

# MEDICAL SOCIETY of the STATE OF NEW YORK

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*Division of Governmental Affairs*  
**MEMORANDUM IN SUPPORT**

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**A.336 (GOTTFRIED)**

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**S. 1157 (HANNON)**

**AN ACT to amend the public health law, in relation to requirements for collective negotiations by health care providers with certain health benefit plans**

This bill would amend the public health law to permit some collective negotiations between health care providers and health insurance plans under close state supervision. **The Medical Society of the State of New York strongly supports this measure.**

Currently, federal antitrust laws generally prohibit individual health care providers from collectively negotiating any provisions of contracts presented to them by managed care entities. This bill would allow physicians -- especially in solo or small group practices -- to communicate with each other and jointly negotiate with health insurance companies in certain circumstances. Without this basic right, independent physicians and those in small group practices are powerless to challenge the practices of huge health insurance companies that offer "take it or leave it" contracts which almost always contain provisions which are not only unfair to care providers but unfair to patients as well. With health insurance company domination likely to grow as a result of the creation of its Health Insurance Exchange, as well as the implementation of the mandate to purchase health insurance, we must protect the ability of the patient's physician to be an advocate for the patient.

While the Federal Trade Commission (FTC) does not favor "state action immunity" exceptions to federal jurisdiction, the exception is well recognized. This bill would take advantage of the "State Action" doctrine created nearly 70 years ago by the US Supreme Court in a landmark decision permitting collective action under close state supervision to vindicate legitimate public interests. This bill would allow in limited instances health care providers in New York State to conduct some collective negotiations by creating a system under which the state would closely monitor those negotiations, and approve or disapprove such negotiations from going forward. Negotiations involving fee-related matters would be prohibited unless an individual health plan controls a substantial share of the managed care market in a particular region.

The new dynamic created by this legislation will not increase the cost of health care but will re-distribute existing dollars which will be re-directed away from insurance company profits and to the provision of necessary clinical care for patients. Moreover, reductions in cost would result from greater standardization of

administrative procedures which often now vary from plan to plan. As an absolute failsafe mechanism to assure that costs will not rise inappropriately, the bill grants broad powers to the Commissioner of Health that would in effect permit him to prevent joint health care provider negotiations from going forward if it is believed that such negotiations would have an adverse interest on patient access to care, for any reason including any concerns regarding increases in the cost of health care.

## New York's Concentrated Health Insurance Market

With insurer consolidation, regional markets continue to be further dominated by a dwindling number of health insurance behemoths. According to a 2012 report from the American Medical Association, 85% of the enrollees in the commercial managed care market in New York State were enrolled in just 5 health insurance companies. And the same report demonstrated that most regions of New York State had two insurers dominating that market.

### HMO PENETRATION

MSA	Insurer 1	Insurer 2	Share % of Top Two Insurers
Albany-Schenectady-Troy	CDPHP (64%)	MVP (29%)	93%
Binghamton	Excellus (67%)	MVP (26%)	93%
Delaware-Cheektowaga-Tonawanda	Health Now (75%)	Health Now (25%)	100%
Delaware-Cheektowaga-Tonawanda Coughkeepsie-Newburgh-Middletown	MVP (48%)	Wellpoint (16%)	64%
Syracuse	Excellus (65%)	MVP (33%)	98%
Rochester	MVP (68%)	Excellus (31%)	99%
Nassau-Suffolk	Emblem (50%)	United (20%)	70%

### HMO + PPO Penetration

MSA	Insurer 1	Insurer 2	Share % of Top Two Insurers
Albany-Schenectady-Troy	CDPHP (31%)	Wellpoint (21%)	56%
Binghamton	Excellus (45%)	United (23%)	68%
Delaware-Cheektowaga-Tonawanda	Health Now (48%)	Independent Health (19%)	67%
Delaware-Cheektowaga-Tonawanda Coughkeepsie-Newburgh-Middletown	Wellpoint (32%)	United (26%)	58%
Syracuse	Excellus (45%)	United (21%)	66%
Rochester	Excellus (43%)	MVP (36%)	79%
Nassau-Suffolk	Wellpoint (39%)	United (31%)	70%

Source: AMA, *Competition in Health Insurance, 2012 Update*

At the same time these companies wield such market domination, their profits have grown significantly. According to a recent United Hospital Fund report, profits for health insurers serving New York's commercial market were \$1.3 billion for 2010, a nearly 50% increase over 2009. Moreover, as noted below their executives continue to be handsomely compensated.

### Health Insurer CEO Salaries - 2011

Company	Salary
John Cordani (Cigna)	\$1,855,567
John Hemsley (United)	\$1,948,832
John Braly (Wellpoint)	\$1,581,142
John Bertolini (Aetna)	\$1,563,335
John Ellert (Health Net)	\$1,284,429
John Watson (Emblem)	\$1 million

Source: June 4, 2012 AMNews and February 6, 2012 New York Post, based upon SEC filings

The source of these grossly excessive profits of the managed care companies is clear. They are increasing premiums for businesses and other payers at a dramatically high rate and even as they do so they are reducing coverage, limiting patient access and straining providers' ability to keep their practices afloat. These are profits, furthermore, that are often going out of state. They are not being re-invested to protect New York's health care system.

## **The Broader Impact of Market Concentration**

This overwhelming power of the companies to force providers to accept unfavorable terms is manifested by a number of different health plan actions, such as:

- Imposing burdensome processes and permitting inappropriately long wait times for physicians and their staffs when they request pre-authorization for patient care and needed prescription medications;
- Constraining reimbursement to the same level year after year, or in some instances imposing cuts, despite the fact that the cost of running a practice keeps going up significantly each year;
- Employing a host of other tactics to cut reimbursement, including:
  - Downcoding physician claims despite appropriate medical justification;
  - Bundling multiple services provided by a physician into just one service, in contrast to rules set forth under the AMA's CPT coding guidelines; and
  - Making exorbitant refund demands long after the time that payment was initially made, sometimes by making specious allegations of "abusive billing" and using the grossly unfair practice of extrapolation to grossly inflate refund demands,; and
  - Having the unprecedented ability to change the terms of a contract with a physician unilaterally, with little notice to the physician and only an illusory ability to "opt out" of the contract if the physician disagrees with the amendment; and
- Limiting the ability of physicians to refer their patients to ancillary service providers necessary for making correct diagnoses, including imaging facilities and laboratories.

This bill would enact important reforms which would allow doctors to negotiate fairly with the HMO industry under strict conditions. Activities which would negatively affect patients access to necessary health care -such as collective slow downs, strikes or boycotts - are expressly prohibited by the legislation. Negotiations over professional fees have been carefully limited to those circumstances where the plan has substantial market power and could otherwise radically reduce physician reimbursement to levels that jeopardize access to care.

This law will empower physicians to advocate for their patients, encourage competition among health care plans, and restore some semblance of fairness and balance in a marketplace that is increasingly and overwhelmingly dominated by one sector of the health care industry. Most importantly, it will enhance the quality of health care for all New Yorkers which is being jeopardized by the vast power wielded by huge health insurers with tremendous market domination.

Our national framework of trade regulatory statutes, including our antitrust laws, was enacted to prevent the huge concentration of market power in a few massive sellers and/or buyers. The application of these laws in such a way as to enhance the power of huge health insurers by effectively crippling providers, patients and health insurance purchasers is a gross perversion of these statutes.

**For all of the foregoing reasons, the Medical Society strongly supports this measure and urges its enactment into law.**

Respectfully submitted,

**ELIZABETH DEARS KENT, ESQ.**

3/6/15 - Support  
MMA