

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Kristen S. McDermott, individually	:	
And Kimberly P. Johnson, personal	:	
Representative of the estate	:	
of Sandra S. Lobb , deceased	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION: 05-cv-02536
	:	
Diane Koken, individually and as	:	
Insurance Commissioner	:	
Dr. Calvin B. Johnson, individually,	:	
and as Secretary of Health,	:	
and Independence Blue Cross	:	
and The Chester County	:	
Hospital, Jointly and severally,	:	
Defendants	:	JURY TRIAL DEMANDED

**MEMORANDUM OF LAW IN OPPOSITION TO COMMONWEALTH DEFENDANTS’
AND IBC’S MOTION TO DISMISS PLAINTIFF’S SECOND AMENDED COMPLAINT**

I. INTRODUCTION

IBC’s Motion to Dismiss the Plaintiffs Complaint is a blatant attempt to mislead the court on the material facts in this case. IBC is creating its own set of facts to extract itself from the contradictory position it finds itself because of admissions before the Pennsylvania Commonwealth Court and the Pennsylvania Legislature --- namely, that IBC and not the Plaintiffs’ physician has the final say on what is “**medically**” appropriate compared with the sworn testimony of its Medical Director that “We do not make medical decisions, and IBC’s acknowledgement to Pennsylvania State Representative Arthur D. Hershey that “Pennsylvania law mandates language in all IBC’s provider contractors” barring the Plaintiffs right of contract with a doctor compared with their position in this court that IBC cannot be viewed as a state actor. Subscribers are prohibited from paying for care IBC refuses to provide compared with their averment to Chester County Court of Common Pleas that nothing in their provider contracts prevents such self payment. In short, IBC’s misrepresentation of the material facts in this matter are so outrageous that IBC has no choice but to attempt to obscure to real facts in the case and avoid any form of a meaningful review by this Honorable Court. As such, Plaintiffs take this opportunity to alert IBC’s attorneys to the contradictory statements made by their client and their ethical obligation to determine the truth of these averments for themselves.

Commonwealth Defendants’ Motion to Dismiss is also an attempt to avoid a review of this matter. Commonwealth Defendants find themselves in the embarrassing situation of having already acknowledged in Pennsylvania Commonwealth Court that IBC’s authority to overrule

the Plaintiffs' doctor is an unconstitutional delegation of authority, as well as a violation of Pennsylvania law that the Commonwealth Defendants have both aided and allowed to go unchallenged for more than ten (10) years. Hence, they have no choice but to attempt to have the case dismissed without any embarrassing discussion of the core issue the Plaintiffs seek to bring before this Honorable Court for resolution and justice.

Plaintiffs wish to advise the Court that they have resolved their differences with Defendant Chester County Hospital and move to dismiss them from the case at this time.

In an effort to avoid taking this Honorable Court's time pursuing specious arguments raised by The Defendants in their Motions to Dismiss, Plaintiffs offer the following general arguments to cut to the core of IBC's misrepresentation of material facts as well as demonstrate that the Plaintiffs have more than met their legal burden for rejecting the Defendants' Motions to Dismiss and allowing this case to go forward.

First and foremost, the case before this court has nothing to do with IBC's denial of insurance coverage or their denial of the Lobb family's ability to pay for care they sought to prevent the death of Mrs. Lobb. That case is currently being litigated in the Pennsylvania state court system where it belongs and will ultimately be resolved. Furthermore, that case is strictly a contractual dispute between two private parties, IBC and Plaintiff Johnson.

Second, the only connection between this case and the state case is that they have **some** common facts and **two** similar parties. The common facts involving the death of Mrs. Lobb provide context for what happens when IBC overrules an individual's doctor and enforces its determination of medically appropriate health care. Furthermore, because denial is a serious component of the disease of alcoholism and the opportunity to treat can be short. See: Amicus Brief of Pennsylvania District Attorneys Association p. 8. The facts and controversy concerning the Plaintiffs' inability to rely on the medical judgment of Mrs. Lobb's personal physician is not moot, as the controversy is "capable of repetition, yet evading review" **Globe Newspaper Co. v. Superior Court, 457 U.S. 596; Gannett Co. v. DePasquale, 443 U.S. 368**. While the case in state court properly pursues IBC's breach of the Plaintiff Johnson's insurance contract, causing Sandra Lobb's death, this case deals solely with state action impairing the Plaintiffs' right of contract with their physician and that specific injury. In addition, this is an injury that is felt by all Pennsylvania citizens with IBC insurance.

Third, the insistence of the Commonwealth Defendants and IBC that the Plaintiffs should have known the Defendants had empowered IBC to unconstitutionally impair the Plaintiffs' right of contract with their doctor and allow IBC to overrule the medical judgment of the doctor is, on its face, **outrageous**. IBC, with the support of the Commonwealth Defendants, insists all its provider contracts remain secret. In addition, IBC has deliberately misrepresented its authority to the Plaintiffs and the Chester County Court of Common Pleas. On August 7, 2003, Catherine Dratman, M. D., testified in deposition for IBC as its Medical Director who reviewed Mrs. Lobb's case. She stated: "We do not make medical decisions. We make coverage decisions" (attached hereto: relevant portion of Deposition of Catherine Dratman, MD; August 7, 2003). Plaintiffs were operating on that alleged fact until September 8, 2004 when they heard IBC's lawyer from Buchanan Ingersoll say in open court before a three judge panel of the Pennsylvania

Commonwealth Court that IBC makes “medical decisions for treatment purposes”. In its brief to this Honorable Court, the lawyers for IBC are still arguing “IBC’s determination of medical necessity is for purposes of coverage only, not treatment.” (Defendant’s Brief at p.22). The deception and misrepresentation continues and can no longer evade judicial review on mere technicalities. The very integrity of the judicial process is now at stake.

IBC CANNOT HAVE IT BOTH WAYS. [Incidentally, IBC’s overruling a physician’s medical judgment constitutes a violation of both Pennsylvania statute, **40 Pa. C. S. A. Section 908-1 et seq.**, and regulation, **28 Pa. Code Sec. 105.11**]. To claim the Plaintiffs should have known: 1) What IBC misrepresents, 2.) The Defendants keep secret and 3.) What violates both Pennsylvania law and the U.S. Constitution speaks to a level of legal representation the Plaintiffs simply do not know how to characterize or address. In the face of IBC’s duplicity to suggest that plaintiffs are forum shopping begs the question.

Fourth, a point the Plaintiffs feel obliged to address directly is the court’s ability to redress the Plaintiff’s injury given the death of Mrs. Lobb. Kristen S. McDermott is employed by the very same public school system that employed Mrs. Lobb, and has the very same IBC insurance currently in force and has the very same impairment of her right of contract with her physician as Mrs. Lobb and Kristen McDermott is now a party to this action. Moreover, Plaintiff McDermott witnessed first hand both the wrongful denial of care for Mrs. Lobb and IBC’s repeated false and misleading statements regarding access to necessary health care. As such, Plaintiff McDermott now knows her right of contract with a doctor and any hospital she might choose for necessary health care for her children, her husband and herself is compromised and impaired, putting the very lives of her children and herself in jeopardy. The family doctor of Plaintiff McDermott and her husband is Dr. David G. Rooney of 57 N. 4th St., Oxford, PA. The doctor for her two children is Dr. Jeffrey Fendrick of 440 E. Marshall St., Westchester, PA. To the best of Plaintiff McDermott’s knowledge, both doctors have provider contracts with IBC that are similar to the one with Dr. Pileggi and contain terms and conditions she is not allowed to see and based upon her knowledge and the state regulations must contain the offending Hold Harmless language. This is the very injury that Plaintiffs seek to redress.

