Pennsylvania Public Interest Research Group
1334 Walnut St., Philadelphia, PA 19107 (215) 732-3747
http://www.pirg.org/pennpirg

House Bill No. 710
Providing for Health Insurer Liability

Hearing of the Judiciary Committee
January 20, 2000

Testimony on Behalf of
David Masur
Pennsylvania Public Interest Research Group

Good Morning, and thank you for inviting me to join you today to discuss this important issue. My name is David Masur; I am the Director of the Pennsylvania Public Interest Research Group (PennPIRG). PennPIRG is one of the state's leading public interest advocacy organizations, with more than 10,000 members in Pennsylvania. PennPIRG is also a non-profit, non-partisan organization, working on consumer, environmental, and democracy issues.

I am testifying today is support of House Bill No. 710 which provides for health insurer liability. While PennPIRG supports the enhancement of a consumer's ability to seek redress from an entity that causes them harm, this is only a small step to solve a much larger problem.

Our current health care system to failing. The most basic consumer protections and medical principles have been compromised to the point of crisis. Lack of access to health care is rampant. While health care is a fundamental right, forty five million Americans have no health insurance and one third of Americans are inadequately insured. In Pennsylvania, 1.2 million residents are uninsured, which is 10 ½ % of Pennsylvania's total population. Unfortunately, the trend in Pennsylvania indicates that the number of uninsured is increasing, in 1996 9 ½ % of Pennsylvania residents were uninsured. The number of uninsured is increasing due to the continual increase in the costs of health insurance.

Health care costs are escalating at a pace which far exceeds inflation. In addition to consumers paying more for their health care, patient dissatisfaction is at an all-time high. While prices are increasing, consumer choice-- of doctors, specialists and treatments is declining.

The costs of prescription drugs commonly used by older Americans are also rising faster than the rate of inflation. Over the past calendar year, prices for the 50 top-selling drugs among the elderly rose more than four times the rate of inflation (Families USA, Hard to Swallow: Rising Drug Prices for America's Seniors (Washington, DC: Families USA, November 1999)). This also indicates the disconnect between the costs of producing and manufacturing prescription drugs and the prices consumers must pay.

In addition to the sky rocketing costs of health care, Americans are experiencing a decline in the quality of the medical care they are receiving. Instead of medical expertise determining medical treatment, health insurers are pressuring doctors with cost cutting measures. For example, doctors are spending less and less time with their patients, often only 7-10 minutes is allotted for each office visit. Patients and doctors are reporting that that necessary care is being withheld from patients to save money. Insurance company administrators instead of medical experts are making medical decisions.

One of a number of critical solutions to this managed care dilemma is to hold health insurers liable for the decisions they make if those decisions cause an injury to a consumer. Health insurers should not be held above the basic laws of accountability that apply to every other industry and the rest of American society. Patients should not be prohibited from suing their health insurer when a health insurer's decisions cause injury or death. Everyday, consumers place their health and their lives in the hands of business entities whose priority is making profits. Health plans have no Hippocratic Oath to "do no harm." A for-profit health plan's primary obligation is to its stockholders.

HMO's argue that making them liable for the harms they cause will result in an increase in health care costs. Health care costs have already been dramatically increasing, even without liability. While health insurers are so concerned about increased costs, this does not limit their CEOs multi-million dollar salaries. And while doctors and every other practitioner are held accountable if their action causes a consumer harm, too many HMOs are immune from this liability in other states.

The loophole in the Employee Retirement Income Security Act (ERISA) makes the health insurance industry the only industry that is immune from liability when its actions harm people. Health plans are increasingly encroaching on the medical treatment decisions historically made by physicians and other health care providers. When physicians are found negligent in making health care treatment decisions, they are held accountable through the legal system. Health plans should be held to the same standard-to exercise ordinary care when making health care treatment decisions about covered services-and should be held responsible for their failure to meet this standard. Health insurers wrongly maintain that when they deny treatment to a consumer they are not making a medical decision.

Health insurer liability is another clear instance where the insurance companies' "cost argument" is meritless. In Texas, the first state to hold HMO's accountable for their actions, costs did not dramatically increase. Further, HMO liability cases did not clog an already overburdened judicial system since only one law suit has been filed since the Texas law passed in 1997. A study prepared by William M. Mercer, Inc. and the American Medical Association demonstrates that managed care accountability legislation will only increase premiums between 0.5%-1.8%.

While House Bill No. 710 deals with the important issue of HMO liability-we believe that the language in this bill can be strengthened to be even more protective of a consumer's right to sue their HMO. The bill includes the following standard for liability in section 8313 (a): "Whenever a health insurer fails to conform with accepted standards of medical practice in supervising, managing, approving or providing, in a timely manner or otherwise, any health care service to the extent the health insurer is legally required to do so, the health insurer shall be liable for any personal injury, death or other damages caused by that failure."

This language is ambiguous and does not grant consumers the strongest right to sue their HMO when they are injured. Specifically it is ambiguous as to what the health insurer is already "legally required to do" as stated in House Bill No. 710. What laws are at issue here? What does this require HMO's to do? Further, we are unsure as to the definition of "accepted standards of medical practice." House Bill No. 710 does not indicate the source of these standards. Medical professionals must determine medical practices. This language does not eliminate the possibility that health insurers, whose main concern is cost saving and profit maximizing, are setting these standards.

We believe that a consumer's right to obtain redress must be clearly and strongly enumerated in legislation. While we propose the strongest possible language, an example of strong language is in the current Texas law, which was the first state law to establish health insurer liability. In section 88.002, the law states, "(a) A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care. (b) A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan is also liable for damages for harm to an insured or enrollee proximately caused by the health care treatment decisions made by its: (1) employees; (2) agents; (3) ostensible agents; or (4) representatives who are acting on its behalf and over whom it has the right to exercise influence or control or has actually exercised influence or control which result in the failure to exercise ordinary care." We believe that this "ordinary care" standard will better enhance a consumer's ability to obtain redress once they are harmed.

This language is clear- and gives a particular standard as opposed to referring to an unclear legal standard. To adequately protect consumers, health insurance recipients must be given the right to sue their HMO whenever that HMO caused them an injury. Further, once the HMO's immunity from suit is removed, the HMO will make its decisions based on the fact that it is legally accountable to consumers. Thus, instead of considering only cost cutting and profit maximization, HMO's must also consider that they can not use less than "ordinary care" when rendering a care determination.

For real managed care reform- the Pennsylvania Legislature in this bill or in other legislation must also pass other reforms essential to protecting consumers. Such legislation includes:

1) legislation that will prohibit HMO's from giving financial incentives to doctors if they limit treatment or limit the number of prescriptions they issue;
2) legislation that will improve access to medical care and decrease the number of uninsured Pennsylvania residents;
3) legislation linking the costs of prescription drugs to the federal supply schedule to decrease the skyrocketing costs of prescription medication;
4) legislation mandating that an HMO's care decisions are subject to review by an independent, external review board, and not by insurance administrators;
5) legislation ensuring that patients have the right to continuity of care- enabling patients to continue to go to doctors who are familiar with their medical history and who advocate for their interests;
6) legislation ensuring that all medically necessary treatments are available and that patients have access to clinical trials;
7) a cap on an HMO's administrative costs; and
8) legislation that prohibits gag clauses. Health care providers must be able to disclose all treatment options to their patients.

While we applaud House Bill No. 710 as a first step toward achieving patient protections, we look forward to working with this legislature to fully protect the consumers of Pennsylvania and to ensure that in Pennsylvania, patients and not profits are prioritized. Again, thank you for allowing me to join you this afternoon.