Testimony of Sean Dilweg
Wisconsin Insurance Commissioner

Before the
United States Committee on Education and Labor Subcommittee on Health, Employment, Labor and Pensions

Regarding:
Paul Wellstone Mental Health and Addiction Equity Act of 2007

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Good afternoon Chairman Andrews, Ranking Member Kline, and members of the committee. My name is Sean Dilweg and I am the Insurance Commissioner from the State of Wisconsin. Thank you for inviting me to testify this afternoon on H.R. 1424, the Paul Wellstone Mental Health and Addiction Equity Act of 2007.

Today I will speak to the importance of parity legislation and highlight the importance of H.R. 1424 in addressing unequal coverage limitations on mental health services. In addition, I will express my concern with preemption language included in S. 558 (June 13, 2007 draft manager's amendment), the Senate Mental Health Parity bill, which leaves Wisconsin's mental health mandate and laws in other states vulnerable to court interpretation. There are 46 states with laws requiring some level of mental health coverage and 27 states with full parity laws.

Importance of Parity

Individuals diagnosed with a mental illness are too often limited in their ability to access treatment due to insufficient insurance coverage. Coverage limits for mental health services are generally more restrictive than those applied to other medical conditions. Such treatment limitations force this population to look to their own finances or public programs as a means to cover expenses. In the worst cases, people forgo services altogether. Given the debilitating nature of many mental illnesses, individuals find they cannot maintain employment, health conditions related to the mental illness go untreated and people generally find themselves unable to maintain the quality of life most of us enjoy. It is estimated the indirect cost of mental illness is $79 billion, with $63 billion of

that amount related to lost productivity[1]. H.R. 1424 will greatly improve access to mental health services by ensuring individuals the same level of insurance coverage for their mental health needs as would be available for their treatment of other medical conditions.

In Wisconsin, group health insurers providing coverage of inpatient hospital treatment, outpatient treatment or both, must also provide coverage for mental health and alcohol and other drug abuse services. This means that insurance companies selling health insurance coverage to employers in Wisconsin must include coverage for mental health related care. Current state law requires a minimum of $7,000 in coverage be provided for these services, but also allows plans to limit benefits to this statutory amount. The law allows insurers to offer better coverage, but in most cases, policies with more coverage are not available.[2] These coverage requirements do not go far, especially for those who have a severe mental illness or duel diagnoses.

H.R. 1424

I commend Representatives Kennedy and Ramstad in their efforts to improve coverage of mental health benefits in private health insurance while ensuring that federal standards serve as a "floor", not a "ceiling." As currently drafted, the House bill specifically states that nothing in the federal legislation "shall be construed to preempt any State law that provides greater consumer protections, benefits, methods of access to benefits, rights or remedies." This language is consistent with the preemption language in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) which has been very successful in expanding important access protections throughout the country. HIPAA's portability and access provisions affecting private health coverage has also been a model for how federal and state health coverage reforms can work together, with states having the flexibility to supplement federal standards to better protect consumers, when necessary.

[1] New Freedom Commission on Mental Health, *Achieving the Promise: Transforming Mental Health Care in America. Final Report.* DHHS Pub. No. SMA-03-3832. Rockville, MD: 2003.
[2] In part, this is because of adverse selection problems.

In moving forward toward equity in coverage for mental health services, it is important to maintain the recognition that state policymakers may determine it necessary to have a stronger set of standards to ensure the protection of patients in state-regulated health insurance policies. For example, H.R. 1424 would not mandate that group health insurance policies provide mental health benefits; it, however, would set standards for group health plans that choose to provide benefits for mental health. Wisconsin's policymakers have determined that a mandate is necessary to ensure that some mental health benefits are provided in all group policies. Wisconsin's requirement to cover mental health care coupled with the proposed federal parity is the way to ensure that state-regulated insurance policies provide necessary coverage to patients with mental illnesses.

S.558 and Preemption

It would be very problematic for Wisconsin and other states if the House were to move in the direction of the Senate with regard to preemption. The Senate version preempts, subject to certain exceptions, any state mental health parity standard or requirement which differs from the mental health parity standards or requirements as defined in subsections (a), (b), or (e) of section 712A." The Senate Mental Health Parity Bill (manager's amendment draft June 13, 2007), would completely preempt all state protections in the following areas:

- Parity in financial requirements, i.e. coverage limits, co-pays, deductibles; and
- Exemptions to parity requirements due to increased costs.

