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UNITED STATES SUPREME COURT

Supreme Court issues much awaited *Pegram* decision. The Supreme Court has held that treatment decisions made by physician-employees of an HMO are not fiduciary acts within the meaning of ERISA, 29 U.S.C. §§1001, et seq. Thus, a patient could not establish a breach of fiduciary duty by alleging that her HMO provided financial incentives to physicians to limit medical care to plan participants.

In the underlying case, the plaintiff, Cynthia Herdrich, went to Dr. Pegram with complaints of abdominal pain. Dr. Pegram discovered an inflamed mass in Herdrich's abdomen, but did not order an immediate ultrasound test at a local hospital. Dr. Pegram instead decided that Herdrich would have to wait eight more days to have the procedure done at an HMO owned facility 50 miles away. Before the eight days were over, Herdrich's appendix ruptured, causing peritonitis.

In reversing a decision to the Seventh Circuit Court of Appeals, the Supreme Court said that Congress did not intend HMOs to be treated as ERISA fiduciaries when their physicians made "mixed eligibility and treatment decisions." The Court also noted that the remedy sought by Herdrich, namely, the return of profits from the HMO's owners back to the plan, would result in nothing less than the elimination of for-profit HMOs. The Court also rejected the Seventh Circuit's attempt to limit its holding to cases in which the *sole* purpose of delaying or withholding treatment was to increase the physician's financial reward.

HMOs serving employers breathed a collective sigh of relief.

ADMINISTRATIVE ACTIONS

HCFA approves first Medicare private fee-for-service plan. Sterling Life Insurance Company will begin to offer a private FFS Medicare option in 17 states beginning July 1, 2000. The Sterling plan is the first private FFS plan to be approved under the Medicare+Choice program created by Congress in 1997. The plan will enable Medicare beneficiaries to obtain health care from any Medicare-eligible provider with no utilization review. The plan will operate primarily in rural areas where other Medicare+Choice options have not been widely available.

OTHER JURISDICTIONS

Illinois Supreme Court holds that Medicaid HMO may be liable for institutional negligence. The court held that a Medicaid HMO Member may proceed with her institutional negligence claim for assigning her to a PCP which had an overloaded patient population and had adopted procedures requiring the Member to call for an appointment before visiting the doctor's office or obtaining emergency care. The Member had called her PCP about her very ill three month old infant and had been told to give the child castor oil for what turned out to be bacterial meningitis secondary to an ear infection. The Illinois Court cited the Pennsylvania case of *Shannon v. McNulty*, 718 A.2d 828 Pa.Super. 1998, for the proposition that an HMO could be liable under

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