Representing Parents with Mental Illness
The Harvard Pilgrim Health Care Receivership: A Case Study in Consumer Activism

By Renée Markus Hodin, Laurie Martinelli, and Marcia Hams

One of the most respected health maintenance organizations (HMOs) in the country, Harvard Pilgrim Health Care was placed on January 4, 2000, under temporary receivership by the Supreme Judicial Court of Massachusetts. The Massachusetts insurance commissioner was named as the temporary receiver. At the time Harvard Pilgrim provided health care coverage to 1.1 million members in Massachusetts.\(^1\) The appointment of a receiver came after Harvard Pilgrim discovered several accounting errors that would result in a 1999 operating loss of $177 million.\(^2\) The news of Harvard Pilgrim’s financial crisis came on the heels of its sudden exit from the Rhode Island insurance market, where it had left 155,000 members looking for new insurance coverage.\(^3\)

The financial crisis at Harvard Pilgrim is replete with lessons. In fact, much has been written about the causes of the plan’s decline into insolvency.\(^4\) What has been less examined, however, is the impact of consumer advocacy and participation on the receivership’s outcome. In this case study we seek to examine how Health Care for All and its public interest law firm, Health Law Advocates, brought a unique consumer voice to a complex set of proceedings and changed the way that Massachusetts regulators and courts view health care insolvency proceedings. From what we learned from the Harvard Pilgrim receivership we also seek to impart lessons that could protect consumers in any future HMO insolvency.

I. Background: Consumer Protection Law

Consumer protection is the paramount concern of the Health Maintenance Organization Insolvency Law that the Massachusetts legislature enacted in November 1999. This is clear from the language of the emergency preamble:

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It is hereby declared that it is necessary to protect residents of the commonwealth who are members of health maintenance organizations which may become financially troubled; to give the division of insurance the same administrative supervision, rehabilitation and liquidation authority which the division currently possesses with regard to other insurance companies; to provide members of an insolvent health maintenance organization the opportunity to obtain adequate health care and to protect members, employees and unions should a health maintenance organization declare bankruptcy. Therefore it is hereby further found and declared that the general court recognizes that health maintenance organizations are an integral part of the health care insurance system for residents of the commonwealth and that it is in the public interest to protect the health and welfare of the residents of the commonwealth should a health maintenance organization become financially unsound. In furtherance of such public purpose, the general court herein provides procedures to be followed should the division of insurance determine that the interests of members of a financially troubled health maintenance organization are at risk.5

The law goes on to explain the circumstances under which HMOs may be placed under receivership. This law, passed only months before Harvard Pilgrim was placed into receivership, would play an enormous role in the way that the Harvard Pilgrim crisis was resolved and in the arguments that consumer advocates made for a more inclusive process.

II. The Consumer Voice

Established in 1985, Health Care for All is a nonprofit, statewide consumer advocacy organization whose mission is to ensure access to quality health care for Massachusetts’ vulnerable consumers and to ensure that they have a role in shaping the system. Health Care established its credibility among its constituents, among state officials and among major institutions in the health care system, through its successful organizing and advocacy on a wide range of issues, including expanded access, insurance reform, and community protections during hospital or HMO restructuring. Health Law Advocates is Health Care’s public interest law firm. Since 1996, it has represented Health Care in a variety of matters, including the conversion of nonprofit hospitals. Health Law also represents individual consumers on issues of health care access. To assist in its work, Health Law recruits a legal network of pro bono attorneys from the private bar; these attorneys take on individual cases and at times provide backup legal assistance for Health Law in its representation of Health Care.

When Harvard Pilgrim was placed under receivership, Health Care and Health Law Advocates quickly assembled a legal team made up of Health Law attorneys (including Health Law’s volunteer legal director), attorneys from Community Catalyst (a Boston-based national advocacy organization that works on health care issues), and private-bar attorneys from Lieff, Cabraser, Heimann & Bernstein and Brown, Rudnick, Freed & Gesmer. Health Law Advocates’ legal network was key in recruiting the private-bar attorneys. Ten days after the receivership was announced, Health Care filed a motion to appear as amicus curiae, or “friend of the court.”6 Health Care’s goal in appearing as amicus was to advise the court on how to preserve quality and continuity of care and protect the interests of consumers. In its motion it cited its “rich and relevant expe-

experience in maintaining essential services in the conversion of nonprofit health care facilities to for-profit entities.™ This motion went unopposed.® Ultimately the Supreme Judicial Court ordered that no action be taken on Health Care’s motion to appear as amicus; the court said that Health Care’s appearance would suffice to entitle it to receive copies of all papers and to express its positions on any matter in writing and, with leave of court, in oral argument. Health Care left open the possibility of moving to change its party status.™

