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Testimony of Attorney General Mike Fisher

before the

House Judiciary Committee's Sub-Committee on Courts

on

House Bill 710

Good morning Chairman Clark, and members of the Sub-Committee. I would like to thank you for the opportunity to testify in support of House Bill 710, which deals with the liability of health insurers in Pennsylvania. I commend Representative Masland for taking the initiative in introducing the bill, and the Sub-Committee for giving it this public hearing.

Based upon the latest figures submitted to the Department of Health in 1999, more than 5.3 million Pennsylvanians, or 43 percent of the population, now receive health insurance through a health maintenance organization (HMO). This is a significant change from the way that health insurance delivered under the indemnity-and-fee-for-service system earlier in the last decade.

I support HB 710 because it demands accountability and responsibility from Managed Care Organizations (MCOs). Managed Care Organizations, just like all other health care providers, must be accountable for their decisions. If an MCO makes a negligent medical

decision by delaying or denying medically necessary treatment to one of its subscribers that ultimately results in harm to the patient, then that organization should take responsibility for its action. Of course, my office is concerned with the protection of the consumer/patient in the health care arena.

The regulation of insurance is historically a state function. HB 710 is another indication of this traditional state power---creation of a state remedy in state court. This legislation acknowledges the seriousness of the issue.

As you know, MCOs claim immunity under the federal Employee Retirement Income Security Act (ERISA). This interpretation of the statute gives MCOs an advantage which is not given to any other business entity. The status quo simply can no longer be tolerated.

I believe that, as a matter of fundamental fairness and quality patient care, patients must have the ability to sue their managed care plan for negligent medical decision making. A 1997 survey found that the vast majority of Americans believe that health plans should be legally accountable for negligent decisions that injure or kill patients. Another survey conducted by the Kaiser Family Foundation and the Health Research and Educational Trust (an affiliate of the American Hospital Association) found that 60% of employers support the right to sue a health plan.

The argument against holding MCOs accountable for their negligent acts is that it will open the litigation floodgates and drive up costs. Upon closer examination, this argument is

without merit.

Representatives of the insurance industry have publically admitted that holding plans accountable will not significantly drive up health care premiums. In a **Washington Post** article on July 11, 1999, Jeff Emerson, the former CEO of NYL Care said that he is "...not going to make the argument that it's going to be a lot of money." Aetna/US Healthcare spokesman Walter Cherniak stated: "We would charge the same premium to a customer with the ability to sue as we do those who do not have the ability to sue."

Both the federal judiciary [1] and our State Supreme Court have recognized the need for accountability and patient protection where managed care organizations are involved. In its decision in Pappas v. Asbel, [724 A 2d 889 (1998)], our Supreme Court dealt with the issue of ERISA pre-emption and concluded that negligence claims against a health maintenance organization do not "relate to" an ERISA plan. In that case, a patient was admitted to the emergency room in a community hospital, complaining of slight paralysis and numbness in his arms and legs. The emergency room physician soon determined that the pressure on the patient's spinal column needed to be treated at a university hospital, however the nearest facility was not authorized as a provider by the patient's HMO. The patient remained in the emergency room for over four hours until an authorized university hospital could be located. The patient is now a permanent quadriplegic. The holding of our Supreme Court would allow the negligence

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1. See Dukes v. U.S. Healthcare, Inc, 57 F2d 350 (3d Cir.1995), cert. denied, 516 U.S. 1009, 116 S.Ct. 564 (1995) wherein the Third Circuit Court of Appeals (which includes Pennsylvania) explained "patients enjoy the right to be free from medical malpractice regardless of whether or not their medical care is provided through an ERISA plan." at p. 358.

of the HMO in this case to be determined by a jury. The case is currently on appeal to the United States Supreme Court.

Texas, the first state to adopt managed care accountability, reports that little litigation has resulted. In fact, there have only been five lawsuits filed in the last two years under the Texas statute out of four million Texans who are HMO subscribers. Texas State Senator David Sibley (R) stated, in a September 28, 1999 **Washington Post** article, that "those horror stories" raised by the HMO industry "just did not transpire." There has been no flood of litigation and no significant premium increases in Texas.

In conclusion, this legislation is necessary to protect the citizens of the Commonwealth and to make managed care organizations accountable and more responsible. Therefore, I support its passage.

Again, I would like to thank the Committee for this opportunity to weigh in on this issue. I will be happy to answer any questions you may have.