ANY "DAMAGE" BECAUSE THERE IS NONE. ALL THAT THE PLAINTIFF HAS SUFFERED IN THE EYES OF THE LAW IS DAMNUM ABSQUE INJURIA MEANING HARM WITHOUT INJURY SINCE THE LOSS HAS NOT GIVEN RISE TO A VIABLE LEGAL ACTION FOR WHATEVER HARM HAS COME TO THE CLAIMANT.

MOREOVER, EVEN ASSUMING THAT THIS VARIATION FROM THE PREVAILING LEGAL STANDARD CAN BE ACCOMMODATED, IT IS NOT CLEAR WHAT "DAMAGE INCURRED BY THE PLAINTIFF" MEANS. DOES IT REFER TO HIS MEDICAL BILLS, PAIN AND SUFFERING, LOSS OF CONSORTIUM, OR WHAT? IN THIS CONTEXT, THE LOGIC OF THE LAW COINCIDES WITH COMMON SENSE. WITHOUT THE STANDARDS BASED ON THE PRECEDENTS IN OUR LEGAL SYSTEM WHICH GUIDE THE RECOVERIES OF CLAIMANTS WHO ARE THE SUBJECTS OF LEGALLY RECOGNIZED HARM, WE ARE LEFT WITHOUT ANY GUIDANCE AS TO WHAT THESE DAMAGES ARE. FINDING DAMAGES IN THE CASE OF A LEGALLY NON-

RECOGNIZABLE HARM IS NOT SOMETHING THAT THE LAW DOES OR INDEED CAN DO.

2. ALLOCATION OF RESPONSIBILITY FOR THOSE DAMAGES

THE BILL THEN PROVIDES THAT AN INSURER, PRESUMABLY THE CLAIMANT'S INSURER, AS OPPOSED TO THE EXONERATED DEFENDANT'S, WILL PAY THESE DAMAGES "UP TO THE LIMITS OF THE POLICY" TO ITS INSURED, I.E., THE CLAIMANT. WHILE THE REFERENCE TO THE LIMITS OF THE POLICY IS UNCLEAR, IT PRESUMABLY REFERS TO THE THIRD PARTY LIABILITY LIMITS. IF IT WERE A REFERENCE TO FIRST PARTY BENEFITS, THE INSURER WOULD BE RESPONSIBLE FOR THEIR PAYMENT UNDER OUR PRESENT SYSTEM ANYWAY AND THIS BILL WOULD BE UNNECESSARY. THERE WAS SOME DISCUSSION INITIALLY THAT THIS BENEFIT WAS A CHANGE TO EXTEND FIRST PARTY MEDICAL BENEFITS TO MOTORCYCLISTS, BUT THE BILL CANNOT BE SO CONSTRUED.

INTERPRETED IN THIS FASHION THEN, THE BILL SAYS THAT IF A CLAIMANT IS FRUSTRATED BY THE SUDDEN EMERGENCY OR ILLNESS DOCTRINE FROM RECOVERING DAMAGES AGAINST THE AGENT WHO CAUSED THEM, HE CAN RECOVER THEM AGAINST HIS OWN INSURER. IN TRADITIONAL TERMS, THEN, THIS IS AN EXPANSION OF THE FIRST PARTY COVERAGE IN ACT 6 TO A VASTLY EXPANDED AMBIT OF DAMAGES. INSTEAD OF A LIMITED MEDICAL BENEFIT, THE INSURER COULD NOW ANSWER FOR THE FULL RANGE OF "DAMAGES" TO WHICH IT WOULD HAVE PREVIOUSLY ANSWERED ONLY IF ITS

INSURED HAD NEGLIGENTLY INJURED A THIRD PARTY. EVEN WORSE, THESE DAMAGES ARE TO BE DETERMINED AGAINST AN EMPTY CHAIR WITH THE TRIER OF FACT FREE TO ASSESS WHATEVER DAMAGES IT CHOOSES, KNOWING THAT ONLY A DEEP POCKET INSURER IS THERE WITH NO RAMIFICATIONS AGAINST A FLESH AND BLOOD DEFENDANT.