At the same time that the lawyers were lining up their arguments, they were working hand in hand with Health Care’s organizing and policy staff. The organizers started by reaching out to their network of community-based organizations throughout the state as well as to other advocacy organizations and unions to alert them to the potential risks to Harvard Pilgrim members and to the public at large. Through their efforts, they built a coalition of approximately fifty advocacy and community organizations. Health Care organizers kept these coalition members informed of the proceedings and Health Care’s activities throughout the course of the receivership through regular meetings and mailings. Health Care also discussed the issues raised by the receivership at a series of meetings with its Health Access Network, a network of community-based outreach workers. Health Care’s Helpline counselors passed along, to callers, information about the receivership and its potential impact on consumers.

III. The Attorney General: Guardian of the Public Interest?

The Massachusetts attorney general, in his role as protector of the public interest, played a critical role in the receivership. He initially attempted to operate in an inclusive manner by convening, within weeks of the receivership, a Harvard Pilgrim advisory roundtable, in which Health Care served as a member. The purpose of the roundtable was to issue status reports on the receivership and to discuss the possible options for resolution. For instance, at one early meeting in February 2000, the roundtable members discussed possible terms, conditions, and mechanisms that could be implemented through a management agreement or otherwise in a Harvard Pilgrim recapitalization or as conditions of sale. They also discussed potential oversight and reporting requirements for managed care companies.

Throughout January and February 2000, Health Care and Health Law Advocates also worked with lawyers in the attorney general’s office to design a “consumer impact survey” to help regulators and watchdog groups evaluate investors or bidders proposing to recapitalize, buy, or merge with Harvard Pilgrim. The final survey instrument explored, in a comprehensive way, the following categories: organizational background; financial considerations; customer satisfaction; networks; care and health management; program management; communication strategies; Medicare HMOs; Medicaid coverage; and community benefits.™

As defined by the attorney general, the possible options for solving Harvard Pilgrim’s financial crisis were (1) sale to a for-profit buyer; (2) infusion of cash from “investors”; (3) state bailout; or (4) liquidation. In late January 2000 the attorney general began soliciting bids from potential buyers and investors. At one point thirteen parties were considering buying or investing in Harvard Pilgrim.™ Possible

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8 See Letter to Maura S. Doyle, Clerk, Supreme Judicial Court for Suffolk County from J. David Leslie, Special Assistant Attorney General (Jan. 21, 2000); Joint Record Appendix, Appeal, A-26, Ruthardt.
9 E.g., Health Care for All would have considered moving to intervene “if the [attorney general] recommended a for-profit option to the exclusion of all other options....” Liz Kowalczyk & Richard A. Knox, State: HMO Stable; Judge Gives More Time, BOSTON GLOBE, Feb. 2, 2000, at F1.
10 Ultimately, because of the way the receivership was resolved, only Harvard Pilgrim itself was required by the attorney general’s office to complete the survey.
11 Convey et al., supra note 2.
suitors included Aetna U.S. Healthcare, Anthem Insurance Companies, Cigna, Oxford Health Plans, Wellpoint Health Networks, and UnitedHealth Group. Selling the state’s largest nonprofit HMOs to a for-profit company was extremely controversial in Massachusetts, which has a strong nonprofit tradition.

Although consumer advocates tried to learn as much as possible about the proposals for getting Harvard Pilgrim out of receivership, the attorney general kept the process secret, declining even to say how many proposals he had received.\(^\text{12}\)

In response, Health Care and Health Law Advocates called on regulators to hold hearings on all proposals for bringing Harvard Pilgrim out of insolvency.\(^\text{13}\)

Health Care and Health Law Advocates suggested that the hearings be modeled after Massachusetts’ environmental review process and that financial information necessary to prepare a consumer impact report be released to the public.\(^\text{14}\)

Frustrated over the closed-door nature of the deliberations, and concerned that a for-profit resolution was in the works, Health Care and Health Law Advocates filed, under Massachusetts’ public records law, a request seeking all documents related to potential buyers or investors (including information on how much they were offering).\(^\text{15}\)