Plaintiff respectfully contends the court should focus on the elements of the Plaintiffs Second Amended Complaint rather than the Defendants’ specious arguments for determining whether to grant the Defendants’ Motions to Dismiss. In that context, Plaintiffs acknowledge the merit of their case should rise or fall on the following questions:

1. **Is it “possible”** the Plaintiff can show they have a right to establish a contractual relationship with a physician under Pennsylvania Law?
2. Is it **“possible”** the Plaintiff can show the actions of the Defendants impaired the Plaintiffs’ right of contract with their doctor and the duties reasonably associated with that relationship?
3. Is it **“possible”** the Plaintiff can show the inclusion of state mandated language in IBC’s contracts impairing the Plaintiffs’ right of contract constitutes state entanglement with a private party and state action?
4. Is it **“possible”** the Plaintiff can show its claim of discovery is justified given IBC’s:
1.) fraudulent representation of its role in determining appropriate medical care as

well as its authority to overrule a physician's medical judgment, 2.) failure to disclose its true role and authority in determining appropriate medical care, 3.) efforts to keep the contents of its contracts secret and 4.) violation of applicable Pennsylvania law when overruling a physician's medical judgment.

If the court finds, as we believe it must, the answer to these four questions can only be **yes**, then it must reject Defendants' Motions to dismiss. Dismissal is only appropriate when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 L. Ed. 2d 80, 78 S. Ct 99 (1957).

The following facts cannot be disputed by IBC or any other defendant:

1. The Commonwealth mandates inclusion of language it refers to as the "Hold Harmless Provision" in all IBC provider contracts. (See: **28 Pa. Code Section 9.722(e)(i),(ii) and (iii) and 31 Pa. Code § 301.122**).
2. The hold harmless language is clear and unambiguous.
3. The hold harmless provision applies to all covered services under the subscriber's plan of coverage which therefore includes all health care services other than the likes of nursing home care, cosmetic surgery and experimental treatments. Covered services are independent of whether or not IBC is willing to approve and pay for the care.
4. The hold harmless provision impairs the Plaintiffs' contractual doctor patient relationship by: 1.) Giving IBC's contract with the doctor precedence over any agreement the Plaintiffs have with their doctor and 2.) Barring the doctor from accepting payment from the Plaintiffs.
5. IBC's provider contract then requires the doctor to adopt IBC's determination of medically appropriate care as the doctor's own.
6. Because neither IBC nor the Commonwealth Defendants have distinguished between a decision for medical purposes and one for insurance purposes, IBC's decision of medically appropriate care becomes factually both.
7. The Commonwealth and IBC have "**acknowledged**" the Commonwealth's policy has long been to allow IBC to overrule the medical judgment of a policyholder's doctor for determining "**medically necessary and appropriate**" care.
8. Neither the Commonwealth nor IBC have ever seen fit to inform the Plaintiffs or any other policyholder of IBC's authority to overrule the individual's physician for determining "**medically necessary and appropriate**" care.
9. Plaintiff Johnson had every reason to believe Mrs. Lobb had independently contracted with her doctor and had a long-standing personal and private doctor patient relationship in which she could place her trust. See affidavit of Dr. Rooney.
10. Following the Plaintiffs' discovery on September 8, 2004, Plaintiff McDermott knows she cannot have a private and personal doctor patient relationship in which she and her family can place their trust.
11. Plaintiffs have never abrogated their right of contract with their personal physician. Plaintiffs certainly have never abrogated their right to contract with their personal

physician for health care that IBC alone determines is not medically necessary or appropriate and refuses to approve and pay for.

12. IBC, through its attorneys Lamb, Windle & McErlane, P.C, argued in the Chester County Court of Common Pleas “We do not make Medical Decisions.” In its brief to this Honorable Court, the lawyers for IBC are still arguing “IBC’s determination of medical necessity is for purposes of coverage only, not treatment.” (Defendant’s Brief at p.22). However, IBC, through its attorneys Buchanan Ingersoll, P.C., testified in Pennsylvania Commonwealth Court that “*health care services are to be proposed by the provider and then evaluated for medical necessity and appropriateness*” by IBC and “*to abide by the initial certification and referral for appropriate treatment by a licensed physician... leads to absurd or unreasonable results*” **See: Petition to Advise The Court, Pursuant to The Rules of Professional Conduct, of Absolutely Inconsistent Positions Taken By Appellee, Independence Blue Cross In The Courts of The Commonwealth.**

The mendacity and arrogance of IBC is beyond comprehension.

Lastly, finding your personal physician has an overriding contractual relationship with your insurance carrier is like discovering your attorney is under contract to the opposing party.

Common sense and fundamental fairness more than explain why the doctor patient contractual relationship is one that is zealously guarded by both the medical community and the legal system. It is obvious to all that “a person going to a doctor for treatment impliedly contracts with him for treatment”. **Brown v. Moore, 247 F.2d 711 (3rd Cir. 1957), certiorari denied 78 S. Ct. 148, 355 U. S. 882, 2 L.Ed.2d 112 (Interpreting Pennsylvania law on the contractual relationship between a doctor and patient).** The right to contract with a physician is so fundamental that it has not been questioned nor has it required articulation until now. The Constitution safeguards that right of contract from state intrusions. **See: Constitution, Article I, Sec. 10.** Moreover, the Defendants have impaired this contractual right in secret and in violation of the Commonwealth’s own applicable law violating both the Equal Protection Clause and Liberty of The Individual protection in the Constitution.

In denying Defendants’ Motions to Dismiss, the Court will be merely upholding what the Commonwealth has determined through its statutes and regulations to be:

- 1.) The appropriate role and authority of a properly licensed physician;
- 2.) The appropriate role and authority of a properly licensed health insurance provider and
- 3.) Agreeing with what the Commonwealth Defendants have already averred is an “unconstitutional delegation of authority” to IBC in **Insurance Federation of Pennsylvania, Inc. vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, Docket No. 10 M.D. 2004 (unreported decision April 25, 2005).**

On the other hand, should the Defendants’ Motion be granted, the harm to the Plaintiffs and the general public is substantial in that the state and its enforcer, IBC, can continue to

interfere with the proper determination of appropriate medical care outside the law and the view of the public. They will have again evaded judicial review of this outrageous conduct. Moreover, they will be free to do so in life threatening circumstances which can and will result in the ultimate irreparable injury – death. In addition dismissal of Plaintiff's Amended Complaint can only have a detrimental effect upon the right to life and liberty as well as call into question the very foundation of our freedoms under the Constitution. The court would, in effect, be questioning an individual's very right to have a personal and private relationship with his or her doctor.

II. PLAINTIFF DISCOVERED THEIR INJURY ON SEPTEMBER 8, 2004 AND FILED HER COMPLAINT WITHIN THE TWO YEAR STATUTE OF LIMITATIONS

Plaintiffs agree with The Defendants that there is a two year statute of limitations in effect relative to the injuries to Mrs. Lobb and Kristen McDermott. However, Plaintiffs discovered the constitutional injury which is the subject matter of this litigation while attending the oral argument in **Insurance Federation of Pennsylvania, Inc. vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, Docket No. 10 M.D. 2004 (unreported decision April 25, 2005)** in Harrisburg on September 8, 2004. They filed their complaint in May 2005 well within the two year statute of limitations. Kristen McDermott has utilized her IBC health insurance to deal with personal and family medical issues over the last few years and has had direct experience with IBC's misrepresentation of medically necessary care involving her child, Luke McDermott, a minor.

