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TortSource

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Another Chink in the ERISA Immunity Shield From State Court Claims:

American Mfrs. Mutual v. Sullivan

Scott D. Pomfret

Plaintiffs who bring state negligence claims against managed care organizations (MCOs) operating in the context of ERISA employee benefit plans often find themselves hauled into federal court on the basis of removal jurisdiction. In recent years, a subset of such claims has won remand to state courts based on *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995). *Dukes* created a distinction between claims for a quantity of benefits and claims for quality; only state law claims of the former variety could be recast as claims under ERISA and were therefore the proper subject of removal jurisdiction under the doctrine of complete preemption. Under *Dukes*, a "quality" claim, such as an allegation of vicarious liability for medical malpractice, is remanded to the state court in which it was filed.

Until now, though, another subset of claims has universally been found to be a proper subject of complete preemption and thus federal removal jurisdiction: claims charging negligent decision-making in the context of the managed care utilization review (UR) processes. These are the processes that determine from the medical record whether medical treatment was necessary and covered by the employee welfare benefit plan.

The federal courts have held that such claims are "really" a "claim for benefits" under ERISA § 502(a)(1)(B). Because federal courts have exclusive jurisdiction on ERISA enforcement suits of this kind, state claims alleging negligent UR decision-making have been held completely preempted, and the federal district courts have found removal jurisdiction. For plaintiffs, the end result is either a drastically limited recovery under ERISA's remedial scheme or no recovery at all.

A recent Supreme Court decision, *American Mfrs. Mutual Ins. Co. v. Sullivan*, 119 S. Ct. 977 (1999), may have changed all that. Plaintiff's counsel will now be able to contend by analogy that even claims for negligent UR are not completely preempted and should be remanded to the state court for resolution on the merits (including interposition of the defense of ERISA preemption under ERISA § 514(a)).

Sullivan's Reasoning

In *Sullivan*, the Supreme Court determined that a UR firm acting in the context of reviewing a workers' compensation (WC) claim for benefits was not a "state actor." As part of Pennsylvania's WC scheme, injured workers may seek compensation for expenses for medical treatment for their injuries. Compensation is available only for treatment that is "medically necessary" and "reasonable." To ensure that it pays only claims for which compensation is available under the WC scheme, the WC

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Legislative Update

Patients' Rights to Sue Under Managed Care:

ABA Policy, TIPS Role

Leo J. Jordan

Amid intense public concern, the stage is set in Washington for the next round of debate on managed care. Despite major differences in approaches, Democrats and Republicans alike recognize the issue as one neither party can ignore. Based in large part on action taken by the TIPS leadership over the past several months, the ABA is well positioned to have an impact on the ultimate outcome.

Introduction of five bills by senior congressional leaders highlights the importance of this debate. The legislative intent is to protect consumers in managed care plans or who have other health coverage.

What's It All About?

Whether real or perceived, there is growing criticism that managed care organizations are withholding or denying necessary medical procedures based mainly on financial or profit-oriented reasons. Under existing federal law, persons who are denied medical care or who suffer from the quality of medical care provided have limited remedial rights against managed care organizations. The federal law in question, ERISA, preempts claims under state law that "relate to" employee benefit plans. Because more than 125 million American workers are estimated to be covered under employer-provided, ERISA-protected plans, the anticipated legislative debate has stirred much public interest, as well as the interests of managed care providers, insurers, and employers.

While ERISA preempts state law "relating to" employee benefit plans, it has always afforded at least minimal remedies for those claiming improper denial of medical treatment. Where benefits are improperly denied, claimants are entitled to bring an action in federal court. However, the only remedy available is the recovery of the costs of health services previously denied. In those situations in which plans have been determined to have acted in bad faith, attorney fees and costs are permitted.

Participate in the first *TortSource* e-poll! See pages 4 and 5 for details and for point/counterpoint plaintiff's and defense views on managed care liability.

But ERISA does not allow for non-economic loss damages under state or federal law. ERISA's legislative history recognized that exposing employers to traditional state tort and contract actions would discourage the development of health benefit plans, possibly leading to higher costs and withdrawal of an important employee benefit. As a result, the philosophy of ERISA was to establish balance between benefits afforded to employees against costs incurred by employers. Moreover, when ERISA was enacted in 1974, one of its purposes was to keep multistate corporations from having to deal with a vast array of state insurance and health care regulations.

Points of Difference

In earlier days, consumers and insurers argued about payment only after the treatment was provided. In today's managed care environment, pre-approval of health care treatment is often required.

Both sides of the aisle recognize that some relief must be provided. The tradi-

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Midyear Meeting Roundup: "L.A. Confidential" Report

Sandy Astor

The TIPS Scholarship Fund is increased by $20,000, thanks to the generous donation of Jack Gibson, president of the International Risk Management Institute (IRMI).

Jill Berkeley, Dianne Dailey, and Sue Popik getting ready for a TIPS Council meeting.

Kim Ebert, Tom Brown, Kip Reader and Dudley Oldham take a break from meetings.

Three Texans in Beverly Hills: Arnie Reyes, Alex Gonzales, and Hervey Levin.

Photos courtesy of John Pavlou

The 1999 ABA/TIPS Midyear Meeting in the City of Angels was a smashing success!

TIPS members were seen everywhere from Century City to Beverly Hills, Santa Monica, and the hills beyond…and of course in the dozens of meeting rooms to take care of Section committee business from A (Admiralty) to Z (well, W—Workers' Compensation).

Members were delighted with this year's accommodations in the Japanese-style Nikko Hotel. From the stunning Zen garden in the lobby, complete with soothing waterfall, to the gorgeous and beautifully designed rooms…the Nikko was definitely a first-class experience.

The TIPS gourmet food division was in heaven as they tasted and tested every great restaurant in town. From Spago to the Ivy to Patina and Matsuhisa, no hip gourmet restaurant was ignored!

The TIPS conference officially began on Thursday evening, February 4, with a gala welcoming reception in the beautiful Nikko lobby sponsored by the West Group.

Friday, February 5, the hotel's meeting rooms were filled to bursting with TIPS meetings in all available conference rooms and suites.