The attorney general released a small number of documents but deemed most of the requested documents to be exempt from disclosure. The attorney general asserted that the public records law did not apply to the temporary receiver who, because she had been appointed by court order, was considered a judicial officer. The attorney general also asserted that other documents fell within recognized exemptions to the public records law. The claimed exemptions were that (1) the documents were memoranda or letters relating to policy positions being developed by an agency, (2) the documents were investigatory materials collected in an ongoing law enforcement investigation, (3) the documents were confidential financial or trade secret documents, or (4) the documents were received by the attorney general’s office pursuant to the attorney-client privilege in its role as counsel to the temporary receiver.\(^\text{16}\)

Health Care and its coalition members also wrote to the attorney general on February 16, 2000, a letter opposing a for-profit buyer option.\(^\text{17}\) The letter said:

We are writing to let you know that we are forming a broad alliance to oppose a for-profit buyer and believe it would be a threat to quality of patient care, local governance, access to coverage and community benefits. Furthermore, a large for-profit national HMO with one-sixth of Massachusetts’ residents could touch off a race to lower quality and higher premiums by other insurers as well. Unregulated competition in the private market has brought us to this crisis. Insurance companies and health care providers should operate in

\(^{12}\) The attorney general required each potential bidder or investor to sign a confidentiality agreement before gaining access to documents about Harvard Pilgrim.

\(^{13}\) Julie Jette, Advocates Want Hearings on HMO, PATRIOT LEDGER, Feb. 2, 2000, at 18.

\(^{14}\) Id.; see also Kowalczyk & Knox, supra note 9.


\(^{16}\) Letter to Laurie Martinelli, Executive Director of Health Law Advocates, from Dean Richlin, First Assistant Attorney General of Massachusetts (Apr. 12, 2000) (on file with Renée Markus Hodin).

the public interest with more
public oversight, not less.\textsuperscript{18}

The letter also recommended a cautious approach to using public funds in any plan for recapitalization. It stated that "the priority for state funding should be to significantly expand coverage for the uninsured and the underinsured" and urged that six conditions be imposed on any state funding option:

1. expansion of coverage for the uninsured and underinsured;
2. patient protections for Harvard Pilgrim members, including an external grievance and appeals process; bans on financial incentives that would cause clinicians to reduce appropriate care; continuity in provider networks; and overall public monitoring of quality of care and access;
3. ongoing public oversight of Harvard Pilgrim's business practices, including reserves, provider payment schedules, and major changes in its lines of business;
4. maintenance of reasonable premium prices, particularly for nongroup, small-group, and Medicare members;
5. protection of employees' rights and working conditions, including the freedom to report quality-of-care problems to regulators without fear of reprisal; and
6. a role for consumers, employees, unions and the community in governance of the plan so that they have a voice in decisions affecting them.

The letter also called on the attorney general to organize public hearings before a decision was made on any particular plan.

Health Care's legal team began researching the potential for-profit bidders' track records. The team researched topics such as premium rate increases, participation in Medicare and Medicaid markets, level of consumer grievances, executive compensation, financial incentive arrangements with providers, and penalties issued by state insurance departments.

Meanwhile, Health Care's organizing staff continued updating information to the members of its coalition by regularly developing and circulating fact sheets.

IV. The Rehabilitation Plan

A rehabilitation plan to retain Harvard Pilgrim's nonprofit status would keep Harvard Pilgrim afloat through certain accounting shifts and by subordinating some of the company's debt. The attorney general and the insurance commissioner announced the plan on March 2, 2000, and on March 20 submitted it to a single justice of the Supreme Judicial Court for approval. The rationale for allowing the accounting shift was that, if there was a reasonable way to reevaluate Harvard Pilgrim's assets, forcing Harvard Pilgrim to change ownership or to liquidate in order to solve the problem of its low reserves was not in anyone's interest.

Health Care and its coalition agreed with this strategy overall since they did not want to force Harvard Pilgrim to sell to a for-profit company. However, the coalition wanted to ensure that Harvard Pilgrim's future business plan would not sacrifice the interests of Harvard Pilgrim members and the community at large either. Health Law Advocates—on behalf of Health Care—filed, on April 10, 2000, a motion to oppose the plan for rehabilitation; it called for an outright rejection of the plan.\textsuperscript{19} Health Care and Health Law

\textbf{The dedicated involvement of health care consumers in health care industry transactions is critical.}

\textsuperscript{18}Letter to Thomas Reilly, Attorney General of Massachusetts, from Robert Restuccia, Executive Director, Health Care for All, et al. (Feb. 16, 2000) (on file with Renée Markus Hodin).