Wisconsin and other states are struggling to predict how the preemption language might impact current parity laws. Short of litigation in federal court, it is unclear who decides if the state law differs from the federal law and what a state's options are if the state disagrees with that decision. There are 46 states with laws requiring some level of mental health coverage and 27 states have full parity laws, requiring insurers to provide the same level of mental health benefits as medical and surgical benefits. Coverage in most of these states, to varying degrees, is at risk of being weakened or completely eliminated by

the Senate preemption language. Concerns have been expressed on the impact to mental health mandates in states, including, Washington, Vermont, Oregon, Connecticut, California, Montana, Maryland and Nevada.[3] Insurance Commissioners in Connecticut, Vermont, Washington and Oregon have shared written concerns with their Senate members. Copies are attached for your review.

National Association of Insurance Commissioners

In a letter to Chairman Kennedy and Ranking Member Enzi of the Senate Health, Education, Labor and Pensions Committee, dated May 2, 2007 analyzing S. 558 as voted out of committee, the National Association of Insurance Commissioners stated that the nation's insurance commissioners find the Senate bill's preemption language "both excessive and unnecessary." They go on to recommend that, "should the Senate decide to include any preemption language in the bill, we would prefer the language in the Mental Health Parity bill currently being considered in the House of Representatives." I acknowledge that the June 13th language is significantly better; however it does not address all preemption concerns and would still leave state laws open to potential preemption challenges.

Wisconsin's Mental Health Mandate

Of particular concern for Wisconsin is the extent to which preemption will impact the state's current requirement that a group health insurance policy provide coverage of

[3]Mila Kofman, Georgetown University Health Policy Institute, *" California's mental health parity law is a standard that applies generally to health insurance coverage. Unlike a specific law applicable to individual or small group coverage, there is no guarantee that courts will uphold the law as it applies to individual and small group policies if challenged under ERISA and as a result, the legislative intent in the bill to save state individual and small group coverage from preemption may not be accomplished." "Montana law requires coverage for severe mental illness and such coverage must be provided on parity with coverage for physical illness. The standard applies to individual and group coverage with no distinction between small group and large group coverage. The parity requirements differ from S. 558 and would be preempted, unless the exception in the bill is interpreted broadly."* In reference to Maryland *"…requirements for individual coverage and large group coverage are in one section. Litigation may be necessary to determine if standards for individual coverage would continue. The mandate for large group coverage to include mental health benefits and provide coverage on parity with physical illness may also be litigated to determine if it is saved from S.558 preemption."* In reference to Nevada "*…the mental health parity law for group coverage applies to groups of more than 25 employees. Similar to other states, although there is a mandate to cover mental health (severe mental illness), the standards for the mandate are 'parity type' standards. It may be up to the courts to determine if Nevada's law is saved under the new preemption standards.*"

mental health services. Our state mandate for coverage and the coverage limits are tied together under the same statutory provision. If a Senate Mental Health Parity bill preempts coverage requirements, such as Wisconsin's required $7,000 minimum, a court must determine whether the entire statutory provision (the minimum coverage amount and the requirement to provide services) or only the provision mandating a minimum "floor" of $7,000 is preempted.

Generally, statutory provisions are "severable" so one provision may avoid preemption even if a related provision is preempted. However, the court must determine whether the resulting statutory language is consistent with the "intent of the legislature."
The statute resulting from "partial" preemption would be a mandate to provide mental health benefits up to at least the maximum limits otherwise available under the policy. However, the Wisconsin legislature specifically included limits on its mandate to provide mental health benefits. This may lead a court to rule the entire statute preempted because to do otherwise would be inconsistent with the intent of the legislature.

The senate bill raises several questions relating to Wisconsin's mandate, and if passed would leave consumers extremely vulnerable to losing coverage, as it is anticipated a great number of employers and/or insurers would take advantage of the new flexibility by challenging state law and dropping coverage for mental health. As I mentioned earlier, under H.R. 1424, Wisconsin's mandate and those in other states would be preserved.