III. PLAINTIFFS AMENDED COMPLAINT DEALS WITH IMPAIRMENT OF CONTRACT, NOT A DENIAL OF INSURANCE

Learned counsel for the Commonwealth Defendants is incorrect when she characterizes the injury in this matter as “the denial of insurance coverage for needed treatment”. Plaintiffs’ injury in this case is the impairment of their contract with their physicians. The Commonwealth, through its regulations, the so called “Hold Harmless Provision”, **28 Pa. Code Section 9.722(e)(i),(ii) and (iii) and 31 Pa. Code § 301.122**, mandated to be in all IBC provider contracts, unconstitutionally impairs that right in violation of **Article1, § 10, and the 5th and 14th Amendments of the United States Constitution**.

The Hold Harmless regulation and contract provision states:

Hospital agrees that in no event, including but not limited to non-payment by Blue Cross, Blue Cross's insolvency or breach of this Agreement, shall Provider, one of its subcontractors, or any of its employees or independent contractors bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from or have any recourse against a Subscriber or persons other than Blue Cross acting on their behalf for services provided pursuant to this

Agreement. This provision shall not prohibit the collection of coinsurance, copayments or charges for non-Covered Services. Provider further agrees that (1) this provision shall survive the termination of this Agreement regardless of the cause giving rise to termination and shall be considered to be for the benefit of the Subscribers, and that (2) **this provision supersedes any oral or written contrary agreement now EXISTING or hereafter entered into between Provider and Subscriber or persons acting on their behalf. (emphasis added).**

The last phrase is particularly telling. It states unequivocally that it “supercedes any oral or written contrary agreement... between Provider and Subscriber...” Both the Commonwealth and IBC thereby recognize the implied doctor patient contract and then trump it. IBC and the Commonwealth are now one.

IV. IBC IS INEXORTICABLY ENTANGLED WITH THE COMMONWEALTH AND IS A STATE ACTOR

IBC is an agent of the Commonwealth in the enforcement of the so called “hold harmless” regulations. The Commonwealth mandates IBC include the “hold harmless” language in its contracts with the Plaintiffs’ doctors. This mandated language gives IBC’s contract with the doctors precedence over the Plaintiffs doctor patient relationships and bars the doctors from accepting payment from the Plaintiffs. As such, the Plaintiffs’ contractual relationship with their doctor is secretly and irreparably impaired by the Commonwealth acting through IBC’s contracts with the Plaintiffs’ doctors making the act fairly attributable to the state. **Lugar, v. Edmondson Oil Co., 457 U.S. 922, 937.**

The Commonwealth itself recognized that IBC is a state actor in its brief filed in **Insurance Federation of Pennsylvania, Inc. vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, supra, arguing** that IBC’s interpretation of Act 106 constitutes an unconstitutional delegation of authority under both the Federal and Commonwealth Constitutions. In advancing that position, the Commonwealth clearly understands that the United States Constitution applies only to state action. And while this theory is somewhat different from Plaintiff’s, it is equally applicable in the matter the Plaintiffs seek to bring before this Honorable Court. In **Insurance Federation of Pennsylvania, Inc. vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, supra,** both the Commonwealth and IBC agreed IBC has long had the authority to overrule the Plaintiffs doctors in determining appropriate medical treatment for alcoholism and that the Commonwealth has not “*enforced against them in any way.*” **Brief of Pennsylvania Insurance Department in Support of Its Motion for Judgment On The Pleadings, page 6, line 19.** The Commonwealth admits and acknowledges that this delegation of authority to IBC is unconstitutional and that the Commonwealth’s actions in not in any way enforcing against IBC have provided IBC with, at a minimum, significant state encouragement to deprive the Plaintiffs of their doctor patient relationship for the treatment of alcoholism, i.e., the very treatment the Plaintiffs sought for Mrs. Lobb and the cause of her death.

Private insurers cannot be held to constitutional standards unless there is a sufficiently close nexus between the State and the challenged action so that the latter may be fairly treated as of the State itself. Whether such a nexus exists, depends on, among other things, whether the State has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. In essence, the Commonwealth in **Insurance Federation of Pennsylvania, Inc. vs. Commonwealth of Pennsylvania, Insurance Department, Commonwealth Court of Pennsylvania, supra**, fully acknowledged that IBC had exercised its authority to overrule the Plaintiffs' doctors as the proper application of the Commonwealth's Act 106 and Act 68 for well in excess of the past ten years and the Commonwealth has accepted or at least condoned this application of the law.

And last but not least, IBC itself acknowledged it is a state actor in a letter to Pennsylvania State Representative Arthur D. Hershey (13th Legislative District), IBC, through an officer of the corporation, categorically states that a subscriber cannot pay for a covered benefit that IBC refuses to approve --- "*contract providers agree to look only to the health care plan for payment of covered services under the member's plan of coverage.*" Furthermore, IBC acknowledges the requirement is a matter of law enforced through the state's Hold Harmless language which "*are contained in all IBC--- provider contracts*". These admissions clearly show that IBC recognizes that it is a state actor. Moreover, in these admissions, IBC again demonstrate its willingness to provide false and conflicting testimony in pursuit of its unconstitutional agenda.

In the letter to Representative Hershey, IBC acknowledges it is a state actor to avoid taking responsibility for barring direct payments by the Plaintiffs to their doctors or a hospital. However, before this Honorable Court, IBC avers it is not a state actor to avoid responsibility for the very same unconstitutional acts. IBC even demonstrates its arrogance in the matter by its choice of words, stating "*At best, Plaintiffs' Second Amended Complaint seems to suggest IBC is a state actor merely because IBC chose to comply with the law*". See Defendant Independence Blue Cross' Motion To Dismiss Plaintiffs' Second Amended Complaint Pursuant To F.R.C.P. 12(b)(1) and (6), page 20, lines 6 and 7. The bus driver who caused the arrest of Rosa Parks also "chose to comply with the law" of segregation in Montgomery, Alabama. By arguing that severing the Plaintiffs' doctor patient relationship should not be seen as "*egregious official conduct*", page 21, lines 11 and 12 and by arguing that the contracts clause of the Constitution is limited to "*existing contractual relationships*", all the while knowing that the Hold Harmless provision severs all the Plaintiffs' doctor patient relationships, **existing** and future is a clear misrepresentation to this Honorable Court.

V. PLAINTIFF'S SECOND AMENDED COMPLAINT CLEARLY STATES A CAUSE OF ACTION AGAINST THE COMMONWEALTH DEFENDANTS AND INDEPENDENCE BLUE CROSS FOR THEIR WRONGFUL IMPAIRMENT OF PLAINTIFF'S RIGHT OF CONTRACT WITH THEIR PHYSICIAN

It is obvious to all that "a person going to a doctor for treatment impliedly contracts with him for treatment". Brown v. Moore, 247 F.2d 711 (3rd Cir. 1957), certiorari denied 78 S. Ct. 148, 355 U. S. 882, 2 L.Ed.2d 112 (Interpreting Pennsylvania law on the contractual relationship

between a doctor and patient). There should be no question that the Plaintiffs did in fact establish a contractual relationship with their doctor. The right to contract with a physician is so fundamental that it has not been questioned nor has it required articulation until now. The Constitution safeguards that right of contract from state intrusions. See: Constitution, Article I, § 10. The right merely enables citizens to enjoy the same privilege as all other Americans to contract for the medical advice and services of their properly licensed personal physician in pursuit of their health and, indeed, their very life. Although a detailed review of our nation's history, legal traditions and practices with respect to medical care is beyond the scope of this brief, the view that each of us should be free to obtain whatever medical care we want and can afford is virtually universal and traces its origins to a time much earlier than the founding of our nation. See, e.g., W. Blackstone, Commentaries 1:120-41 (1765) reprinted in *The Founders' Constitution* at 390-91 ([T]he preservation of a man's health from such practices as may prejudice it or annoy it . . . are rights to which every man is entitled [sic]). The right to contract for medical services has been recognized historically and without dissent in Pennsylvania and the Third Circuit. *Brown v. Moore*, supra (Interpreting Pennsylvania law on the contractual relationship between a doctor and patient).