\textsuperscript{19}See Julie Jette, \emph{Group Urges Changes in HMO Plan, Favors Measures to Protect Public}, PATRIOT LEDGER, Apr. 11, 2000; Liz Kowalczyk & Richard A. Knox, \emph{Objections Filed Over HMO Plan; Ex-Harvard Pilgrim Workers Oppose Move to Lift State Control}, BOSTON GLOBE, Apr. 11, 2000, at E1; Jennifer Heldt Powell, \emph{Group Seeks to Delay HMO Plan}, BOSTON HERALD, Apr. 11, 2000.
Advocates argued that the statutory requirements for approving the plan and terminating the receivership had not been satisfied. They argued that the evidentiary disclosure supporting the plan for rehabilitation had been inadequate and that several pieces of documentary evidence had been withheld from the court and the affected parties. And they argued that the consumer protection standards contained in the plan for rehabilitation were insufficient to compensate for the inadequate disclosure in the matter.

Health Care and Health Law Advocates also filed an alternative proposed order for amending the rehabilitation plan. This proposal made six suggestions for enhancing the consumer protections contained in the plan.

(1) **Governance.** Health Care and Health Law Advocates recommended that Harvard Pilgrim be required to have a governing board of between nine and fifteen members, with no fewer than three community representatives serving on the board.

(2) **Independent Health Care Analyst.** Health Care and Health Law Advocates recommended the hiring of an independent health care analyst who would, for a period of three years, report on changes at Harvard Pilgrim in “health care access, levels of service, and community benefits.” Based on experience in other transactions in which information produced by an independent health care analyst was delayed and indigestible when it was eventually produced, Health Care and Health Law Advocates urged that a Harvard Pilgrim community advisory board be created to develop a request for proposal and be involved in the selection and oversight of the analyst. Health Care and Health Law Advocates also suggested that the court (a) impose clear deadlines for preparing and producing annual reports; (b) grant authority to the analyst to gain access to all key documents in the possession of Harvard Pilgrim or regulators; and (c) clarify the purview of the analyst’s monitoring to include changes in critical services for vulnerable populations such as the mentally ill, MassHealth and Medicare beneficiaries, and limited-English speakers.

(3) **Community Advisory Board.** Health Care and Health Law Advocates recommended that Harvard Pilgrim establish a community advisory board consisting of thirteen members representing consumer groups with an established long-term interest in health care. The role of the community advisory board would be to address issues affecting Harvard Pilgrim’s members and the public at large—for example, patient satisfaction and quality of care, prescription drug utilization, and community benefits. The board would review Harvard Pilgrim’s benefit to the community as reported by the independent health analyst.

(4) **Material Change in Services.** Health Care and Health Law Advocates proposed that Harvard Pilgrim be required to seek attorney general approval sixty days in advance of any “material change in services.” Such a material change included changes in benefits, reductions in the number of plans offered, or the merger, sale, or conversion of Harvard Pilgrim to for-profit status. Health Care and Health Law Advocates recommended that Harvard Pilgrim bear the burden of showing “reasonable necessity” for the change. The burden would have to be proven by producing a written presenta-

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20 Amicus Curiae Health Care for All’s Motion to Oppose the Temporary Receiver’s and Attorney General’s Motion for Approval of Plan of Rehabilitation or, in the Alternative, to Amend the Plan of Rehabilitation and Memorandum in Support, Ruthardt (Apr. 10, 2000).

21 Health Care and Health Law Advocates objected specifically to the withholding of key documents including Harvard Pilgrim’s turnaround plan, 2000 business plan, February 2000 financial data, and an audit completed by KPMG Peat Marwick. Id. at 8–12.

22 Id. at 12–18.

23 Health Care and Health Law Advocates defined “community representative” as (1) a member of Harvard Pilgrim but not an employee involved in benefits decision making or management or (2) an individual representing an at-risk group in the wider population such as the uninsured, disabled, low-income, or person of color or with limited English-speaking ability. Id. at 15.
tion explaining the nexus between a documented problem or need and the change being proposed. There would have to be notice to the public and an opportunity for public comment.

(5) Adequate Resources for Oversight. Health Care and Health Law Advocates asked the court to require that the attorney general and the insurance commissioner assure that they have the resources and expertise to conduct ongoing oversight and monitoring (including the resources to report to the public on the results of their work).