One of the more unusual and outstanding programs of the entire Midyear Meeting was held Friday afternoon at the Museum of Radio and Television in Beverly Hills. Legal scholars and the head writers (all attorneys) of the hit television series *Ally McBeal, The Practice*, and *Law and Order* anchored a panel devoted to looking at how lawyers are portrayed on television. Replete with many, many clips from TV's celebrated legal past (*Perry Mason* and *The Defenders* were just a few) as well as exceptional clips from the head writers' shows, the audience was given a real treat when the panel looked at the depiction of lawyers on TV.

On Friday evening, the TIPS Women and Minorities Involvement Committee, chaired by Marjie Barrows from San Francisco, held its sold-out reception with the generous sponsorship of State Farm Insurance.

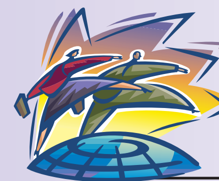
Saturday, February 6, TIPS members attended committee meetings. They also toured the town…there were visits to the famed Getty Museum, the Van Gogh exhibit at the L.A. County Museum, and Universal Studios.

Saturday night was the social "piece de resistance" of the meeting. TIPS took over the entire McCormick and Schmick restaurant on Rodeo Drive in Beverly Hills for an extraordinary dinner-dance. The famous two-story seafood palace, centered around a gorgeous brick patio, was filled with TIPS members sitting outside under the stars and the moon. After an extraordinary buffet…TIPS members rocked to a terrific six-piece band filling the night with music from Motown to rap and Celine Dion to Lee Ann Rimes. It was indeed a night to remember.

Cheers to the TIPS staff and all the members whose involvement adds so much to the Section. L.A. was a delight, and with meetings scheduled in Phoenix in May, and Atlanta in August…make your reservations now…you sure don't want to miss a thing!❖

Sandy Astor practices law with Stall Astor & Goldstein when he's not leading tours of Los Angeles.

TIPS will meet next on May 13-17 in Phoenix at the TIPS spring meeting (312.988.5672 or www.abanet.org/tips). To register for the ABA Annual Meeting—August 5-10 in Atlanta—call 847.940.2124 or visit www.abanet.org.



In Motion

In Memoriam. Donald J. Farage of Haverford, Pennsylvania, an active TIPS member for many years, passed away in his home while celebrating receiving an honorary doctorate from Pennsylvania Law School. TIPS extends condolences to his family and friends.

Donald H. Flanary, Jr., and **David J. Schubert,** litigation attorneys, have joined the Dallas office of **Arter & Hadden** as partners. They previously were co-chairs of the tort and insurance trial group at Dallas' Vial, Hamilton, Koch & Knox. **William W. Speed** has also joined **Arter & Hadden** as an associate, handling insurance coverage and bad faith litigation.

Kenneth L. Harrigan of the Albuquerque office of **Modrall, Sperling, Roehl, Harris & Sisk, P.A.**, has been listed in the 1999-2000 edition of *The Best Lawyers in America.* He is listed for his expertise in business litigation and personal injury litigation.

John E. Sebastian, formerly associate surety counsel for Fireman's Fund Insurance Companies, has become associated with the law offices of **Leo & Weber, P.C.**, in Chicago. The firm concentrates in fidelity and surety bond claims and litigation, as well as construction law and bankruptcy and D&O litigation.

Also In Motion: It could be you—visiting China! TIPS, through the International Tort and Insurance Law and Practice Committee and the Hawaii State Bar Association, announces a joint program, *Principles of Chinese Law,* between Guangdon (formerly Canton) Province legal leaders and American lawyers. The program, November 14-17, 1999, will include two days of presentations from Chinese attorneys, including site visits, and a one-day jury trial presented by American attorneys. The venue is about two hours from Hong Kong by train and also offers opportunities for side trips to Beijing and the tropical island of Hainan. For more information, contact **Michael Cass** by phone at 847.304.1060 or by e-mail at mikecassre@aol.com.❖

Please submit news via fax or e-mail to Anne Spencer: 312.988.6081; spencera@staff.abanet.org. Entries will be edited for space and content.

tech.tips

Michael Vargas

Increasing Your "Net" Profits:

Net Expert Offers Lawyers Tips on Creating a Low Cost, Easy-to-Use Web Site

As the Internet emerges as an effective sales and marketing tool for a wide range of legal services, many lawyers and small firms are asking how they can create a cost-effective web site of their own that's quick and easy to set up.

There are a number of online services that provide "click and go" solutions to individuals who recognize the necessity of having a personalized web site. Sign-up is simple and can be done at a variety of locations, including Netopia (www.nvo.com), Big Planet (www.bigplanet.com), GeoCities (www.geocities.com), or Netscape (www.netscape.com). These companies offer services that eliminate the need for hiring expensive site developers, learning numerous programming languages, or paying huge monthly hosting fees.

For example, using any of these services, an attorney can easily set up a complete web site that includes:

• A full description of their services
• Web-initiated conference calling
• Answers to frequently-asked questions (FAQs) posted on their site
• A directory of links to related legal service sites.

10 Simple Guidelines for Creating an Effective Web Site

1. Determine the information you'd like to display on your site. For example, you may wish to discuss your services in greater detail or post news and updates about your practice area.

2. Develop a look that complements your style. Choose colors and formats that are easy on the eyes.

3. Be consistent with all of your messages. All the information should be the same on your web site, business cards, brochures, and so forth.

4. Organize your site before you get started. If you plan to create more than one page of content for your site, make it easy to navigate.

5. Create a layout to see how you'd like your site to look and know where the various components will be positioned. Will the site have pictures, logos, or other artwork? For example, if you're planning to use photos, you'll need access to a digital camera or a scanning device. Once you're ready, the image can be easily placed into the web site.

6. Resist the urge to continuously tweak the design. Stick to the main objective(s) you set.

7. Update your web site continually with fresh news and information regarding your practice, areas of law, or activities.

8. Check to make sure nothing falls through the cracks. For example, check that all site link addresses are fully functioning.