THIS WHOLE PROCESS CONTRADICTS THE THEORY AND STRUCTURE OF ALL AUTOMOBILE LIABILITY COVERAGES. THE LIABILITY PORTIONS OF FILED AND APPROVED AUTOMOBILE POLICIES HAVE SINCE THEIR INCEPTION BEEN INDEMNITY COVERAGES. THAT IS, THE INSURER UNDERTAKES TO PAY DAMAGES FOR WHICH ITS INSURED IS HELD LEGALLY RESPONSIBLE. MOREOVER, IT UNDERTAKES TO DEFEND AN INSURED AGAINST SUCH LIABILITY. UNDER THIS BILL, THE POLICY WOULD BE ASKED TO ANSWER WHERE ITS INSURED WAS NOT FOUND LIABLE AND ITS INTEREST IN DEFENDING LIABILITY FINDINGS AGAINST ITS INSURED WOULD NOT EVEN BE TRIGGERED IN THE TYPES OF CASES ENVISIONED BY THIS BILL. IN BOTH RESPECTS THE BILL IS RADICALLY AT ODDS WITH LONGSTANDING PRACTICE AND THEORY.

3. A SIGNIFICANT RETRENCHMENT ON AUTOMOBILE LIABILITY AND A PROMISE OF WORSE.

AS COURTS HAVE REPEATEDLY STATED, THE GENERAL ASSEMBLY'S EFFORT IN ACT 6 WAS TO ESTABLISH A SYSTEM WHICH MINIMIZED THE COSTS OF THE AUTOMOBILE REPARATIONS SYSTEM WHILE MAINTAINING A SYSTEM OF FAIR

REDRESS FOR CITIZENS. AGAIN IN LEGAL THEORY, IN THE CASES IN WHICH THIS BILL IS APPARENTLY INTENDED TO APPLY, THERE ARE ONLY TWO EXPLANATIONS FOR ANY DAMAGE SUFFERED BY THE CLAIMANT: (A) HE WAS NEGLIGENT HIMSELF; OR (B) HE WAS HARMED BY AN ACT OF GOD OR RANDOM CHANCE FOR WHICH NO ONE IS ANSWERABLE. IN EITHER EVENT, IT WORKS A COMPLETE REVERSAL OF PENNSYLVANIA'S APPROACH TO MINIMIZING THE COSTS OF THE AUTO REPARATIONS SYSTEM (AND INSURANCE PREMIUM LEVELS) TO DECIDE THAT A PERSON'S INSURER SHOULD BE MADE LIABLE UP TO POLICY LIMITS AS IF IT WERE A RESPONSIBLE TORTFEASOR.

MOREOVER, THE INSTANCES IN WHICH THIS ACT WOULD APPLY ARE NOT AS LIMITED AS THEY MAY APPEAR. THE SUDDEN EMERGENCY DOCTRINE IS SIGNIFICANTLY MORE LIMITED THAN THAT DESCRIBED IN THIS BILL. TRADITIONALLY, THE SUDDEN PERIL HAD TO BE SO IMMINENT AS TO LEAVE NO TIME TO REACT AND THE PERIL OR HARM HAD TO BE AS A RESULT OF THE NEGLIGENCE OF THE OPPOSITE PARTY. IT WAS NOT SIMPLY A SUDDEN PERILOUS OR LIFE THREATENING SITUATION. SECONDLY, THE DOCTRINE NEVER INCLUDED SUDDEN PHYSICAL IMPAIRMENT OR ILLNESS. INDEED, THE VAGUENESS OF THE DEFINITION IS ALMOST AN INVITATION IN CERTAIN SITUATIONS TO COLLUSION BETWEEN RELATED PARTIES.

IN ANY EVENT, CONTRARY TO WHAT YOU MAY HAVE BEEN TOLD, THIS BILL DOES NOT RESTATE THESE DOCTRINES IN THE SENSE OF CODIFYING THEM WITH ALL THEIR NUANCES AS THEY HAVE BEEN DEVELOPED IN OUR LAW. TO THE CONTRARY, THE BILL REFERS TO THEM IN A GENERIC SHORTHAND WITH NO ASSURANCE THAT THEY WILL BE NARROWLY CONSTRUED AND APPLIED ONLY

IN THE INSTANCES WHICH ARE CONSISTENT WITH PRIOR COURT DECISIONS OF OUR STATE COURTS.