(6) Reporting. Health Care and Health Law Advocates recommended that during the administrative oversight period, the insurance commissioner should be required to report regularly to the Supreme Judicial Court. They recommended that the first report on the progress of meeting the financial benchmarks contained in the final order be completed within ninety days of the lifting of the receivership and every ninety days thereafter throughout the administrative oversight period. They suggested posting these reports on the Division of Insurance’s Web site.

Opposition to the rehabilitation plan also came from former employees, a malpractice claimant, a Massachusetts provider (Boston Regional Medical Center), three New Hampshire providers, and Blue Cross and Blue Shield of Massachusetts.24

Health Care’s organizing staff widely distributed to its coalition members fact sheets about the rehabilitation plan and Health Care’s proposed conditions. The fact sheets also urged people to speak at the public hearings on the plan and offered to help put together testimony or coordinate with other speakers or both.

At one of two public hearings on the rehabilitation plan in Boston, on April 14, the Health Law Advocates executive director (Laurie Martinelli) and volunteer legal director (S. Stephen Rosenfeld) implored the attorney general not to approve the plan until key financial and business documents had been disclosed to the court and affected parties. Health Care testified, as did many other members of the coalition. Community groups from Lynn, Brockton, Leominster/Fitchburg, and Framingham supported the recommendations from Health Care and Health Law Advocates and testified about their experiences working to hold their local hospitals accountable when they had merged or had been sold. The Parents Action League and Service Employers International Union (SEIU) representatives focused on the potential impact on members who use mental health services, which were to be contracted out to a for-profit company. A representative of an organization from western Massachusetts emphasized the need for community participation in the rehabilitation process, given their experience with Kaiser Permanente, which had recently left the market in that region. A representative of Community Catalyst testified in order to place the Harvard Pilgrim receivership and the plan for rehabilitation in a national context.

The attorney general rejected Health Care and Health Law Advocates’ recommendations around the disclosure of documents through regular reporting. The attorney general alleged that these requirements would place Harvard Pilgrim at a competitive disadvantage since those same mandates would not be imposed on other Massachusetts HMOs.25 Although the attorney general attempted to persuade Health Care and Health Law Advocates to drop their objections to the rehabilitation plan, the two sides could not reach an agreement.26

At the hearing on the rehabilitation plan that the single justice of the Supreme Judicial Court held on April 27, Health

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24 Blue Cross and Blue Shield of Massachusetts argued that the state regulators should not “sponsor” Harvard Pilgrim and therefore put its competitors at a disadvantage. Response of Blue Cross and Blue Shield of Massachusetts Inc. to Temporary Receiver’s and Attorney General’s Motion for Approval of Plan of Rehabilitation, Ruthardt (Apr. 10, 2000).


26 Id.
Care and Health Law Advocates presented their opposition to lifting the receivership. They highlighted the arguments made in their formal opposition regarding disclosure of key documents. And they reiterated the six recommendations contained in their amendments to the plan.

The order (issued by the single justice on May 24) approving the amended plan for rehabilitation included a provision requiring that Harvard Pilgrim “fund for three years an independent health care analyst selected by and contracted with the Attorney General to analyze and report on changes at Harvard Pilgrim in health care access, levels of services and community benefits.” The order also required that for three years Harvard Pilgrim's board give the attorney general sixty days' notice before agreeing to a merger, acquisition, or joint venture; reducing its service areas or lines of business; making any material change in network contracting, member contracts, or provider contracts; or making any material change in member benefits (e.g., appeal procedures, emergency room coverage, determination of medical necessity).

The memorandum of decision on objections to the amended plan of rehabilitation (also issued by the single justice on May 24) rejected Health Care’s (and others’) objections to the amended plan. The memorandum held that, despite Health Care’s objections to the lack of public disclosure, there was “nothing inherently suspect about [the insurance commissioner’s] opinion and there is a substantial basis to believe that her opinion is credible.” However, stating that “[Health Care] has been permitted to participate in these proceedings by virtue of its perspective as a consumer advocate organization in the area of health care and related fields,” the memorandum reaffirmed Health Care’s “standing.” The memorandum found that Health Care’s suggestions regarding the board were in the discretion of the attorney general, not the court. However, the memorandum noted, “where hard decisions may possibly be on the horizon, particularly involving questions of compensable services and premiums, some form of ‘community’ input may go a long way towards gaining general acceptance for those decisions.”