9. Promote your site regularly once it is launched. Many people think that once they get their web site up and running...they're set. The key is promoting the benefits of visiting the site and not just the URL. If no one knows about your web site, it's useless. Be consistent and diligent, and take full advantage of all the opportunities to market it including:

• List your site in free classified sections, online directories, and on search engines like HotBot, Yahoo, or AltaVista
• Cross-link it with other web sites (colleagues, bar associations, group services)
• Use traditional marketing to advertise and promote your web site, e.g., put your URL on business cards and all marketing collateral.

10. Encourage visitors to come again and to tell others about your web site. Positive word-of-mouth is your greatest asset.

By following these guidelines, you can readily avoid getting tangled in the web...and use it, instead, to weave your rainmaking magic.❖

Michael Vargas is vice president of marketing with Netopia, Inc., makers of Internetworking products.

Visit the Tort and Insurance Practice Section's Web site at www.abanet.org/tips.

Book Review

Reviewed by Timothy W. Bouch

A Complete Guide to Lead Paint Poisoning Litigation

By Alan Kaminsky (ed.), Paul Bottari, and Michael Boulhosa

As litigators, we are continually faced with new cases, new issues, or new subjects. While the practice of litigation becomes increasingly specialized, one of its continuing pleasures and satisfactions is the new challenge: handling cases in different or new areas. Part of this challenge, of course, is discovering where you can acquire knowledge in a new field. Alan Kaminsky and his co-authors, Paul Bottari and Michael Boulhosa, in their recent book, *A Complete Guide to Lead Paint Poisoning Litigation,* have given us such a start in an increasingly specialized area.

It is assumed that a competent litigator is familiar with basic evidentiary law and trial practice. However, lead paint litigation is an area that requires another step. This book is valuable not only to the litigator with a new case to try, but also to counsel for landlords, tenants, and manufacturers who advise their clients on how to avoid litigation. Aptly titled, it is a complete guide that presents an excellent step-by-step process to evaluate, counsel, or litigate a lead paint contamination case.

Lest one think the book is solely for those representing defendants, the book provides an effective road map for those representing plaintiffs in describing what is necessary to establish a plaintiff's case.

Appropriately enough, the book pays the closest attention to setting forth all of the major steps in the handling of such a case. This is its best value. Beginning with proper and effective investigation, the authors lead the lawyer through the maze. The lists of discovery required for effective advocacy are of particular benefit.

The chapter on "Confounding Variables," though brief, should be thoroughly understood by those entering the toxic tort field for the first time. Evidentiary causation issues are particularly challenging in any toxic tort case. The authors here do not attempt to present the definitive treatise on lead paint poisoning, and properly so. This book is where a practitioner should start, not end. What the authors accomplish is to tell the litigator where the basic issues and research are located and how to get there. This saves the lawyer countless time avoiding many "rabbit trails" and false starts.

The book also includes sample questions for examining witnesses, useful discovery and investigation checklists, and a case study focusing on a plaintiff's and defendant's efforts in handling a multimillion-dollar lawsuit on behalf of a child tenant against a landlord.

Other useful topics include a Baedecker of recent cases on the issues: insurance coverage, immunity, notice, and applicable government regulation—state-by-state.

The table of contents is well organized to permit the reader to isolate the subject areas of interest. An index would have been helpful, especially in a work like this, which invites re-use.

For those interested in the area of toxic tort law that is becoming ever larger, *Lead Paint Poisoning Litigation* is a useful, readable book. The authors have written a thorough primer on this specialized area of their practice in a manner that is simple to comprehend. A job well done.❖

Timothy W. Bouch of Charleston, SC, concentrates in toxic tort and environmental litigation and is chair of the TIPS Toxic Tort and Environmental Law Committee.

Lead Paint Poisoning Litigation is a TIPS publication and is available to members for $79.95 ($89.95 for nonmembers). To order, or to get information on other TIPS publications, call 1.800.285.2221.

A Defense Perspective on Managed Care Liability:

More Litigation Is Not the Best Policy

Rita Theisen

The ABA may know what is good for lawyers, but it doesn't know health policy. Advocating lawsuits against health plans for the decisions they make about health coverage will result in higher costs for health coverage and ultimately force more people out of the market for health insurance. The prospect of unlimited damages for denying payment for care may lead to more care, but not better care. The nation's health policy is badly served by blunt force incentives to pay for whatever a medical provider recommends.

The cries for liability are not emanating from the general public but from those strangest of bedfellows: doctors and lawyers. The medical community, which has so vehemently denounced the U.S. tort liability system's handling of medical malpractice claims, now wants to throw insurers to the wolves. However these liability proposals may be characterized, they are not about "patient protection."

The usually unspoken premise of the liability proposals is that whatever the doctor or other health care provider recommends is always best. The loudly-trumpted premise is that only sheer greed and profit-mongering could motivate a health plan to deny coverage for whatever the provider recommends. If these assumptions are going to drive health policy in the 21st century, health care quality and cost containment will be the victims. Inevitably, so will the patients.

The truth is much more complex. Individual doctors are not infallible. A multitude of factors influences their treatment decisions, not all of which are consistent with the best interests of the patient. In a minor but telling example, doctors admit to prescribing useless antibiotics for children—helping fuel the development of antibiotic-resistant strains of bacteria—knowing the treatment is worthless, simply to appease the children's parents.

Researchers at RAND, in a review of academic literature on quality of care, recently concluded that the quality of health care provided in the United States varies among hospitals, cities, and states. They concluded, however, that the solution is not simply a matter of spending more money on health care. "A large part of our quality problem is the amount of inappropriate care provided in this country. Elimination of such nonbeneficial and potentially harmful care would lead to a large savings in human and financial costs."

To suggest, as the cries for health-plan liability do, that insurers should simply pay on the recommendation of a provider or risk untold liability, short-circuits necessary efforts to ensure that all insureds, or health plan members, or taxpayers—those paying the health care freight—obtain value for their money. Many of the federal policymakers advocating provider control of the purse-strings are the same ones who fight a never-ending battle against extensive fraud and abuse in federal health programs (estimated at 14%-17% of all health claims). They know well enough that not every health care provider is always right, and would not dare subject federal programs to the same standards proposed for the private sector.

