Sen. Metzenbaum

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TO: Chris Jennings

TELECOPIER NO. 456-7739

FROM: Michele Varnhagen

Senator Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Room 608 Hart Senate Office Building
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PHONE NUMBER: (202) 224-5546

MESSAGE:

October 7, 1993

To: Chris Jennings
Steve Richetti

Fr: Michele Varnhagen
Senator Metzenbaum

Re: Health Care Reform and Consumer Legal Rights

As it is my understanding that no Congressional staff will be able to review the final legislative language of the Administration health care reform plan before introduction, it is crucial that the bill contain adequate legal protection provisions for consumers. More than any other outstanding issue I can think of, the provisions providing consumer legal remedies for violations of the law must be drafted as strongly as possible.

Under current law, individuals who purchase individual health insurance policies are protected under state law. All 50 states have laws in which individuals whose health insurance benefits are wrongfully denied or denied in bad faith may recover extracontractual or tort damages. Until 1987, state law also applied to group insurance policies. In 1987, the Supreme Court, in Pilot Life Insurance Company v. Dedeaux, held that employer-sponsored group insurance policies, as well as self-funded employer plans, are governed by the remedy provisions of ERISA (the Employee Retirement Income Security Act). Legal protections under ERISA are limited to the benefit denied and may be less than even traditional contract damages.

I know that legal damages are a controversial issue with insurers and employers. But they are crucial to consumers. Especially in a new cost-controlled environment, the pressure and incentive to deny or delay the provision of health benefits will be intense. Unlike many other issues, there is no compromising up on legal remedies. Whatever provisions are included in the Administration will be the outer limits of what consumers ultimately receive.

The 240 page Administration plan says that consumers will have legal remedies. The bill must state what those remedies are. The Supreme

Court has held that federal remedies do not exist unless specifically enumerated. Since the regional allliances primarily are regulated at the state level, it makes sense to apply state law here as well. (The language should simply refer to "state law" and not specify which state laws since each state has a different common law in this area.) With respect to the corporate alliances, a federal remedy probably must be provided. If you want to be somewhat vague and leave the door open, you can provide for "legal damages". This probably lets a judge award all types of damages and lets us negotiate over this later. A lesser standard would be "compensatory" damages which gets you economic and non-economic damages but not punitive damages. Of course, I prefer to start off leaving this issue as open as possible. You also should keep in mind that the malpractice provisions do not limit damages. Once you limit damages in one area, you've set the stage for the other.

As you may know, there are other related issues such as benefit review and denial procedures, grievance standards, alternative dispute resolution standards, etc. Even though I am also interested in these provisions, these likely can be dealt with later.

In closing, let me reiterate -- it is imperative that the bill contain adequate legal remedies for consumers. At the outset, the Administration bill must provide the strongest starting point on this issue. Please call me if you need more information or ideas, or if you need more convincing. My number is #224-5546.