

# THOMSON, RHODES & COWIE, P.C.

## MANAGED CARE LAW UPDATE

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### FEDERAL CASE LAW

**Seventh Circuit Rejects Request for Rehearing of Decision Allowing ERISA Claim against HMO.** In a split decision, the Seventh Circuit (covering Indiana, Illinois and Wisconsin), has rejected a petition for rehearing of a controversial decision allowing a plaintiff to claim that an HMO and its treating physicians were fiduciaries who breached their fiduciary duty by depriving the patient of proper medical care. In reaching the original decision that allowed the plaintiff to proceed under ERISA, the court observed that the physician defendants managed the pre-paid plan, including the doctor referral process, the nature and duration of patient treatment and the extent to which the participants were required to use the defendant's health care facilities. In addition, the court determined that the defendant physicians exercised "discretionary control and authority". Four judges would have granted the petition for rehearing on the basis that the original decision improperly determined that the physicians and HMO acted in a fiduciary capacity as defined by ERISA. The dissenters also expressed concern that the majority's decision may prohibit employees from offering managed care options to their employees. Herdrich v. Pegram, 154 F.3d 362 (7<sup>th</sup> Cir. 1998), reh'g & reh'g en banc denied, 170 F.3d 683 (7<sup>th</sup> Cir. 1999).

### FEDERAL AGENCY ACTIONS

**Increased Government Focus on Nursing Homes.** On March 16, 1999, administrator Nancy M. DeParle of the Health Care Financing Administration (HCFA) announced the following nursing home initiatives: (1) new regulations effective May 17, 1998 allowing regulators to assess civil money penalties against nursing homes prior to the time a violation is corrected and without regard to the number of days that the nursing home fails to comply with federal requirements; (2) requirements that states investigate complaints within ten working days whenever a complaint alleges harm to a resident; (3) staggered surveys and surveys on nights and weekends; (4) a national education campaign to teach residents, their families and nursing home workers to identify and report signs of neglect and abuse; and (5) creation of the "Nursing Home Compare" internet site to provide consumer information on nursing homes, including information from state inspectors of every Medicare and Medicaid certified nursing home.

### LEGISLATION: OTHER JURISDICTIONS

The site is located at HCFA's consumer website at <<http://www.medicare.gov>>.

**Georgia Managed Care Legislation.** In a legislative package approved by Georgia lawmakers on March 24<sup>th</sup>, that state joined the growing number of states to enact managed care laws. In pertinent part, Georgia amended its tort law to allow civil actions against managed care entities that fail to exercise ordinary diligence in the review and administration of claims and benefits. The statute authorizes recovery of compensatory damages against the managed care entity but does not permit recovery of punitive damages. In separate legislation, Georgia managed care companies that allow enrollees to see out of network physicians were authorized to increase premiums by up to 17½%. In a third legislative act, Georgia enacted a bill that creates a Consumers' Insurance Advocate to appear on behalf of consumers in administrative and judicial proceedings, and to advocate positions in support of the public

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