The *Fox* Case: Breast Cancer Treatment

Quality and value in health care are elusive concepts, and there will always be difficult cases. But penalizing legitimate efforts to make the right decisions is no solution. The much-publicized 1993 case of *Fox v. HealthNet*, in which a California jury awarded $89 million in damages, including $77 million in punitive damages, for an HMO's refusal to pay for coverage clearly excluded under its contract, shows how destructive of good health policy the liability system can be.

Despite the lack of clear evidence that bone marrow transplants improve survival rates, *Fox v. HealthNet* and other emotional, heart-wrenching lawsuits brought on behalf of women with breast cancer forced most plans to make the legally, but not medically, prudent decision to cover the treatment.

Some might argue that this was the right result. The evidence suggests otherwise. Preliminary reports of two large studies indicate that bone marrow transplants are not more effective than conventional treatments for breast cancer.

Perhaps society nevertheless wishes to say that health plans should be required to pay for the treatment, as expensive, dangerous (1% to 5% of patients die from the treatment itself), and inconclusive as it may be. But insurers who stated in their agreements with policyholders that such treatments would not be reimbursed should not be at the mercy of the passions of juries understandably sympathetic to victims of serious illness and injury. And all those who pay a premium for private health insurance and taxes for public health programs must know that they will foot the bill.

The Goodrich Case: Cancer Treatment

The *HealthNet* award was surpassed earlier this year in the case of *Goodrich v. Aetna U.S.Healthcare,* in which a jury hit Aetna for $120.5 million, including $116 million in punitive damages, allegedly for failure to pay for experimental treatment for a rare form of stomach cancer. According to Aetna, the patient, Mr. Goodrich, was not a candidate for the experimental treatment because his cancer was in an advanced stage. Mr. Goodrich received all the care for which he was medically eligible, and Aetna paid for everything Mr. Goodrich was entitled to under his health plan.

Mr. Goodrich died of his stomach cancer, but not because of anything Aetna did or did not do. Society cannot afford to allow grieving plaintiffs and complicit juries to exact revenge on health plans when miracles do not happen.

None of this is to say that health plans, any more than doctors, are perfect. Just as we can assume that most doctors are well-intentioned if not always right, it is fair to assume that most health plans are also well-intentioned if not always right. "Right"—that is, the optimum level of medical treatment for a particular individual—is not to be found in a courtroom. Nor, if *HealthNet* and *Aetna* are representative, is a fair and dispassionate assessment of the contractual obligations of a health plan to pay for it.

Litigation Alternative: External Review

An alternative with better prospects than litigation for patient protection is the growing use of external review. Employer-sponsored health plans have always had the obligation under ERISA to provide for "full and fair review" of benefit claim denials, and plans have often referred difficult questions of the appropriateness of recommended treatment to outside experts. In response to calls for more "independent" review of claim denials in managed care settings, however, more plans have begun implementing external review procedures using independent, expert medical professionals with no ties to the health plan.

Over half the states have enacted laws requiring external review for managed care plans, and more are expected to do so this year. Experience to date indicates that very few claims out of the millions of individuals insured by a plan go to external review, an indication that, notwithstanding the occasional horror story, patients are being reimbursed for the treatment they need.

While external review may make plan participants feel more satisfied with the reimbursement decisions their plans are making, it is too soon to know what effect it will have on health care policy. If external review decisions are biased in favor of paying for more treatment, not necessarily better treatment, little progress will be made in improving the quality of health care in this country.

Better, more efficient delivery of health care requires more research, better data, and the will of both the medical community and health care payers to adhere to the best clinical judgments. It does not mean demanding payment for anything a provider recommends, regardless of cost, value, and risk. It certainly does not mean flooding health plans with threats of ruinous litigation, or demonizing those who genuinely seek to assure that the patient receives the best care, not the most care, available.❖

Rita Theisen, a member of the Health and Disability Insurance Law Committee, is with the Health Insurance Association of America in Washington, D.C. The views expressed are her own.

***TortSource* E-POLL: MA**

1. Should ERISA preemption of state c
2. Should HMOs be liable for medical

SOUND OFF! Send your views by e-r (spencera@staff.abanet.org) or by fa May 21. Responses will be edited of *TortSource*.

A Plaintiff's Perspective on Managed Care Liability:

Rein in HMOs; Give Patients Right to Sue

Lisa June Cox

For years HMOs have managed to hide behind the shield of ERISA for virtually all negligent and/or wrongfully denied care. Other than in limited circumstances, ERISA has allowed HMOs to injure with impunity by delaying and denying health care. The only meaningful rebukes received by HMOs for their wrongful behavior have been in lawsuits seeking to punish them for their negligent, tortious, and illegal practices, which invariably exist in the name of "cost-saving." For example:

• Breast cancer victim Nelene Fox died after being denied a bone-marrow transplant by HealthNet, despite her treating physicians' recommendation that she was a prime candidate for the procedure. Her family was awarded $89.1 million, mostly as punitive damages.

• After the *Fox v. HealthNet* award, Aetna said it made some policy changes about care delay and denial. Now, after a recent $120 million verdict against Aetna, in *Goodrich v. Aetna*, Aetna says that the company will consider more changes. Aetna has also recently decided to allow its members access to external review by independent physicians. Mr. Goodrich had a fast-moving form of stomach cancer. His physician recommended a bone-marrow transplant. Aetna denied the treatment as experimental, although the policy contained no such exclusion. The standard for approval was 48 hours, but Aetna delayed for six months, until the cancer spread to Goodrich's liver and it was too late.

• In *Adams v. Kaiser Foundation Health Plan of Georgia*, after repeatedly "blowing off" the mother of a gravely ill six-month-old with a fever of 104-105º, Kaiser was delivered a large verdict for their behavior. Besides ignoring the gravity of the illness, when it finally acknowledged the severity of the illness and directed the child to another care facility, Kaiser sent the child to a hospital 42 miles away, with which it had a big contract. The Adams child was directed right past several other competent hospitals en route to the hospital with which Kaiser had its "bargain deal." The result was that the child suffered full cardiorespiratory arrest en route, and lost his arms and legs from deprivation of blood circulation. Had the child received treatment at a hospital near his home, he would have had minimal tissue loss.