The decision failed to include the community advisory board that Health Care and Health Law Advocates sought. However, the new Harvard Pilgrim board did appoint two new members who were expected to bring a consumer perspective to the table: a progressive former state legislator now in academia and a Latina health center director from a low-income city west of Boston.

V. Pursuing Public Accountability

The Supreme Judicial Court dismissed the receivership proceedings on June 21. The basis for the appeal that Health Law Advocates filed on the same day on behalf of Health Care was the lack of disclosure of key documents upon which the insurance commissioner relied in her affidavit to the Supreme Judicial Court. Again, with the help of its legal team, Health Law led the effort to submit its September 14 brief outlining the legal arguments in favor of disclosure. Health Law argued that, notwithstanding that it was not a party—and in fact had not even been granted

29 *Id.* at 7.
30 Memorandum of Decision on Objections to the Amended Plan of Rehabilitation, *Ruthardt* (May 24, 2000), at 8.
31 *Id.* at 7.
32 *Id.* at 8.
amicus status—it had standing to bring the appeal.\footnote{Brief of Appellant, Comm'r of Ins. v. Harvard Pilgrim Health Care Inc., No. SJC-08354 (Mass. Sup. Jud. Ct. Sept. 14, 2000), at 8–13.} It then argued that the single justice erred in failing to require that the documents be disclosed to the court.\footnote{Id. at 13–32.} Health Care was supported by a brief from Walter Miller, a Boston University law professor specializing in bankruptcy.\footnote{Amicus Curiae Brief of Professor Walter W. Miller Jr. in Support of the Appellant’s Appeal, Harvard Pilgrim; see also James Bandler, Accountant Had Doubts About HMO, WALL ST. J. (Oct. 4, 2000), at NE1, NE4.} The attorney general and the insurance commissioner formally opposed (on October 16) Health Care’s appeal on the grounds that (1) Health Care did not have standing, (2) the case was moot because the receivership was closed, and (3) the single justice did not abuse his discretion in approving the rehabilitation plan without requiring the disclosure of additional information.\footnote{Brief for the Commissioner of Insurance and the Attorney General, Harvard Pilgrim (Oct. 16, 2000).}

The Supreme Judicial Court ruled (on April 26) that the single justice erred by failing either to call for the underlying documents or to require that the insurance commissioner explain in more detail her reasons for seeking an end to the receivership. The court also held that an amicus might be permitted to view these underlying documents, subject to certain safeguards such as protective orders and confidentiality agreements. Although it did not undo the termination of the receivership and stopped short of granting standing to Health Care, the court’s ruling represented a tremendous victory for consumer interests and is an important tool for consumers in future HMO receiverships.

VI. Monitoring the Effects

In June 2001, well over a year after the approval of the rehabilitation plan, the attorney general’s office issued a request for responses for the independent health care analyst position. Health Care reviewed every proposal submitted and participated in the interviews. Health Care wanted to ensure that the selected analyst had (1) a good understanding of Harvard Pilgrim and potential changes in Harvard Pilgrim in the context of health insurance and access issues in Massachusetts and (2) the ability to work collaboratively with regulators, insurers, and consumer representatives alike.

\footnote{Health Law Advocates filed its reply brief on behalf of Health Care on November 2, 2000.}

\footnote{Liz Kowalczyk, Harvard Pilgrim Reports $17M Loss; CEO Says Turnaround Working; HMO on Target to Break Even This Year, BOSTON GLOBE, Mar. 2, 2001).}
In the end the state hired Dougherty Management as the independent health care analyst. The analyst’s primary responsibility is “to analyze and report on changes at Harvard Pilgrim in healthcare access, levels of service, and community benefits.” The analyst develops an assessment plan using both quantitative and qualitative (e.g., focus groups) methodologies. For health care access issues, the analyst examines behavioral health; prescription drugs; and rehabilitation services for non-English-speaking populations as well as for the chronically ill. For issues of coverage, the analyst evaluates the availability of services, pricing, scope of benefits, and enrollment or disenrollment patterns in Medicare, Medicaid, nongroup, and small-business product lines. In the area of community benefits, the analyst evaluates funding levels, types of services, and community participation. The analyst is to prepare a baseline assessment for Harvard Pilgrim, assess Harvard Pilgrim for fiscal years ending 2001, 2002, and 2003, prepare a report incorporating each assessment, and file the report—available for public inspection—with the attorney general’s office.

