MANAGED CARE LIABILITY A DANGEROUS DEVELOPING CLAIM

By Dave Johnson

April 13, 1998:
An Arizona jury awards $3 million against an HMO, claiming it did not diagnose a spinal bacteria infection quickly enough.

January 20, 1999:
A California jury awards $116 million to the widow of a cancer patient, on the basis of a claim that an HMO had refused to pay for experimental treatment which was sought to battle his wife's cancer.

May, 1999:
A national legal publication profiles a lawyer who specializes in managed care lawsuits and has won several verdicts in excess of $1 million, focusing on managed care decisions and HMO shortcuts.

I. MANAGED CARE LIABILITY - A DANGEROUS NEW CLAIM

In today's health care arena, there's a new type of defendant often involved: managed care organizations. With increasing frequency, these entities are being included among the defendants, whether there is a legitimate basis for their joinder or not.

"Corporate liability" has been applied to managed care organizations. Managed care organizations have been sued on the basis of misrepresentation, breach of contract, or bad faith. Managed care organizations are being blamed for deficits in the care provided by doctors who have been approved to render services.

A number of the lawsuits which have targeted "managed care" have produced huge verdicts. Because of the strong negative attitudes about managed care which many people still hold, managed care litigation has the prospect to produce higher recoveries than traditional medical malpractice. This reality must be a major concern of all healthcare providers and their insurers, because most of the cases which allege that a managed care organization is at fault will involve not only the managed care organization, but also the physicians and hospitals which participated in providing the patient's care. If there is liability in these lawsuits, regardless of who is found to be at fault, the verdict is likely to be higher than if managed care had not been an issue.

A key reason for high managed care verdicts is that managed care is about money, and the cost of health services. This is a volatile issue when it becomes part of a medical malpractice case and will be the most important factor in fueling managed care litigation. Patients do not think kindly about "economic decisions" when their healthcare or that of their loved ones is at stake. Seldom do jurors agree that healthcare should be limited for monetary reasons, and jurors are inclined toward "punishing" anyone involved in compromising healthcare for an economic reason. If the focus of medical malpractice cases shifts to economic issues, the managed care organizations and the healthcare providers themselves will have a difficult time either prevailing or holding down the amounts awarded by juries.

Traditionally, juries have approached the decision-making process in medical malpractice cases by affording doctors a great deal of respect. The problem for the future, is that to the extent economically-based decisions become issues for trial, jurors are likely to afford physicians and other healthcare providers a much less favored position. If a plaintiff can effectively present a medical malpractice lawsuit as an issue of economics, and demonstrate to the jury that harm was caused to a patient by an economically-driven decision, the medical malpractice plaintiff's chances of prevailing at trial will increase significantly, and the potential for a remarkably high verdict will increase exponentially.

II. THE ANSWER: CONVINCE JURORS THAT HEALTHCARE WAS NOT COMPROMISED BECAUSE OF MANAGED CARE

It is incumbent upon both managed care organizations and the healthcare providers who are part of the system to demonstrate to the public that there is more than just a concern for economics, and that managed care really is a program designed to enhance healthcare to the benefit of the patient. When a case comes to trial, it will be essential to convince the jury that, managed care notwithstanding, a high degree of care and responsibility was exercised by physicians and the other healthcare providers involved, and that medical decisions were made not on the basis of economics, but were justified as part of a reasonable analysis of the appropriate level of care to be afforded to the patient.

Jurors do not expect that everything conceivable be done in caring for a patient. Jurors, despite the extraordinary verdicts often reported by the media, are in most cases inherently reasonable persons and responsible decision-makers. Jurors, will realize for example, that a physician cannot be stationed all day in every patient's hospital room; they appreciate that it is neither appropriate nor reasonable to perform every test in the world on a patient, especially if the physician believes that a proper diagnosis has been made with less than a complete battery of tests. But even these reasonable jurors will not respond favorably to flat-out assertions that something was just too expensive or that good medical care was sacrificed for someone's bottom line.

It is essential for both the managed care organization and all of the involved healthcare providers to engage in the best "bedside manner" possible. Even if the managed care organization is not involved in hands-on patient care, considerable effort should be undertaken to assure that positive public relations are fostered and that patients sense that the managed care organization is truly interested in their personal well being, and not just in their plan membership. If this concept can be conveyed, the risks of enhanced liability from managed care lawsuits will be lessened considerably.

Simultaneously, however, the managed care organization must be careful that it does not oversell itself, or make promises upon which it cannot deliver. There is the distinct potential for lawsuits premised upon the claims made in the advertisements and commercials of managed care organizations. Although it certainly is necessary for such an entity to market itself, it should be done with care, with legal advice, and, yes, even with some restraint. Managed care organizations should make certain that their promotional materials do not make misrepresentations, contain promises that they will not be able to keep, or advertise a level of care that the HMO and its providers will not be able to provide.

The careful credentialling of providers and the continuous monitoring of a managed care organization's panel of physicians is also an essential component in reducing the potential for successful lawsuits against the HMO. The analysis most critical is one which is based on the clinical performance of the practitioner, as opposed to his meeting of economic targets or guidelines. If a physician is determined to have performed poorly, it is essential for the managed car organization to take corrective measures. If it fails to do so, and harm later results to a patient, the managed care organization clearly has liability exposure on the basis of a negligent credentialling claim.

Financial incentives should be disclosed to patients both by the managed care organization and by participating providers. This should be done in a manner which is accurate, yet tactful. It should be done utilizing a well considered and legally reviewed form, preferably at the beginning of the relationship.

Last, but certainly not least, managed care organizations and their providers should work together to develop the best health care plan possible. The goal is to assure that the managed care decisions which are made are not reasonably subject to criticism.

Indeed, for all participants in the managed care system, substantial legal liability lies ahead unless the public and the jurors it produces are convinced that the standard of care has not been tainted by the bottom line. It is incumbent upon managed care organizations and their affiliated healthcare providers to establish their credibility through day-to-day care, so that when cases inevitably reach the courtroom it will be possible to prove convincingly that managed care was not at fault, that the care rendered to the patient was reasonable and appropriate, and that any discussion about financial factors is nonsense. Unless these themes are established, managed care liability will be a potentially explosive courtroom issue.

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