"Victim of the Day"

There are many more horror stories. Indeed, there are so many that Jamie Court, of Consumers for Quality Care, was able to supply press releases for months running, telling the real-life story of a "Victim of the Day." One of them involved Frank Wurzbacher, who was recovering from prostate cancer when a new insurer took over his health plan. The new insurer denied the continuation of the cancer preventive injections his doctor was giving him. The only treatment available from his new health plan was castration. After fighting to get injections, being denied and returning home after his castration, he received a letter advising him that his insurer would now cover the injections. The reason provided for the delay in allowing this treatment was "administrative snafus."

These are not isolated instances, as the insurance and HMO industry would have us believe. Besides *Delayed Benefits Costs Man His Testicles*, other examples of victims' stories publicized by Consumers for Quality Care were headlined *Insurer Told Her to Reuse Disposable Colostomy Bag for Five Days* and *HMO Denies Treatment. Skinless Girl Has No Remedy.*

Judges' Hands are Tied

The consequences of HMO indifference and negligence vary between mild injury and death. However, most chapters in these stories of health care plan failure do not end like those listed above. Instead, because of the misplaced shield erected by ERISA to HMO accountability, the victims go uncompensated and the HMO gets off free, regardless of how egregious its conduct. Here are examples of how this works and what some federal judges have said about the situation:

• Florence B. Corcoran's unborn baby died when her insurance company refused to approve her physician-ordered hospitalization for her high-risk pregnancy. When she sought damages under Louisiana state law, the 5th Circuit said, "The Corcorans have no remedy, state or federal, for what may have been a serious mistake." The harsh result " would seem to warrant a re-evaluation of ERISA so that it can continue to serve its noble purpose of safeguarding the interests of employees."

• When Buddy Kuhl died after his HMO denied his physician-ordered heart surgery, his family's lawsuit failed because of ERISA's preemption; the Eighth Circuit said its hands were tied until Congress changed the law.

• When the 10th Circuit was faced with a case in which Judge John C. Porfilio said he was moved by the tragic circumstances of a woman with leukemia dying after her HMO refused to approve a bone marrow transplant, he said ERISA gave the court no choice and the deceased's husband is "left without a remedy."

Do HMOs Really Reduce Costs?

And what are all these health care denials and human misery for? Perhaps they are for nothing. It has not been demonstrated that HMOs even reduce medical costs in the long run, according to the U.S. General Accounting Office and Congressional Budget Office:

> Although HMOs appear to reduce the level of health care costs, there is no credible evidence that they also reduce the rate at which costs subsequently increase. The claim that the rate of growth is lower for HMOs than for Fee For Service plans is based on a comparison of growth in premiums over the past few years. That evidence, however, is too weak to support any conclusion about the relative growth of costs for different types of plans. A valid comparison of costs among plans must look at total costs, including patients' out-of-pocket costs for services that are typically covered.

In other words, if you were faced with the same scenario as Frank Wurzbacher, and you had the money, would you pay for the expensive injections out of your pocket, or get castrated? And if you paid for them, you would be a survivor whose successful outcome is included in the HMO's "cost savings" calculations. Another GAO report showed that the HMOs actually increase the cost of care to Medicare patients above that of the old fee-for-service plans because of "favorable selection" or cherry-picking of the best enrollees with the lowest risks.

ERISA was intended to protect workers from crooked administrators of pension plans, not to protect HMOs from accountability for their wrongs, thereby giving them a "king-of-the-hill" invincibility. Corporations that are accountable for their actions and inactions are more likely to act responsibly.

Americans deserve their money's worth. Federal legislation is needed to make HMOs accountable. Polls show that somewhere between 69% and 78% of Americans believe that they should have the right to sue their HMO for wrongdoing and that HMOs must be reined in. Perhaps Congress will listen now.❖

Lisa June Cox, a member of ATLA, heads the Law Offices of Lisa Cox in Jackson, TN, a plaintiff's personal injury practice .

For related managed care information, check out the the following in TIPS:

Committees:
Health and Disability Insurance Law
Medicine and Law
Seniors' Law
312.988.5573

Publication:
Managed Care Liability and Responsibilities in a Changing Health Care System
(PC: 5190264; $74.95 for TIPS members; $84.95 regular price; 1.800.285.2221)

CLE Programs:
ElderLaw Y2K Program
August 6, 1999, ABA Annual Meeting
HIV/AIDS and the Older Adult
August 9, 1999, ABA Annual Meeting
312.988.5672 or www.abanet.org/tips

ANAGED CARE LIABILITY

ourt lawsuits be abolished?
malpractice?
mail to *TortSource* editor Anne Spencer
ax if you prefer (312.988.6081) by
and published in the summer issue

"When I Was a Young Lawyer"

Roberta Cooper Ramo
First Woman President of the ABA

"My Mentoring Advice: Set the Best Example You Can"

Roberta Cooper Ramo's career did not follow a "typical" path to the top spot at the ABA. Although she is a past president of the Albuquerque Bar Association, she rose through the ABA section structure rather than through the well-connected network of state bar leaders to become the first woman ABA President in 1995-96."My unusual, probably checkered, job career probably made me more sensitive to what the public expects from lawyers, and also to the needs of lawyers in every aspect of the profession," she said.

Ramo as a young lawyer in 1979

Ramo in her current practice

A 1967 law graduate of the University of Chicago, her career began when women lawyers were few and far between; she was one of only 10 women in her class. She recalled that at the time, "there were few women lawyers, no women's bar associations, and women constituted about 2% of medical school students and 1% of law school students."

Her legal career began slowly. After graduation, she taught for two years at Shaw University, a predominantly black college in Raleigh, North Carolina, while her husband pursued his medical career at Duke. One of her most interesting courses included a team-taught one called "20th Century Man, the Black Experience." She noted that much of the black experience in this country intersects with the law.

She and her husband moved to San Antonio in 1970. Interviewing for her first job in private practice when she was nine months pregnant, Ramo was the first woman attorney ever hired at the firm of Sawtelle Goode. Ramo recalls that the firm's lawyers were very open to new ways of doing things, and that they accommodated her desire to work an altered, flexible schedule of essentially three-quarters time. Noting that "the law wasn't so compartmentalized at that time," she handled a wide variety of civil transactions, from real estate closings to will contests.