VII. Discussion

Although the story of the Harvard Pilgrim financial crisis is not yet completely written, many lessons can be drawn as useful guides for Massachusetts (and other states’) consumers facing similar changes in their health delivery systems.

First, the deregulation of the insurance industry in the early 1990s in Massachusetts and elsewhere has failed to protect consumers. Insurance departments must exercise greater oversight over insurers to prevent crises of this kind from occurring. A report regarding the level of resources and the regulatory effectiveness of state insurance departments (issued in April 2000 by the Center for Insurance Research, a nonprofit watchdog organization in Cambridge, Massachusetts) found that the Massachusetts Division of Insurance’s relative budget ranked lowest out of all fifty states. It also found that the office ranked forty-sixth out of the fifty states in policing the insurance market to protect consumers from financial insolvency as well as improper market practices. The report’s recommendations would enhance the division’s oversight and make it more accountable to the public.

At one point, the attorney general’s office was discussing a package of reforms, including strict solvency standards, detailed quarterly filings, and state-mandated premium rates. To date, however, the office has had no concrete proposals for setting minimum financial reserves, for creating an “HMO insolvency fund” with assessments on HMOs and health care providers, or for establishing

41 At writing, the independent health care analyst had finalized a draft of the baseline assessment tool and was awaiting approval from the attorney general’s office. In designing the assessment tool, the analyst met with and solicited input from key consumer groups that had been involved in the earlier stages of the receivership. Telephone Interview with Wendy Holt, Dougherty Management (Sept. 6, 2002).
42 Brendan Bridgeland & Nathaniel Orenstein, Ctr. for Ins. Research, A Hole in the Bucket: Massachusetts’ Failure to Police Insurance Companies Leaves Millions of Consumers Vulnerable (2000), at 1. The Center for Insurance Research called for the following reforms: (1) the states should establish accreditation standards and minimum requirements for market conduct and financial regulation by each state to ensure that the states regulate these practices; (2) the budget of the Massachusetts Division of Insurance should correlate to the amount of premiums that the insurance industry generates; (3) the Massachusetts Division of Insurance should establish a dedicated market conduct department, with twice the current number of market conduct examiners and financial examiners, and with an ample budget; and (4) government officials overseeing the insurance industry must be more responsive to the needs of consumers by (a) making the commissioner of insurance an elected official; (b) creating a new position—consumer’s insurance advocate—indepen dent from the Division of Insurance; and (c) posting all information regarding insurers and their market-conduct practices on the Internet. Id. at 11.
Fourth, whatever the approach, regula-
tory improvements must be put into place
as soon as possible.

Second, the Health Maintenance
Organization Insolvency Law passed in
1999 must be amended to permit a greater
level of public accountability when an
HMO is in financial crisis. The Supreme
Judicial Court should be required to
examine all documentation supporting a
proposed plan for rehabilitation of an
insolvent HMO, and provisions must be
made for making these documents avail-
able to the public so that consumers may
evaluate what the potential impact of a
plan is on access to health care services.

Third, and most significant, the ded-
icated involvement of health care con-
sumers in health care industry transac-
tions is critical. But for Health Care and
Health Law Advocates, the Harvard
Pilgrim receivership and designing the
rehabilitation plan would have happened
largely behind closed doors. In particu-
lar, Health Care and Health Law Ad-
vocates’ success in bringing the consumer
voice to the table was largely due to
employing a unique and powerful blend
of legal advocacy, organizing, and policy
support. By maintaining constant pres-
sure on the insurance commissioner and
the attorney general, and by keeping the
issue in the public eye, the consumer
coalition ensured that a for-profit solution
was not chosen. The consumer impact
survey helped yield a wealth of informa-
tion about Harvard Pilgrim for the public.
Health Care and Health Law Advocates
hope that future regulators will avail of
it. We also had a strong hand in design-
ing the job description for the In-
dependent Healthcare Analyst that was
appointed to hold Harvard Pilgrim’s feet
to the fire and keep consumers informed
about Harvard Pilgrim’s activities. Finally,
and most significantly, our dedicated pur-
suit of the appeal on the issue of the dis-
closure of documents ensures that con-
sumer interests will be paramount in all
future receiverships.

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44 One partial solution came in July 2000, when the Massachusetts legislature enacted a
managed care law. A provision of the law requires third-party payers to pay providers
within forty-five days. This helps serve as an “early warning system” if insurers or HMOs
fail to meet the requirement.