The argument has been made that laws like Wisconsin's would be protected under the exception that reads:

> "...nothing in section 712(A) shall be construed to require a group health plan to provide the following: (i) Any mental health benefits, *except that State insurance laws applicable to health insurance coverage that require coverage of specific items, benefits, or services (including specific mental health conditions) are specifically not preempted…"*

While the intent behind the exception may be to preserve state mental health mandate laws, the proposed language does not go far enough in clearly excluding states from the preemption provisions in the bill. It is my understanding that, before this exception can be applied, a state's coverage provisions must be consistent with the federal parity provision. As I mentioned earlier, Wisconsin's statute says coverage "need not exceed $7,000" while the proposed federal provision requires coverage equal to the medical maximum limit.

A court would have to determine that the new proposed limits qualify as a requirement for a "specific benefit" within the exception. In other words, if Wisconsin will have to impose the coverage limits in the bill, and those new coverage limits are considered "specific benefits," Wisconsin's mandate for providing coverage of mental health services is preserved under the exception. The federal parity would then "overlay" the state mandate to separately require higher maximum limits.

The risk under this language is that my state as well as other state mental health laws would be preempted. New legislation would be necessary to reinstate Wisconsin's mandate; however, one only needs to look to the past few sessions in the Wisconsin Legislature to see the political will is not there to pass legislation that results in parity. Under this scenario, consumers will be left with fewer protections than they have under the current model.

Other states with similar mental health mandate requirements would face similar preemption problems. Therefore, the risk of consumers losing existing state-based minimum coverage guarantees goes beyond Wisconsin's borders.

Cost Exemption

Preemption with regard to the cost exemption is also extremely problematic given Wisconsin and many other states with some level of parity do not allow insurers to end coverage if a cost increase is demonstrated. S. 558 does not apply if a plan's cost in the first year goes up by 2% and 1% in subsequent plan years. S. 558 would preempt any

state law to the contrary, thus severely weakening Wisconsin's mandate to provide coverage. In addition, it will be extremely challenging to question plans' allegations with regard to cost increases given the exemption does not require actuarial analysis to be independent or publicly available.[4]

There are approximately 12 states' mental health parity laws which contain provisions exempting certain employers from the parity requirements if they can demonstrate a certain level of increased costs due to those requirements[5]. Approximately half of those states impose a cost exemption with more stringent standards than those found in this legislation.

The state of Indiana, for example, requires that insurers demonstrate a 4% increase in premiums due to mental health parity requirements,[6] Michigan requires a 3% increase due to substance abuse treatments[7], and both Nevada and Oklahoma require a 2% increase in each year.[8,9] Each of these exemption provisions would be replaced by the less-consumer friendly federal standard, and 34 states would have the cost exemption language imposed upon them for the first time. By contrast, under the House bill only those states laws providing fewer protections to consumers would be affected.

Conclusion

As the Insurance Commissioner charged with protecting consumers, I have a responsibility to bring to light issues that may put consumers at risk.

I have raised several preemption questions; there are others that may come to light as other states more carefully review the proposed language and the approach the Senate takes. These could be open to interpretation and based on a long and difficult history of ERISA-related preemption litigation, it is likely that different courts will reach different conclusions and ultimately the final word will come from the Supreme Court. New

[4] Randy Revelle, Chairman, Washington Coalition for Insurance Parity.
[5] Ibid
[6] Indiana Code §27-8-5-15.7
[7] Michigan Compiled Laws §500.3501
[8] Nevada Revised Statutes §689A.0455
[9] Oklahoma Statutes §36-6060.12

ERISA-related litigation will come with a high price tag for already strained state budgets and even a higher price tag for people who may lose benefits while waiting years for courts to determine if state laws are preempted.

The House bill before you today will increase access to mental health coverage for people covered by employers that choose to cover mental health benefits. The preemption language is clear and will preserve and strengthen Wisconsin's mental health mandate as well as many mental health and parity laws across the nation. The "floor" created by H.R. 1424 protects consumers by ensuring states can enforce current laws that are stronger than the proposed federal standards.

Thank you again for this opportunity to testify today.