She spent two years in San Antonio, then moved to Albuquerque, her childhood home, in 1972. She worked for a variety of firms and as a solo practitioner, and said she "fell in love with private practice." She now is a shareholder in Modrall, Sperling, Roehl, Harris & Sisk in Albuquerque.

A Sports Connection

Although Ramo describes herself as not athletic, sports have intersected with her professional life in a number of ways. In one of her early cases, she represented Nancy Lopez, the girl who wanted to play on her high school's boys' golf team in Roswell, New Mexico. Ramo claims that the lawsuit's success was due in large part to the fact that New Mexico had passed the Equal Rights Amendment.

She was heavily involved in drafting the Women's Bill of Rights for Sports—few colleges in the 1970s had athletic scholarships for women, and opportunities for women in sports were limited. She is proud of the fact that now the Women's Final 4 is nationally televised and that women have an opportunity to play sports and go after scholarships.

Ramo also served recently on the commission chaired by George Mitchell that investigated the International Olympic Committee in the wake of the scandal that tarnished Salt Lake City's winning bid for the 2002 Winter Olympic games. The commission's report called for comprehensive reform at all levels of the IOC, and Ramo said that she is "enormously proud of the commission's recommendations."

Triumphs and Achievements as President of ABA

Ramo counts helping to revive support for the Legal Services Corporation and domestic violence awareness among her proudest achievements during her tenure as ABA President. Her agenda also focused on the practical needs of ABA members. She recognizes that, while her presidency was a positive development in efforts to involve women and minorities in the leadership of the legal profession, it by no means signaled an end to the struggle.

Roberta Cooper Ramo's Advice to Young Lawyers

• It's very important for both men and women to be supportive of their younger colleagues.

• Set the best example you can in the way you practice and in the ways you deal with people.

• Be a good citizen in your community.

• Have a passion for pro bono work.

• Take time to teach the lawyers you work with.

• Embrace your creative problem-solving role as vigorously as your role as advocate. Help resolve conflicts outside the courtroom. The art of negotiation ought to be a matter of pride for our profession.

• Do your part to make sure that all members of our society have access to the legal system and that the justice system works well for your community.❖

Anne Spencer

Chink in ERISA Shield

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insurer may elect to seek utilization review for any WC claim. Such a claim is then submitted to a private UR firm, which reviews the documentary evidence, including the medical record, and determines whether the treatment was reasonable and medically necessary. The payment of benefits by the WC insurer pursuant to the state scheme turns on the UR firm's determination.

The Supreme Court indicated that while the actual payment of government benefits has been found to trigger Due Process requirements (and therefore necessarily entails state action), the medical decision on which the decision to disburse payment of benefits turned did not. The Court thus distinguished the medical decision (whether the treatment was medically necessary and reasonable) from the consequence of that decision (whether benefits were paid).

Plaintiffs' Use of Distinction in ERISA Context

Plaintiffs' lawyers will soon import this same distinction into the ERISA context. The "ERISA plan" is analogous to the state WC scheme: it sets out a structure and background rules, including the appellate procedures in the event of a denial of coverage for a particular claim. The function of the ERISA plan utilization reviewer, whether a separate UR firm or an individual employed by an MCO, is analogous to the role of a UR firm in the Pennsylvania WC scheme. The utilization reviewer makes medical decisions on which particular benefit payment consequences turn. But, as in the state action context, the two decisions, benefit and medical, are arguably distinct.

To understand the legal consequences of the distinction, consider a state tort claim alleging that the ERISA plan utilization reviewer's decision—say about medical necessity or reasonableness—was negligent. Inevitably, the defendant MCO that employs or contracts with the reviewer will remove the case from the state court where it was filed the grounds that the claim is completely preempted. Arguing against federal jurisdiction, the wise plaintiff's lawyer will cite the distinction in *Sullivan*. He or she will argue that the state claim alleges negligence in a simple medical decision (albeit in a UR context); for this reason it is not a claim under ERISA—i.e., not a claim "to recover benefits" or "clarify future rights" under the terms of the plan—but rather more like a *Dukes* "quality" malpractice claim (alleging vicarious liability for bad medical decisionmaking) that is properly tried in state court.

Plaintiff's lawyer will acknowledge that the fact that the medical decision takes place in a UR context means that payment of benefits turns on the outcome of the UR medical decision. But just as this fact did not create "state action" in *Sullivan*, so it will not it will not constitute a "benefits determination" under the ERISA plan.

The plaintiff is not, of course, home free when he wins remand to the state. He will face the ERISA preemption defense of § 514(a) and the formidable Supreme Court precedent in *Pilot Life Ins. Co v. Dedeaux*, 481 U.S. 41 (1987). Yet state courts have been more generous than federal courts in allowing such suits to survive § 514 preemption. Compare *Nealy v. US Healthcare HMO*, No. 44, 1999 WL 161389 (N.Y. March 25, 1999) with *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996). If this happens, another chink will appear in the steadily weakening shield of immunity from state tort claims that ERISA has heretofore granted to MCOs.❖

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Legislative Update: Managed Care

continued from page 1

tional values of both parties, however, sum up their differences. Republicans tend to support health care legislation granting the private sector and marketplace authority to accomplish many of the needed reforms. GOP leaders argue that too much reform will increase costs, result in burdensome legislation, and ultimately force many employers to drop their health plans. Democrats often prefer to see relief spelled out in legislation and to grant federal agencies broader regulatory authority over the plans. Health insurance plans have been critical of both Republican and Democratic efforts. In arguing for voluntary action, they say all proposals will increase costs and force many employers to drop their plans.

There is some measure of agreement in Congress among the various bills introduced dealing with important concerns such as the scope of coverage, determination of medical necessity, access to specialists, expanded emergency room protection, and limitations on financial incentives to providers to limit medical care, as well as privacy protection. While I cite some measure of agreement on these issues, it appears limited to including these issues in the debate–with limited consensus on actually resolving the issues.

ABA Concerns

Two major areas have drawn the interest of the ABA. First is the importance of improving the efficiency of the benefit decision-making process and to provide for immediate due process review of benefit denials. Second is the issue of plan accountability and whether health consumers should be given the right to sue their managed care health plan over treatment decisions.

