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Joan Claybrook, President

September 7, 1999

**RE: Norwood-Dingell Managed Care Improvement Act -- End Special Legal Protection for HMOs**

Dear Representative:

On behalf of Public Citizen's 150,000 members, we urge you to support proposals to eliminate the special protection from accountability that current federal law grants to just one industry -- HMOs and other managed care health plans. Of the alternatives expected to be offered during this month's consideration of managed care legislation, H.R. 2723, the Norwood-Dingell Bipartisan, Consensus, Managed Care Improvement Act of 1999 has the strongest patient protection provisions.


When death or serious injury occurs because of an HMO's decision to deny necessary or appropriate medical care, the patient or their surviving family members should have the right to go to court to seek redress and the insurer should be held accountable for the consequences of negligent or reckless decisions. But currently, under the Employment Retirement Income Security Act of 1974 (ERISA), patients injured by their employer-provided managed care health plans are prohibited from going to state court to seek the remedies available under their state's malpractice and consumer protection laws.

The Norwood-Dingell bill would lift this ERISA preemption of state law in most cases and allow injured patients to seek compensation from the managed care health plan under applicable state law. The bill's accountability provisions provide these vital consumer protections:

- **Eliminate HMOs' special protection from corporate accountability.** Approximately 161 million Americans are covered by private sector, employer-paid health insurance plans. A large majority receive their care from an HMO or other managed care plans; three out of four of these are for-profit firms, which have a financial incentive to spend less on health care in order to maximize their profits and thus raise their stock prices. Under managed care, decisions about necessary and appropriate medical care increasingly are made by insurance company bureaucrats seeking to hold down costs rather than by a physician or other health care provider. Because of the current federal ERISA preemption, these managed care bureaucrats and the corporations they work for cannot be

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held accountable in state court for the consequences of their faulty decisions. No other industry has such special legal protection -- the HMO industry should not have it either.

- **Create an incentive to provide, not deny, necessary and appropriate care.** Under ERISA, injured patients and their families who are wrongly denied needed medical treatment can only recover the cost of the procedure for which the plan failed to pay and attorney's fees. Because health plans can escape from the responsibility to fully compensate injured patients, the current law gives HMOs a huge incentive to delay and deny necessary and appropriate care. Only the right to pursue full compensation, including payments for lost income and pain and suffering, gives health care organizations the proper incentive to make sound medical decisions in the first instance. [Independent external appeals proposals are complementary to, not a substitute for, the patient's right to sue for compensation for injuries. At best, the only remedy in a successful external appeal is to force the managed care organization to reverse its care decisions; at worst, external appeals processes can encourage HMOs to deny care until an external appeals panel orders them to provide it.]
  
- **Allow fair recovery for injured victims and makes those responsible bear the cost of serious injury or death.** The current ERISA preemption prevents many injured persons and their families from being fully compensated for lost income and other economic losses or non-economic losses such as loss of fertility, loss of a limb, loss of a child, permanent disfigurement, or continuing severe pain. The cost of the consequences of the HMO's wrongful decisions, which should be borne by the HMO, is shifted from the HMO to those injured, their families and communities and the taxpayers. The Norwood-Dingell bill will make sure that HMOs bear the costs of their wrongful decisions.

The Norwood-Dingell accountability provision does include significant exceptions that will sometimes prevent injured patients from being able to receive full compensation:

- No punitive damages (which punish wrongdoers for particularly reprehensible behavior) are available if the plan promptly carried out the determination of the bill's external review procedure.
  
- Access to state law remedies would only be allowed for wrongful death or "personal injury" defined as "a physical injury and includes an injury arising out of the treatment (or failure to treat) a mental illness or disease." This definition may exclude claims with no physical manifestations.
  
- Claims for services clearly excluded in the health insurance contract would still be preempted.


We would prefer a bill without these exceptions. However, since under current law injured persons can only go to federal court and at most receive the cost of the denied service and legal fees, the Norwood-Dingell bill's provisions substantially increase patients' ability to hold plans accountable. They deserve your support.

During this month's consideration of managed care legislation, please support the Norwood-Dingell bill's provisions to allow consumers to hold managed care plans accountable. For further information, please contact Tom Bantle, Legislative Counsel for Public Citizen's Congress Watch at 202-546-4996.

Sincerely,



Joan Claybrook, President  
Public Citizen



Frank Clemente, Director  
Public Citizen's Congress Watch