State actor IBC has simply impaired the Plaintiffs' contract and the duties contained therein for the purpose of usurping the most important duty within the Plaintiffs doctor patient relationship, i.e., the doctor's diagnosis and prescription of appropriate medical care. The most important duty for a physician under the Oath of Hippocrates is to "prescribe regimen for the good of my patients according to my ability and my judgment". As such the Plaintiffs are not asking the Court to establish any new protected right of an individual to contract with a doctor. Rather, the Plaintiffs are simply asking the Court to avail the Plaintiffs of the Constitutional protections against wrongful impairment of contracts the Plaintiffs are encouraged to make in good faith under the laws of the Commonwealth.

In ***Cruzan v. Director, Missouri Department of Health***, 497 U.S. 261 (1990), the Supreme Court stated that it could be inferred from its prior decisions that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." 497 U.S. at 278-79. In ***Washington v. Glucksberg***, 521 U.S. 702, 117 S. Ct. 2258 (1997), the Supreme Court cited ***Cruzan*** for the proposition that it had "assumed, and strongly suggested that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." ***Id.***, 117 S. Ct. at 2267. Building on this simple formulation, Plaintiff suggests that the fundamental liberty interest at issue in this case is "The Right to Contract with a Physician for Medically Necessary Treatment". This statement necessarily implies that individuals have a right to the medical judgment of their personal physician and that this judgment shall not be impaired or overruled by an insurance company, as the enforcer of state regulations, that the Commonwealth and IBC have "**admitted**" doing outside the knowledge of the Plaintiffs and absent any process appropriate for such impairment. In essence, a competent person has a constitutionally protected liberty interest in determining medically necessary care in consultation with their personal physician, within an **established** doctor patient relationship and outside any consideration of an insurance company. Common sense, history and fundamental fairness suggest the doctor patient contractual relationship is one that is zealously guarded by both the medical community and the legal system. The Pennsylvania Medical Society even goes so far as to trademark the slogan "**Doctors and Patients. Preserve the Relationship.**"® on its website. See: <http://www.pamedsoc.org>.

If one has a fundamental liberty interest to refuse unwanted medical treatment in order to die, then logic compels the conclusion that one must have an equal if not stronger fundamental liberty interest to obtain wanted medical treatment in order to preserve one's health and extend one's life. Without the right to protect one's health and life, the other rights conferred by the Constitution would serve little purpose.

In **Glucksberg, supra**, the Supreme Court stated that an asserted fundamental liberty interest must be examined in light of our nation's history, legal traditions and practices to determine whether it is deserving of special protection under the Due Process Clause. It is obvious to all that "a person going to a doctor for treatment impliedly contracts with him for treatment". See: **Brown v. Moore, supra**. Again the Pennsylvania Medical Society even goes so far as to trademark the slogan "**Doctors and Patients. Preserve the Relationship.**" ® on its website. See: <http://www.pamedsoc.org>.

Plaintiff would point out that the issue we bring before this Honorable Court is not fraught with the conflicts that surround the previous fundamental liberty interests that have been considered by the Supreme Court in cases involving abortion, assisted suicide and the right to refuse lifesaving medical treatment. Any further exposition of a person's right to contract with her/his physician for medical treatment is overstating the obvious. "**Doctors and Patients. Preserve the Relationship.**" ®

The suggestion that free people should be limited by government in contracting for the medical advice and services of their personal physician in order to protect their health and extend their lives is repugnant to the democratic principles upon which our country was founded. Moreover, the issue does not require the creation of any new fundamental right, but simply the recognition of another aspect of the fundamental right of personal autonomy that the Supreme Court has already recognized. For example, as recently reiterated in **Glucksberg, 117 S. Ct. at 2267**, the Supreme Court has found constitutional protection for marital privacy regarding contraception, **Griswold v. Connecticut, 381 U.S. 479 (1965)**; abortion, **Planned Parenthood v. Casey, 505 U.S. 833 (1992)**; and refusal of life-saving medical treatment, **Cruzan, supra**. In these three cases, which each involved medical decision-making, the Court examined whether an asserted right has been historically recognized and the extent of the contemporary legal and moral consensus on the issue. See, e.g., **Casey, 505 U.S. at 846-53**; **Cruzan, 497 U.S. at 269-77**. The right of personal autonomy involved in this case — the right of a competent individual, in consultation with a licensed physician, to obtain desired medical services at his or her own expense — is fundamental. See: **Brown v. Moore, supra**. The right is so fundamental that it has not been questioned nor has it required articulation until now. And it is recognized in current law (with the exception of the regulations and their enforcement through IBC provider contracts at issue) and contemporary morals. It must also be emphasized that, to the best of the Plaintiffs' knowledge, the right at issue in this case is available to all Americans other than IBC beneficiaries. All other Americans can freely and independently contract for the medical advice and services of their attending/personal physician regardless of whether a private insurance company, or government programs such as Medicaid, is willing to pay for the needed care. Unlike the Supreme Court's earlier cases, the present case does not involve medical treatment that a state has determined to be unlawful for its citizens. Nor does this case involve an attempt to obtain health care services through unregulated or unlicensed providers. It involves simply the

desire of citizens to contract for and obtain care that is clearly legal and available to all other Americans.

In each of the previously cited decisions, the Supreme Court has assumed the existence of a fundamental right to obtain health care and then examined how far that right extends in light of legal and moral objections to the particular treatment at issue. For example, the Supreme Court could not have found a constitutionally protected right to marital privacy regarding contraception, to obtain abortion services, or to refuse life-saving treatment, if it had not implicitly recognized the basic right of an individual to obtain health care advice and to make medical decisions. These cited examples of earlier Supreme Court cases, involve applications of that basic right and under far more controversial circumstances. Not surprisingly, the Supreme Court has not had occasion to deal with the far more basic right at issue in this case. The right is so fundamental that it has not previously been questioned, nor has it required articulation until now. Plaintiff is simply asking this Court to recognize the fundamental right that underlies the Supreme Court's earlier jurisprudence.

If the Court agrees that the right to contract for and obtain wanted medical treatment should be accorded special protection under the Due Process Clause as a fundamental liberty interest, it is clear that there is no compelling state interest that justifies the broad violation of this right by the Commonwealth and health care insurers like IBC acting as the Commonwealth's partner and enforcer. The government's major justification for the so called "hold harmless" clause is that the government is attempting to prevent double billing or balance billing by health care providers. Plaintiff does not dispute that there are compelling state interests in protecting the public health that justify certain limited restrictions on the right of all citizens to obtain medical services they might choose to purchase at their own expense. These include the licensing statutes applicable to physicians and other health care providers to ensure their qualifications and competence as well as the food and drug laws that prohibit products that are unsafe or ineffective. However, no where does Pennsylvania suggest that a patient may not contract for a legal health care need from a health care provider that the Commonwealth itself licenses.