With respect to the first area of ABA interest, the ABA joined two other nationally-prominent groups—the American Arbitration Association and the American Medical Association—to form the AAA/ABA/AMA Commission on Health Care Dispute Resolution. Its purpose was to develop a fair dispute resolution process to protect the rights of patients when they are denied access to care.

This joint commission published its report during the 1998 ABA Annual Meeting. Among its several recommendations, the Commission unanimously agreed that (1) ADR can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients and private health plans, and managed care organizations; and (2) review of managed health care decisions through ADR complements the existing concept of internal review of determination made by managed health care operations.

While the publication of the report was widely reported and rightly praised, it did not bear the imprimatur of ABA policy granted by the House of Delegates. This was rectified at the 1999 ABA Midyear Meeting. TIPS delegates in the House of Delegates worked closely with the two sponsoring sections. Their combined effort resulted in overwhelming adoption by the House of a recommendation to support legislation establishing ADR as an appropriate remedy for resolving disputes between patients and group health plans. Thus, ABA policy of broad support for ADR was extended to include a rigorous system of internal review as well as an independent system of external review of benefit payment requests, claim denials, and medical necessity determinations.

The second major area of ABA/TIPS interest is the continuing concern that ERISA should not be applied to protect health care benefit plans against state causes of actions based upon plan decisions that often have been termed as "amounting to medical negligence." Presently, insurers and HMOs have argued successfully that they are extensions of employee benefit plans and are protected under ERISA's preemption provisions.

Major differences between Democrats and Republicans rest on this issue. Under Democratic proposals, the ERISA shield would be revised drastically so states would be given the freedom to allow employees to bring suits against employer-provided health plans. Republican leadership proposals generally do not include such liability provisions. It appears likely that employers who provide employee benefit plans would remain exempt from state lawsuits–unless the employer actually participated in the decision to withhold medical treatment.

TIPS Involvement

TIPS leaders have helped pave the way for adoption by the ABA House of Delegates of an Association policy position dealing with managed care. TIPS members formed an important nucleus on the ABA Special Committee on Medical Professional Liability. This committee drafted a recommendation for House of Delegates consideration supporting enactment of federal legislation to amend ERISA to allow causes of action to be brought in state court against employer–sponsored health care plans.

The TIPS Council endorsed the work of the special committee. In doing so, it voted to limit the volume of anticipated litigation by encouraging the parties to consider ADR prior to bringing litigation. Consequently, through the joint effort of TIPS and the special committee, the recommendation was revised to allow state causes of action against employer-sponsored health care plans but to encourage use of ADR mechanisms before filing such causes of action.

It will be interesting to watch the legislative debate on managed care reform in the coming months of the 106th Congress. Surely, because of the efforts of TIPS leaders and others, the ABA's Washington-based Government Affairs Office has the necessary tools to carry the ABA message to Congress. As the ABA Washington staff pursues this effort, it will almost surely make use of grass roots efforts to make Congress aware of the ABA interest. Our readers may be called upon to assist with contacts with members of Congress.

With strong public pressure to remedy the real or perceived problems of managed care operations, it appears almost certain that major compromises will be necessary to ensure passage of managed care relief legislation. The policy position adopted by the ABA should go a long way in helping to bridge the differences between competing congressional views.❖

Leo Jordan is a TIPS representative in the ABA House of Delegates.

TortSource

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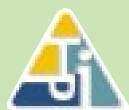

Mark Your Calendar!

There's a stellar lineup of TIPS CLE programs and meetings to choose from during the spring and summer months of 1999. Make time to attend one or more of the following:

- ***Litigation Management***, April 30-May 1 in Cambridge, MA.
- ***The First Surety Claims Workshop***, May 6-9, Hilton Head.
- ***Employment Liability Issues for Non-U.S. Employers***, May 7, Miami;
- ***1999 TIPS Spring Meeting***, May 12-17, Phoenix.
- ***13th Annual National Institute on ERISA Basics***, June 2-4, New York.
- ***Gun Violence Liability: Taking Aim at the Gun Industry***, June 4-5, Washington, D.C. (See related information on page 8).
- ***Early Mediation of the Securities Class Action Suit: A Pipe Dream?***, June 9, Palo Alto, CA.
- ***Catastrophes, Calamities, and Crises: How to be a Master of Disaster***, June 18, Durham, NC.
- ***ABA Annual Meeting***, August 5-10, Atlanta. Call ITS, the official ABA Annual Meeting registration company, at 847.940.2124 for a housing and registration form. The advance housing registration deadline is July 7 and the advance meeting registration is July 15. Save $50 if you register by May 28!
- ***Brain Damaged Baby Cases II***, September 22-25, San Francisco.

Benefits Fact

Did you know . . . that as a member of the Tort and Insurance Practice Section you are entitled to join up to three substantive TIPS committees–for free! Call 312.988.5573 or visit www.abanet.org/tips/committee.

To register for or receive additional information on any of these programs, unless indicated otherwise, contact Debra Dotson at 312.988.5708, call TIPSFax at 312.988.5533, or visit www.abanet.org/tips.

“My Atlanta”

The Next TIPS Meeting Site

Cale Conley

Welcome South, y’all! Here’s my “insider’s take” on the places to be during your visit.

Seeing and Doing. Summer in Atlanta means Braves baseball, and the still-new **Turner Field** is a must-stop for fans and families. The Braves host San Fran and Houston during the annual meeting; avoid scalpers by charging tickets at 800.326.4000. Taking a shuttle from **Jocks & Jills** at 10th Street and Peachtree is the insider’s fun and hassle-free way of getting to and from the stadium.

Also for the whole family, one of my favorite bits of Americana is the laser show at **Stone Mountain Park** (770.498.5600), played out just after dark on the face of the world’s largest piece of exposed granite. For downtown sightseeing, two good choices are **The World of Coca Cola** (404.676.5151), which tells the story of the drink that in many ways built Atlanta, and a tour of **CNN Center** (404.827.2300). No trip to Atlanta is complete without at least a glimpse of the **Fox Theater** (404.249.6400), the historic and elaborately decorated, yet intimate, theater where *Gone With the Wind* debuted in 1939.