MOREOVER, THERE IS NOTHING SPECIAL ABOUT THE SUDDEN EMERGENCY OR SUDDEN ILLNESS DOCTRINES WHICH PARTICULARLY SETS THEM APART FROM OTHER SPECIFIC DEFENSES WHICH MAY BE PLEADED. WHY ARE CLAIMANTS WHO ARE DENIED RELIEF AGAINST A DEFENDANT BECAUSE OF THE ASSURED CLEAR DISTANCE RULE, OR THE LAST CLEAR CHANCE DOCTRINE OR EVEN ASSUMPTION OF RISK INELIGIBLE FOR THIS TREATMENT? IF THEY ARE NOT NOW, IT IS CERTAIN THAT THE TRIAL BAR WILL BE ADVOCATING THAT THEY SHOULD BE. THIS INTRUSION INTO UNCHARTED AREAS OF NO FAULT COVERAGE IS A TERRIBLE PRECEDENT WHICH IS AT ODDS BOTH WITH LEGAL THEORIES OF CIVIL RESPONSIBILITY AND THE CURRENT LEGAL RATIONALE FOR OUR AUTOMOBILE REPARATIONS LAW.

IT ALSO SHOULD BE NOTED THAT INSURERS HAVE NOT PRICED AUTO COVERAGES TAKING THIS EXPOSURE INTO ACCOUNT. THE VAGARIES IN THE BILL WOULD MAKE THAT DIFFICULT TO DO IN THE FIRST INSTANCE. THIS BILL WOULD HAVE A DEVASTATING EFFECT ON INSURERS IN ANOTHER SENSE. THERE ARE ALREADY DIFFICULTIES IN THE RELATIONSHIPS WITH POLICYHOLDERS WHICH HAVE GIVEN RISE TO SIGNIFICANT NUMBERS OF DECISIONS. THE BAD FAITH PROVISIONS OF THE AUTO LAW, THE MOST POORLY DRAFTED IN THE UNITED STATES, ALLOWS ATTORNEYS FOR CLAIMANTS TO MAKE ENEMIES OF COMPANIES AND POLICYHOLDERS IN A SIGNIFICANT NUMBER OF CLAIMS. THIS PROVISION HAS THE POTENTIAL TO SIGNIFICANTLY WORSEN THAT BY TURNING AN INJURED POLICYHOLDER INTO

AN OPPONENT OF HIS INSURER ANY TIME THE COURT HOLDS THAT HE HAS NO REDRESS AGAINST A THIRD PARTY FOR THE CAUSES STATED IN THE ACT.

4. CONCLUSION

IN AN EFFORT TO PROVIDE SOME REDRESS FOR A LIMITED NUMBER OF DISAPPOINTED CLAIMANTS IN AUTO CASES, THIS BILL THREATENS TO UNDERMINE SEVERAL OF THE PRINCIPLES WHICH THE GENERAL ASSEMBLY HAS INTRODUCED AND ADHERED TO IN AUTO INSURANCE LEGISLATION. THE BILL OPENS UP A VAST NEW AREA OF NO-FAULT CLAIMS AND IMPOSES SIGNIFICANT COSTS ON AUTO POLICIES WHERE TRADITIONAL THEORIES OF RESPONSIBILITY INDICATE THERE SHOULD BE NONE. WHILE HUMANELY MOTIVATED, THE BILL IS A BAD PRECEDENT FOR THE AUTO REDRESS SYSTEM. IT IS ALSO A POLICYHOLDER RELATIONSHIP DISASTER FOR INSURERS, CAUSING MAJOR PROBLEMS IN LEGAL REPRESENTATION AND TRIAL TACTICS. THE FEDERATION STRONGLY URGES THAT THE COMMITTEE DISAPPROVE THE BILL.

THANK YOU AGAIN FOR TAKING OUR VIEWS INTO CONSIDERATION. I SHALL BE HAPPY TO ANSWER ANY QUESTIONS OR SUPPLY ANYTHING FURTHER WHICH MIGHT ASSIST THE COMMITTEE IN ITS CONSIDERATION OF THIS BILL.