In this context, it is important to note that, because of the breadth of the regulation and state approved contracts, the Commonwealth and IBC bar citizens from contracting with a properly licensed physician to purchase routine medical services that are perfectly legal and would be routinely provided by such a physician. In fact, these services are the very same services that are otherwise "covered" by an health insurer like IBC for general use, but are just not deemed by IBC to be medically necessary in a particular case based upon IBC's sole determination of an appropriate insurance "**expense**". IBC's state sanctioned contracts allow IBC to alone determine the health care a policyholder "**CAN**" receive and bars the policyholder's personal physician from disputing IBC's final decision regardless of the physician's view on the medical need for the care.

This Court does not need to balance any other interests, as it might if it were considering a case involving a right to assisted suicide or abortion, and there is no issue of government expenditures since the citizens would acting within their own constitutionally protected right of contract and willingness to bear the related expense. In fact, who, other than possibly an insurance company, would argue against the right of an individual to obtain and act on the medical advice of his or her personal physician so long as the physician is properly licensed and

the prescribed care is in conformance with applicable law.

All that the government's interest can possibly amount to is a form of paternalism and consumer protection. As Judge Williams stated in **New York State Ophthalmological Society v. Bowen, 854 F.2d 1379 (D.C. Cir. 1988), cert. denied sub nom. New York State Ophthalmological Society v. Sullivan, 490 U.S. 1098 (1989):**

The sole interest asserted in favor of the restriction is the interest in preventing individuals from being harmed by making unwise expenditures of their own money; there is no claim that the [desired medical treatment is dangerous to the patient]. Thus, the state interest is not only paternalistic, but lies solely in protecting pocketbook interests of the supposed patient beneficiaries. **854 F.2d at 186 (Williams, J., concurring in part and dissenting in part).**

While Plaintiffs recognize that consumer protection is a legitimate government interest, they find it self-evident that consumer protection is not an interest of such importance as to override a competent person's right to obtain legal and recommended medical care from a licensed physician to protect her own life. **And that care MUST include the right to receive the un-infringed medical opinion (certification of medical necessary care) of her personal physician.**

The right to private ownership and control of property is both explicit and implicit in the Bill of Rights. It is recognized not only in the Takings Clause of the Fifth Amendment, but also in the Third and Fourth Amendments and the Due Process Clause of the Fifth Amendment. Yet the right to own property would have little meaning if one could be prohibited from using it.

It is clear to Plaintiff that the State legislature and Executive agencies like the Insurance Department and the Department of Health in its regulations never relied upon any such interest when it enacted the "hold harmless" clause. If the government asserts such an interest in this Court, it should be rejected for the reasons given above.

Even if the government's interest is somehow viewed as compelling, the "hold harmless" clause has not been "narrowly tailored" in order to avoid unnecessarily infringing the fundamental liberty interest of citizens to contract and obtain medical services they require.

Unless one assumes that every citizen's contract with a physician for a "covered services" deemed not "medically necessary" by his/her insurer is an improvident decision, the regulatory and contractual ban on all such purchases is obviously overbroad. For example, it may be perfectly reasonable for a citizen who can afford it to purchase a weekly visit with his or her personal physician rather than the limited number of visits that health insurance will pay for, or to contract with a physician and other health care providers for alcohol rehabilitation that IBC considers unnecessary, as was the case for Sandra Lobb. The government's interest in consumer protection, even if compelling, can be fully served by simply separating medical determinations from decisions pertaining to insurance coverage and requiring physicians and other health care providers like Chester County Hospital to provide their patients with unaltered medical determinations of medical necessity, so the patient can make an informed and intelligent decision. The court should note that this is exactly what happens for uninsured patients.

Simultaneously, the hold harmless clause ban is ludicrously under inclusive, prohibiting citizens from paying for medical treatments of recognized efficacy while leaving them free to pay for noncovered services such as cosmetic surgery, hair transplants and other self improvements. It is impossible to reconcile such irrational line-drawing with a compelling interest in the protection of citizens' pocketbooks.

Additionally, the government's interest in consumer protection presumably extends to all persons. The fact that the legislature and the regulators have not acted to prohibit all citizens from purchasing medical care deemed unnecessary by the government and its insurance enforcer shows that the hold harmless clause is not necessary to serve this interest.

The state's regulatory language, admitted policy and its enforcement by IBC broadly assaults the right of citizens to contract to purchase lawful medical services that have already been found to be covered services, that are appropriately recommended by a licensed physician and that may be freely purchased and used by persons who are **UNINSURED** goes far beyond what is necessary. As such, the hold harmless ban is not narrowly tailored.

In urging this Court to allow this matter to proceed, Plaintiff is not unmindful of D.C. Circuit Court of Appeal's decision in **New York State Ophthalmological Society v. Bowen, 854 F.2d 1379 (D.C. Cir. 1988), cert. denied sub nom. New York State Ophthalmological Society v. Sullivan, 490 U.S. 1098 (1989)**. In **Bowen**, the Court was asked to consider the constitutionality of a provision that prohibited physicians from billing Medicare patients for the services of an assistant cataract surgeon unless those services were approved in advance by the Medicare insurance carrier or designated state Peer Review Organization. As in the present case involving state regulations, the statutory scheme in **Bowen** was designed to restrict patient access to the medical services in question by threatening sanctions against any physician who billed for them without following the appropriate approval procedures. Notably, the opinion of the Court, written by Judge Mikva, recognized that **"the statutory scheme at issue significantly impede[d] appellants' freedom of choice" and that "the type of burden imposed on patients by this scheme, although indirect, would not withstand scrutiny in the context of a recognized constitutional interest."** **Id. at 1384, 1385**. The case was decided, however, in a manner that limits its applicability and makes **Bowen** distinguishable from the present case. The **Bowen** Court first divided the claim into two parts. The first part was characterized as a "privacy claim" dealing with the right of the patient and physician to decide whether to have an assistant cataract surgeon without having to go through any review or approval process. **Id. at 1383**. The Court determined that this privacy claim was ripe for review and held that there was no violation of any constitutional right in this regard. **Id. at 1386, 1390**. This part of the holding is of no relevance to the present case, since there is no review process at issue. The "hold harmless" clause and its state enforcement through state sanctioned contracts containing state mandated language on its face effectively bars citizens from obtaining any medical services they may want outside the insurance system, and this prohibition is not tied to any review or further administrative proceedings. The **Bowen** Court characterized the second part of the claim as what it called a "liberty claim," which the Court described as the claimant's right to access to vital medical treatment apart from the burden of having to go through the review and approval process. **Id. at 1383**. In analyzing this second part of the claim, the Court indicated that the appellants would have to show "dire personal consequences" and denial of "access to treatment indispensable to a patient's life, health or sight in a way that 'shocks the conscience.'" **Bowen**,

however, never reached the merits of this so-called “liberty claim.” The Court determined that the case was not ripe for review, because no patient had actually gone through the review and approval process and been denied the medical treatment. **Id. at 1385**. Thus the applicability of the Court’s definition of what it characterized as a “liberty claim” in **Bowen** is of questionable applicability to the present case.