If shopping is your bag, you can’t beat the upscale tandem of **Lenox Square** and **Phipps Plaza**, located across from each other in Buckhead. While shopping, stop for a lunch bite at **Brasserie Le Coze** in Lenox, a top-notch French bistro, or at night, check out **Prime**, also in Lenox.

Speaking of food, you gotta eat, and there are plenty of options.

The Hot Spots. Right now the place to be seen is the **Fusebox** – an eclectic, ultra-hip fiesta at Piedmont Road in Buckhead. Once you’re in the neighborhood, you can walk up Piedmont Road and check out two older but equally hot spots: **Bacchanalia**—serving a fixed menu of “New American,” it has been rated the best food in Atlanta for the last two years, and the **Buckhead Diner**—still not taking reservations and still packing an often star-studded crowd. Two downtown “hot spots” bear mentioning—**Mumbo Jumbo** on historic “sweet Auburn Avenue” and the **Food Studio** in the King Plow Arts Center on Marietta Boulevard.

Eat Your Greens. If you really want southern food, check out the legendary “meat and three” on Ponce De Leon Avenue, **Mary Mac’s Tea Room**, for lunch. Then for dinner, take your pick of the organically-grown specialties at cross-the-street cousins **OK Café** (a 24-hour diner that has long been my favorite stop in town) and **Blue Ridge Grill** (OK Café’s upscale and pricier cousin). One of my off-beat favorites is **Agnes and Muriel’s** in Midtown, a quaint, pastel-splashed house serving lemon pepper collard greens, sweet potato fries, and a knock- your-socks-off butterscotch pie at affordable prices. And if you can get a seat, **South City Kitchen** on Crescent Avenue is a fantastic “new south” meal, as well.

B-B-Q. You ain’t been south ‘til you’ve had barbecue, and while the best of the best are far from the city, you won’t go wrong with lunch at **Harold’s Barbecue.** Another good choice is **Fat Matt’s Rib Shack** in midtown—and then stick around for a rousing blues band after dark.

Steak Out. If steak is your game, you won’t go wrong at **Bones** or **Chops**. If you want the insider scoop, though, I’d head to **The Cabin** on Buford Highway—a lesser-known (and less pretentious) rustic gem with a great downstairs set in stone.

Four Insider’s Nights Out. Try these as a package or mix and match. One night, head to the Northwest community of Vinings for dinner at **Canoe**, a spectacular restaurant overlooking the Chattahoochee River. After dinner, head just up Paces Ferry Road to the **Old Vinings Inn** for jazz on the weekends and a nice outdoor deck.

For a more intown feel, have dinner at the **Food Studio** or **Nuevo Laredo**, an oddly located Mexican restaurant that looks like a dive but has been voted Atlanta’s best (and most affordable) Mexican restaurant for five years running. After dinner, take a cab to the nearby **Northside Tavern**, where a truly eclectic crowd boogies to the blues late into the evening.

Another great “alternative” intown choice is dinner at **South City Kitchen** followed by a short cab ride to the show at the **Whole World Theater**. If you feel compelled to “do” Buckhead proper, the best bet is **Nava**, a multi-tiered Southwestern stunner with the best desserts in Atlanta. Then walk just down Peachtree Street to **Fado**, an authentic Irish pub with hardwood floors and cozy couches.

No matter where you go or what you do, I hope you’ll find Atlanta an inviting place to be.❖

Cale Conley, a native Atlantan, is a plaintiff’s lawyer with Butler, Wooten, Overby, Pearson, Fryhofer and Daughtery.

Are Guns the Next Tobacco?

Kip Reader

Until recently, lawsuits against the gun industry were viewed as long shots or fruitless efforts. Now, energized by the success of the states in their lawsuits against the tobacco industry, plaintiffs’ lawyers and public interest groups are mounting litigation offensives against the manufacturers and marketers of all types of guns. In recent months, the cities of New Orleans, Chicago, and Atlanta have filed widely publicized and potentially groundbreaking lawsuits against the gun industry. Those actions are expected to generate dozens of governmental actions against gun manufacturers. Chicago’s lawsuit maintains that guns are a public nuisance. New Orleans’ lawsuit is brought under a product liability theory of recovery.

In February, individual plaintiffs achieved a verdict that some characterized as a major breakthrough. In the U.S. District Court in Brooklyn, a jury found that 15 of 25 gun manufacturers were negligent in connection with shootings committed with illegally obtained handguns. The jury found that up to nine of those companies were liable for three New York shootings that resulted in two deaths.

TIPS, in conjunction with the ABA Coordinating Committee on Gun Violence, has developed a groundbreaking CLE conference to educate practitioners—whether big firm or small firm, and whether plaintiff or defense—on the latest developments in this fast-developing litigation. The title of the conference is **Gun Violence Liability: Taking Aim at the Gun Industry—Are Guns the Next Tobacco?** It takes place on Friday, June 4, and Saturday, June 5 at the Mayflower Hotel in Washington, D.C.

Our speakers—plaintiffs’ attorneys, defense counsel, insurance and gun industry representatives, and academics—will include the “cream of the crop” in terms of experience in the firearms litigation field. **Wendell Gauthier**, one of the architects of anti-tobacco litigation and counsel to the City of New Orleans in its lawsuit against the gun industry, will discuss the similarities and differences between tobacco and gun litigation. **Dennis Hennigan** of the Center to Prevent Handgun Violence will join with **Mayors Marc Morial** of New Orleans, **Alex Penelas** of Miami, and **Richard Daley** of Chicago for discussion of lawsuits by municipalities and states against the gun industry. High-profile defense counsel will report the defense perspective. **Congresswoman Carolyn McCarthy** (D-NY), who has been personally affected by gun violence and who is nationally known for her active involvement on gun issues, will provide luncheon remarks.❖

Kip Reader (kreader@ulmer.com) is Chair of the Tort and Insurance Practice Section.

To register for "Gun Violence: Taking Aim at the Gun Industry"—June 4-5 in Washington, D.C.—Visit www.abanet.org/tips/gunviolence or call 312.988.5708.

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