

**THE PENNSYLVANIA STATE HOUSE OF REPRESENTATIVES
HEALTH AND HUMAN SERVICES COMMITTEE
REPRESENTATIVE GEORGE KENNEY, CHAIR
NOVEMBER 10, 2005
HARRISBURG, PA**

**WRITTEN STATEMENT OF LAWRENCE M. OTTER, ESQUIRE,
FORMER SENIOR DEPUTY ATTORNEY GENERAL AND
ATTORNEY IN CHARGE OF THE ATTORNEY GENERAL'S
HEALTH CARE UNIT**

**THE FAILURE OF WILL AND THE LACK OF ACT 106
ENFORCEMENT BY THE ATTORNEY GENERAL AND
PENNSYLVANIA INSURANCE DEPARTMENT**

I have represented the interests of citizens of the Commonwealth of Pennsylvania since 1994 when I was an Assistant Counsel for the Pennsylvania Department of Health and my legal portfolio included the Bureau of Managed Care. In 1999 I was hired by the Office of Attorney General to create the Health Care Unit within the Bureau of Consumer Protection.

With apologies to Humphrey Bogart--Of all the lawyers and law offices within state government, Deb Beck had to walk into my office at Strawberry Square and make me aware of Act 106. I then began to actively enforce Act 106 on behalf of the chief law enforcement officer of the Commonwealth in 2000. In post 9 11, 2001 I recommended to the Attorney General that there was sufficient evidence against various health insurance companies to bring a legal action to enforce Act 106 in the face of the overall refusal of every health insurance company and their subcontractor for "behavioral health" in the

Commonwealth to comply with that law and with the Pennsylvania Insurance Department's refusal or inability to enforce the law through its regulatory and oversight powers.

I quickly discovered that there was no political will to do what is right and just for the citizens of the Pennsylvania. The Attorney General was reluctant to go after his campaign contributors and their minions. The Insurance Department failed to execute the law. This is a disgrace that displays the moral bankruptcy of the government whose highest duty is to protect the citizens of the Commonwealth. They failed to uphold their oath of office.

I am now doing the right thing in private practice. I am counsel for Plaintiffs in three significant cases --. A Civil Rights action in Federal Court [**Kristen S. McDermott, individually and Kimberly P. Johnson, personal Representative of the estate of Sandra S. Lobb , deceased v. Diane Koken, individually and as Insurance Commissioner, Dr. Calvin B. Johnson, individually, and as Secretary of Health, and Independence Blue Cross, Civil Action: 05-cv-02536, United States District Court for the Eastern District of Pennsylvania**]; a personal injury action on appeal to the Pennsylvania Superior Court [**Kimberly P. Johnson v. Independence Blue Cross, Docket 1310 EDA 2004**] and a Petition For Review in Commonwealth Court [**Kristen S. McDermott, individually and Kimberly P. Johnson, personal representative of the estate of Sandra S. Lobb, deceased v. Commonwealth of Pennsylvania, Insurance Department, Docket No: 478 MD 2005**].

By now you have undoubtedly heard the sad facts of the injustice done to Sandra Lobb and her children. This injustice continues to this day against any number of anonymous alcoholics who are shamed and stigmatized by their disease. The Lobbs have the courage to come forward and fight this injustice. Their fight has been ongoing since 1999.

The mendacity and arrogance of Independence Blue Cross, the chief culprit in the Lobb cases, is beyond the pale.

Independence Blue Cross is also a party in the Commonwealth Court action captioned **Insurance Federation et al v. Insurance Department, Docket No: 10 MD 2004**. IBC is actively involved in a deception and fraud upon the courts of the Commonwealth by taking absolutely inconsistent positions in different courts of the Commonwealth.

In **Kimberly P. Johnson v. Independence Blue Cross, Docket 1310 EDA 2004**, IBC, in the Chester County Court of Common Pleas and the Superior Court, by and through their legal counsel, Law Offices of Lamb, Windle & McErlane, P.C. stated: "...there is no prohibition in the contract that forbids members from paying for stays that are considered not covered by IBC." (**Reproduced Record, [RR] Vol. I, p. 61 and p. 86**); "...IBC does not in any way prohibit a member from self paying for services." (**RR Vol. IV, p. 842**); "*that nothing in the provider or patient contracts bars a patient from self paying for services*" (Reproduced Record, Vol. p.) and "*it is absurd to suggest that a hospital would refuse to accept any form of direct payment* (**RR, Vol. I, p. 59 and p. 84**)".

During the oral argument before the Superior Court on December 7, 2004, the following colloquy occurred:

Judge --- *“When you read this provision (the Hold Harmless provision in IBC’s provider contracts) it appears to be very restrictive in terms of a policyholder’s ability to self pay.”*

IBC’s counsel --- *“That is not what it means.”*

Judge --- *“Well, if a policyholder wanted to pay what would you do?”*

IBC’s counsel --- *“We would simply let them pay.”*

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), IBC in its pleadings and motions, all filed by other legal counsel, Buchanan Ingersoll, P.C., averred that *“health care services are to be “proposed by the provider and then evaluated for medical necessity and appropriateness”* (Paragraph 38, Petition for Review) by IBC and *“to abide by the initial certification and referral for appropriate treatment by a licensed physician... leads to absurd or unreasonable results”*(Paragraph 15, Petitioner’s Application for Judgment on the Pleadings). IBC argued that they had long had the authority to overrule licensed physicians for determining appropriate medical care and that IBC alone has the authority to determine whether alcohol treatment mandated by Act 106 is medically appropriate. In the Chester Court of Common Pleas below, IBC averred in the Deposition of Dr. Catherine Dratman, its Chief Medical Officer at the time, that *‘we do not make medical decisions. We make coverage decisions.’*

In a 2002 letter to 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 contradict IBC’s stated position to the Court of Common Pleas and the Superior Court. See Representative Hershey’s letter attached hereto for the Committee’s convenience.

IBC has misled its own attorneys and therefore the integrity of the judicial process. The honor of the court is now at stake in this matter.

The Insurance Department, represented by the Attorney General and the Governor’s Office of General Counsel, 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)** had suggested in its brief that the IBC interpretation of Act 106 is unconstitutional under both the Pennsylvania and United States Constitutions. See Brief of Pennsylvania Insurance Department in Support of its Motion for Judgment on the Pleadings at pages 14 and 18-19. In essence they admit that IBC is enforcing state law and are therefore state actors for constitutional purposes. The Court dismissed the matter on the motion of the Commonwealth because the Commonwealth admits it is not enforcing the challenged 2003 Notice at issue.

The Insurance Department for more than a decade and the Attorney General since early 2000 were on notice that there was a real and significant problem with the failure of

Act 106 to deliver on the Legislature's promise of help to suffering individuals and their families recover from the demons of their disease. Why does the Attorney General and the Executive Branch allow this to continue?

This committee's hearing is welcome at this time. But more needs to be done immediately. You must demand that the law you drafted and passed must be enforced. Prodding with a pitchfork comes to mind but I think the third co equal branch of government must be a part of the solution. Legal action is necessary for the will of the Legislature and the common good of the people of Pennsylvania to be brought to bear upon the insurance companies who have abused their public trust and the statutory and contractual rights of every policy holder in Pennsylvania. What are you waiting for?

Thank you.

Respectfully submitted,

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