More fundamentally, however, **Bowen** was decided prior to three more recent decisions of the United States Supreme Court, **Washington v. Glucksberg**, 521 U.S.702, 117 S. Ct. 2258 (1997); **Planned Parenthood v. Casey**, 505 U.S. 833 (1992); **Cruzan v. Director, Mo. Dep’t of Health**, 497 U.S. 261 (1990) that have articulated a far different method for analyzing substantive-due-process cases than was followed in **Bowen**. In these three cases, the Supreme Court has reexamined and recharacterized its long line of substantive-due-process cases primarily in terms of a single fundamental due process interest in liberty, rather than in terms of the separate privacy and other theories that were articulated at the time of each decision. Accordingly, the bifurcation of the “privacy claim” and so-called “liberty claim” in **Bowen** is inconsistent with the manner in which the Supreme Court now views these types of cases. The Supreme Court has recharacterized its substantive-due-process analysis more in terms of a “unified claim,” along the lines that Judge Williams suggested in **Bowen**, 854 F.2d at 1392, 1394-96. Another and perhaps even more important difference is that the Supreme Court in these three cases has explained what it means by a fundamental liberty interest, in terms far different than was articulated in **Bowen**, with respect to what was identified in that case as a “liberty claim.” Unlike the **Bowen** court, which considered factors like “dire personal consequences” and “treatment indispensable to a patient’s life, health or sight,” the Supreme Court has indicated that a different set of factors should be considered. In **Casey**, Justice O’Connor characterized these factors as follows:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [Due Process Clause]. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. 505 U.S. at 851 (Emphasis added).

This method of analysis and these factors articulated by the Supreme Court in these cases make clear that the method of analysis in **Bowen** is no longer appropriate, and that it’s holding is no longer binding. The intensely personal decision, about what medical treatment should be obtained, made privately in consultation with one’s personal physician falls squarely within the types of rights that the Supreme Court has said should be protected.

Plaintiff also contends that the hold harmless clause and its enforcement through the IBC confidential provider contracts deny equal protection of the laws to Pennsylvanians who are insured by IBC.

As shown in the previous discussion, the right of a competent individual, in consultation with a licensed physician, to obtain wanted medical services at his or her own expense is a fundamental right protected by the Due Process Clause of the Constitution. Because it is a

fundamental right, the discriminatory denial of that right to a particular group of individuals triggers a requirement of strict scrutiny by the Court, and requires the government to show a compelling interest in order to justify the discrimination. **Hutchins v. District of Columbia, 1998 WL 256704 at *9 (D.C. Cir. May 22, 1998).**

In the present case, the government has effectively denied this fundamental right to persons who are insured by IBC. As explained above, any citizen who becomes an IBC subscriber if they wish to have access to comprehensive health care, upon enrollment, however, their ability to purchase wanted medical services that are not approved by IBC is cut off by the operation of the "hold harmless" clause. By contrast, individuals who are **UNINSURED** remain free to purchase such medical services as they wish. The discrimination is clear.

There is no rational basis for such discrimination, let alone the required compelling interest. There is no reason why citizens with health insurance from IBC as a group should be singled out for this prohibition.

It is no answer for the government to say that it treats all insurance beneficiaries alike, and that the discrimination here is not based upon enrollment in one of the myriad of IBC policy options. First, even if the discrimination is viewed as being based upon enrollment or non-enrollment in an IBC health plan, such discrimination, like any other, must be justified when challenged under the Equal Protection Clause. Plaintiff can see no reason why there is a greater justification for protecting IBC beneficiaries from the expense of what IBC views as unnecessary medical treatment than for protecting all other Americans from that expense, given that none of the expense is being borne by the government or the insurer in either case.

What is being challenged here is a regulation and enforcement of the regulation through IBC confidential provider agreements that effectively prohibits a discrete class of citizens from obtaining, at all, medical care that they and their physicians regard as reasonable and useful. In the absence of any justification for that discriminatory denial of the right to obtain wanted health care at one's own expense, the hold harmless clause and its enforcement through IBC contracts should be invalidated as a denial of equal protection.

The fundamental right of an insured to freely and independently contract and pay for medical care and treatment without interference from its health insurance company when the insurance company through its practices, policies and state sanctioned provider agreements (which are all withheld from its insured), 1) sets aside the patient/insured's expectation of a fundamental confidential contractual relationship between the patient and their physician and 2) impaired their ability to contract and pay for care that the insurance company refused to provide as a covered benefit under the insured's policy.

One of the most fundamental rights in Anglo American jurisprudence is "freedom of contract." This notion is woven into the common experience of the average American citizen and beaten into the heads of first year law students in Contracts 101. The heart of this case rests on this fundamental right, or more specifically, the right to reap the benefits of a contractual doctor patient relationship that the State encourages the Plaintiffs to enter in good faith.

The contract that is all too easily lost in the boiling cauldron of contemporary health care issues and this case in particular is the most fundamental, the one between the doctor and patient. See: **United Seniors Association, Inc. v. Shalala, 182 F.3d 965(D.C. Cir, 1999); Brown v. Moore , supra (Interpreting Pennsylvania law on the contractual relationship between a doctor and patient)**. It is obvious to all that “a person going to a doctor for treatment impliedly contracts with him for treatment”. **Brown v Moore, supra**. The contracts between IBC and health care providers made it impossible for the family of Mrs. Lobb to gain access to her obvious healthcare needs once state actor IBC, without ever having seen Mrs. Lobb, determined that her continued care was not “medically necessary”. Moreover, they set aside the fundamental and personal relationship between Mrs. Lobb and her personal physician that the Plaintiffs had every reason to believe they could rely on in pursuing appropriate care for Mrs. Lobb and **required the physician to accept IBC’s decision as though it were her own.**

On August 11, 1997, Kim Johnson and Frank Lobb met with Dr. Pileggi and Mr. Quemore of Chester County Hospital and advised both that the family was ready, willing and able to pay for treatment for Mrs. Lobb. Both Dr. Pileggi and Mr. Quemore had acknowledged Mrs. Lobb was in poor condition and in need of additional skilled inpatient care/hospitalization and alcohol rehabilitation. Mr. Quemore responded that the Lobbs did not have the option to pay, and that IBC had blocked all treatment options except custodial care, which could not provide the treatment Mrs. Lobb required AND was not covered by Mrs. Lobb health insurance plan.

The hospital was barred by IBC from accepting payment from the Lobb family for further care for Mrs. Lobb. The hospital’s contract provided, in relevant part:

Section 6. Medical and Utilization Review

6.2. Where medical and Utilization review is performed by Independence Blue Cross or its designee and an Inpatient Admission, day of stay or outpatient service is denied, the *hospital shall not charge wither Blue Cross or the Subscriber for any health care services rendered or furnished with respect to such admission, day of stay or outpatient service.*

....

12.2 Hospital agrees that *in no event, including but not limited to non-payment by Blue Cross, ... shall Hospital ... bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against a Subscriber....* This provision supercedes any oral or written contrary agreement now existing or hereafter entered into between Hospital and subscribers.

(Chester County Hospital Contract at pp 10 and 13, *emphasis added*).

Similarly, the 1992 Hospital Agreement has a Medical and Utilization review section that provides in relevant part:

- 3.9 In the event that Hospital does not conduct a concurrent review or additional days of stay are denied by IBC or its designee, **Hospital shall not charge wither Blue Cross or the Subscriber for any service related to the denied stay or any portion thereof.....**
- 5.2 When an admission or days of stay are deemed not Medically Appropriate, or when certification requirement set forth in this Agreement are not met, the entire admission or certain days shall be denied and *the Hospital shall not charge either Blue Cross or the Subscriber for any services related to the denied stay or any portion thereof.*
(Emphasis added.)

Further, IBC's Provider Manual states: "Provider driven penalties for failure to receive Precertification are not billable to members." (IBC Provider Manual at VI-4).

Dr. Pileggi was likewise barred by IBC from ordering care for Mrs. Lobb, as the Plaintiffs had every reason to believe was owed to them as a duty under the relationship Mrs. Lobb had established with her personal physician. IBC's contract with Dr. Pileggi provided:

2.7. Utilization Management Requirements.

Provider agrees to participate in, cooperate and comply with all decisions rendered in connection with Independence's Utilization Management Program as detailed in the Provider Manual....

2.9. Participating Providers

.....

Additionally, ***for services rendered to or customized for beneficiary by Provider for which Independence Prior Authorization is required and not obtained, Provider shall be responsible for the unauthorized Covered Medical Service*** and Provider agrees, in accordance with Sections 3.6 and 3.7 of this Agreement, ***to hold harmless the Beneficiary for such claims.***

3.6. Beneficiary Hold Harmless. Provider agrees that in no event, including but not limited to non-payment, insolvency, or breach of this Agreement, ***shall Provider bill, charge, collect a deposit from, seek compensation or reimbursement from, or have any recourse against Beneficiary, Subscriber, enrollees, or persons other than Independence acting on behalf of Beneficiary for Covered Services provided pursuant to this Agreement.***

3.7. Conditions for Reimbursement for Excluded Services. Provider may bill a Beneficiary for other Excluded Services rendered by Provider to such Beneficiary only if the provider satisfies the requirements set forth in Section 2.9 [relating to non-participating providers] prior to Provider's rendition of such services or if the individual was not eligible to receive

Covered services on the date Excluded Services were provided. ***Neither a Beneficiary, nor Independence shall be liable to pay provider for any contracted service rendered by Provider to Beneficiary which is determined under Utilization Management Program not to be Medically Necessary.***
(Emphasis added.)

Dr. Pileggi's IBC contract required her to comply with the decision made by IBC and barred her from continuing to render treatment IBC considered not medically necessary. There was no way for the Lobbs to know that their reasonable expectations of the doctor patient relationship and the duties of that relationship would be unconstitutionally compromised by the secret agreements between IBC and their doctor. In essence, outside the Lobb's knowledge, the state and IBC stripped them of Dr. Pileggi's certification of medically necessary care for Mrs. Lobb and any possible "ACCESS" to that care.

The subscriber agreement given to Mrs. Lobb said exactly the opposite of what the provider contract between IBC and the Hospital and IBC and Dr. Pileggi. The Subscriber Agreement led the Lobbs to believe that they were permitted to personally pay for any treatment IBC refused to cover, as long as the hospital informed them that that treatment was not covered by IBC. The Subscriber Agreement states:

Through its provider agreements or otherwise, Independence Blue Cross will hold the subscriber harmless and ***the subscriber will not be financially responsible*** for admissions which fail to confirm to the previously stated Precertification requirements ***unless the hospital informs the subscriber that the proposed admission does not meet the requirements and will not be covered by Independence Blue Cross.***
(Subscriber Agreement at 11, emphasis added).

The provider agreements referenced in the subscriber agreement are by their own terms "confidential" and the subscriber has no way to ascertain their terms and how they might interact with their own agreement. Moreover, IBC has repeatedly denied the existence of these very clear contractual impairments even to other courts.

IBC's provider agreements:

- 1.) Bar access to care,
- 2.) Impair the ability of a patient to pay for their own treatment and
- 3.) Bar the ability of the health care providers to accept payment for treatment all under the guise of the state mandated "hold harmless" regulation.

This is a fundamental breach of contract between the IBC and its subscriber. It is even more insidious because the IBC uses its economic power to force their contracts on providers, keeps them secret from their subscribers and then hits the subscriber when they are in a hospital bed and are at their most vulnerable.

The appeal process that the doctor and family instituted is equally a sham. To compound the problem, on or about August 12, 1997 IBC's agents lied to the Lobb family about the care Dr. Pileggi was prescribing for Mrs. Lobb. IBC stated that Dr. Pileggi supported IBC's position when in fact the opposite was true. Dr. Pileggi testified in her deposition that she did not agree with that position. On August 13, 1997, Dr. Pileggi sent a letter to Defendant appealing the denial of care. (Pileggi letter of 8/13/97). IBC denied the appeal for care on August 25, 1997. (Hatam letter of 8/25/97). Mrs. Lobb was subsequently discharged from Chester County Hospital and was sent to Pembroke Health and Rehabilitation Residence in West Chester. She received custodial care only, which, by the way, was not insurable by IBC under the terms of Mrs. Lobb's plan and thus was no cost to the defendant insurance company. Dr. Pileggi could not follow Mrs. Lobb at Pembroke because she did not have a working relationship with Pembroke and because her IBC contract required her to "participate in, cooperate, and comply with all decisions rendered in connection with IBC's Utilization Management Program." See: Section 2.7 Utilization Management Requirements (a clear breach of the duty the Lobb's believed was owed to them within their doctor patient relationship with Dr. Pileggi).

On September 1, 1997, Dr. Sheyndra Diwan, Mrs. Lobb's personal physician at Pembroke, certified the need for Mrs. Lobb to be admitted to Mirmont Alcohol Rehabilitation Hospital. This was the second time that in patient alcohol rehabilitation treatment was prescribed or "certified" for Mrs. Lobb as mandated by **Act 106, 40 Pa. C. S. A. Section 908-1 et seq.** and the terms of the IBC policy. On September 30, 1997, Mrs. Lobb was recommended for discharge to home with three days per week intensive outpatient treatment because: "**BC/BS would not cover in house** [treatment] since Sandra has had no alcohol since the admittance to this facility on 8/12/97." Frank Lobb called Mirmont and offered to pay for treatment but was advised that Defendant's contract with Mirmont barred Mirmont from accepting any payment from the Lobbs. Mirmont's contract with IBC's behavioral health subcontractor contains similar restrictions as does the IBC contracts with hospitals and doctors.

Mrs. Lobb was discharged from Pembroke on October 7, 1997 and was only afforded limited outpatient counseling. It did not work. Mrs. Lobb resumed drinking and died of alcoholism on February 1, 1999. The numerous denials of treatment and the contractual barriers in the IBC provider agreements effectively prevented Mrs. Lobb from receiving the treatment she desperately needed and her family desperately sought to provide. These contract barriers in the IBC provider agreement are in direct conflict with the health insurance policy delivered to Mrs. Lobb.

If, as the Supreme Court held in **Cruzan v. Director, Missouri Department of Health, supra**, a person has a constitutionally protected right to refuse unwanted lifesaving medical treatment in order to die, then surely there exist an equal or even greater constitutional right to obtain wanted medical treatment in order to remain healthy and alive. Without the right to protect and preserve the physical integrity of one's own body and to obtain medical services needed to stay healthy and alive, the Jeffersonian maxim of an "unalienable right ...to life" in the **Declaration of Independence** and the other rights found in the Constitution are mere words without meaning. The right to life is so fundamental that it has not been questioned nor has it required articulation. In normal times, the relationship between patient and physician or any health care provider is based upon an implied voluntary understanding or contract. **Brown v.**

Moore, supra. It is the reasonable expectation of anyone being treated by a health care provider that this contractual relationship includes certain fundamental duties on both sides of the agreement and the expectation of payment for services. This expectation of duty could not be greater or more justified than within one's relationship with his or her chosen physician as is the case here.

This case is not about a denial of insurance coverage by IBC. It is about IBC's use of mandated state regulatory contractual provisions in its agreements with health care providers to secretly impair the Plaintiffs' doctor patient relationship and deny the Plaintiffs any ability to independently access health care services IBC refuses to provide under the terms of Plaintiffs' insurance plan. At no time did the Plaintiffs abrogate their right of contract with their doctor or the rights and obligations therein, most specifically the **"unfiltered"** medical judgment of their doctor, as a part of accepting IBC health care insurance.

The issue goes to the very core of our individual rights under the Constitution. For if an insurance company is allowed, with the active participation of the Commonwealth, to impair the right of an individual to the honest and unfiltered medical opinion of their doctor, our freedoms are irreparably damaged. Moreover, because the Commonwealth of Pennsylvania provided detailed legislation, regulation, review and approval of these contracts (**See: Titles 28 and 31 of The Pennsylvania Code & 40 P.S. Section 991.2101 – 991.2193**), the Commonwealth of Pennsylvania bears a unique responsibility and constitutional burden. This Honorable Court also bears the burden to fully and properly address this wrongful impairment of the Plaintiffs right of contract.

To understand the impact of the Defendants' impairment of the Plaintiffs' right of contract, one needs only recognize that for the Plaintiffs to gain admission to an inpatient treatment facility (a hospital), as the Plaintiffs sought for Mrs. Lobb, the Plaintiffs have to provide:

- 1.) A doctor's certification that the admission is "MEDICALLY NECESSARY" and
- 2.) An ability to compensate the hospital.

IBC uses the contractual provisions in its contracts with the Plaintiffs' doctor and hospitals to strip the Plaintiff of any ability to meet either of these two requirements, forcing the doctor to deny treatment and the hospital to refuse admission.

The Defendants also strip the Plaintiffs of any ability to even understand what was taking place. The IBC provider contracts establish counter-intuitive definitions for key terms and make both the details of the admission process and these counter-intuitive definitions subject to nondisclosure.

The heart of this dispute then lies in the belief that the contractual relationship that the Plaintiffs have **"established"** with their doctor is constitutionally from impairment by State Actor IBC, particularly since these changes are deliberately hidden from the Plaintiffs. In clear and unambiguous language, the IBC's contract with the Plaintiff's doctor gave its contract precedence over the Plaintiffs' relationship with their doctor and voids the most basic duty the Plaintiffs have every right to expect from their personal physician.

No contractual relationship has been viewed as more sacrosanct or personal than that between a patient and his or her doctor. And no obligation or duty within that relationship is more important than the doctor's obligation to provide an honest and professionally competent opinion of appropriate medical care for the patient; i.e., "MEDICALLY NECESSARY and APPROPRIATE" care. Moreover, if one removes this obligation from the doctor patient relationship, there is no reason to hire the doctor. It would be like hiring a carpenter that is not allowed to do carpentry. However, State Actor IBC would have us believe are free to both strip the Plaintiff of this most fundamental obligation in the Plaintiffs' relationship with their doctor and to do it secretly. The Plaintiff's case is centered on this fundamental impairment..

As much as IBC will suggest that the whole factual scenario is "absurd" and "counterintuitive", the facts have not changed. Mrs. Lobb was insured by IBC, she sought treatment which was denied by IBC as not medically necessary and thereafter every health care provider that the family sought to treat Mrs. Lobb would not treat her because of the denial by IBC even though the family offered to pay up front out of their own pocket. Following those denials, IBC's position has been that Dr. Pileggi simply failed to properly certify the need for additional skilled care and inpatient alcohol rehabilitation. The situation is totally unacceptable and morally contemptible. With the state mandated language that created this situation, it is a vehicle to impair the fundamental right of contract a person must be accorded with their doctor.
1'

The situation in Pennsylvania directly parallels the underlying facts in **United Seniors Association, Inc. v. Shalala, 182 F.3d 965(D.C. Cir, 1999)** which is essentially the same case under the Federal law. The various Plaintiffs in **United Seniors** included a retired Justice of the Minnesota Supreme Court who sought treatment for an injury that required a tetanus shot. When advised that Medicare would not pay for it he offered to pay for the treatment out of his own pocket and was refused. This is exactly the same factual pattern only this time it is state regulations and policy together with their enforcement by IBC that is at issue.

Where the restriction is on medical treatments that the Government will pay for out of public funds, there is ample precedent to uphold the limitation. Indeed, the courts have sustained even limitations on the amounts a physician can charge a Medicare patient over and above the government reimbursement. In **Whitney v. Heckler, 780 F.2d 963 (11th Cir.), cert. denied, 479 U.S. 813 (1986)**, the court sustained a temporary freeze on fees charged Medicare patients by non-participating physicians; the freeze was designed to preclude physicians from shifting the burden of reductions in Medicare reimbursements to Medicare beneficiaries. **See also Metrolina Family Practice Group v. Sullivan, 767 F. Supp. 1314 (D.N.C. 1989), aff'd, 929 F.2d 693 (4th Cir. 1990).**

However, where a restriction on the availability of treatment at any price goes beyond protecting the integrity of a government reimbursement system -- and the restriction imposed is for economic reasons (rather than health and safety, as in the case of FDA regulations) -- there is a constitutional problem. **See Massachusetts Medical Society y. Dukakis, 815 F.2d 790, 797 (1st Cir.), cert. denied, 484 U.S. 896 (1987).**

The right to medical treatment has been given constitutional protection in the area of abortion; but that is for reasons that are not generally applicable to other types of treatment. **Planned Parenthood v. Casey**, 112 S. Ct. 2791, 2807-8 (1992). Compare **Pennhurst State school & Hospital v. Halderman**, 451 U.S. 1, 16 n.12 (1981) (no constitutional right to rehabilitative treatment for mentally retarded); **O'Connor v. Donaldson**, 422 U.S. 563, 587-89 (1975) (Burger, C.J., concurring) (no constitutional right to treatment for mental illness).

Where the treatment sought is medically necessary -- and particularly where a life-threatening condition is involved -- the courts can impose some constitutional limits on the Government's ability to impose, for economic reasons, restrictions on a patient's ability to obtain treatment for which he or she is willing to pay. See: **New York State Ophthalmological Society v. Bowen**, *supra*, in which Judge Mikva suggested that a liberty interest may exist where "**the challenged regulation restricts access to treatment indispensable to a patient's life, health or sight in a way that 'shocks the conscience,'**" or "**has dire personal consequences.**" (Emphasis added).

In this day and age it should literally "shock the conscience" of the average Pennsylvanian with health insurance and this Honorable Court, that an individual can be so easily stripped of his or her relationship with their personal physician without so much as notice, consent or due process. The Plaintiff is simply asking the court to end this egregious assault on our freedoms and, in point of fact, our very right to life itself. **"Doctors and Patients. Preserve the Relationship."**®

CONCLUSION

For the reasons stated above, Plaintiff respectfully urges this Court to Deny Defendants' Motion to Dismiss and order Defendants to Answer the Second Amended Complaint.

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Kristen S. McDermott, individually	:	
And Kimberly P. Johnson, personal	:	
Representative of the estate	:	
of Sandra S. Lobb , deceased	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION: 05-cv-02536
	:	
Diane Koken, individually and as	:	
Insurance Commissioner	:	
Dr. Calvin B. Johnson, individually,	:	
and as Secretary of Health,	:	
and Independence Blue Cross	:	
and The Chester County	:	
Hospital, Jointly and severally,	:	
Defendants	:	JURY TRIAL DEMANDED

CERTIFICATE OF SERVICE

Lawrence M. Otter, Esquire, counsel for Plaintiffs, hereby certifies that a true and correct copy of the within Memorandum of Law and supporting documents was duly served by first class mail, postage prepaid on October 26, 2005 and/or by email or as otherwise noted on the following:

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IN THE UNITED STATES DISTRICT COURT

