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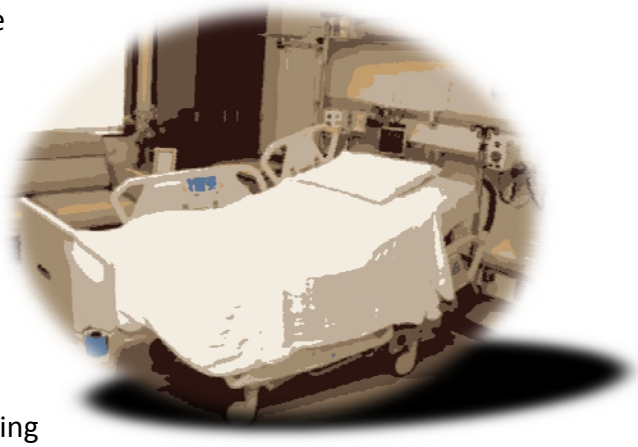
California Appellate Court Allows State Law Claims Against Private Medicare Plans

In a case of first impression, the Fourth District Court of Appeal opened the door to new lawsuits against private Medicare plans that had previously been held to be preempted by the federal Medicare Act. In *Cotton v. Starcare Medical Group Inc.,* Cal.Rptr.3d , 2010 (Cal. App. 4 Dist.), the court found patients who are denied or suffer poor medical care by a private HMOs as part of a government-funded Medicare Advantage plan can bring state tort law claims against insurers who provide those plans and deny coverage under them.

The case involved a Medicare Advantage plan where the federal government pays a fixed rate per month to a private insurer to manage the care of an elderly enrollee.

81-year-old T.J. Jackson died from an untreated infection while enrolled in a Medicare Advantage health plan called "Secure Horizons," run by PacifiCare of California, Inc. ("PacifiCare"). After Jackson underwent surgery to repair a broken leg, he went to a nursing facility named St. Edna's Subacute and Rehabilitation Center ("St. Edna's") operated by another named defendant, Covenant Care California. Plaintiffs, Jackson's children, alleged that St. Edna's failed to provide adequate care to Jackson, causing him to "suffer from starvation, dehydration, and infection, as well as emotional distress," ultimately resulting in his death. Neither PacifiCare nor the medical group, Starcare, would pay for the surgery. Jackson died of hemorrhaging in his skull waiting for surgery, according to the court opinion.



The complaint, which included causes of action for, among others, bad faith and fraud, alleged StarCare was obligated to oversee Jackson's treatment while at St. Edna's, but allowed its receipt of "a fixed or periodic fee" for services and its participation "in a risk sharing agreement" that gave it a portion of "any savings resulting from the denial of reasonably necessary medical care," to affect its decisions concerning his health care. Thus, Plaintiffs alleged that StarCare breached its duties to "review requests for . . . medical service" based solely on "whether the requested service was reasonably medically necessary" and to "conduct utilization review and quality assurance activities without regard for the cost," and also failed to inform Jackson and his family of its financial conflicts of interest.

The trial court initially dismissed the lawsuit based on federal preemption by the Medicare Act.

The primary issue was whether Plaintiffs' numerous state law causes of action are preempted by title 42 United States Code section 1395w-26(b)(3) of the Medicare Act. It declares that, except for laws governing licensing and solvency, "[t]he standards established under this part shall supersede any State law or regulation . . . with respect to M[edicare]A[dvantage] plans which are offered by M[edicare]A[advantage] organizations . . . ." PacifiCare argued that Plaintiffs' claims against it were either expressly or at least impliedly preempted by section 1395w-26(b)(3). It further contended the statute's licensing law exception was inapplicable because that provision only applies to the acquisition of a license, not its maintenance. Plaintiffs

disputed the preemption claim and alternately contended leave to amend should have been granted because some of the causes of action could be based on state tort laws.

The Court agreed with Plaintiffs and held that the Medicare Act did not expressly or impliedly preempt their state law causes of action. The court also rejected PacifiCare's argument that Plaintiffs did not exhaust their administrative remedies. The court rejected this argument, noting that Plaintiffs did not disputing an adverse determination concerning Medicare benefits. Thus, the case was governed by *McCall v. PacifiCare of California, Inc.*, 25 Cal.4th 412, 423 (2001), which rejected a failure to exhaust administrative remedies claim made under the Medicare Act "[b]ecause the [plaintiffs] may be able to prove the elements of some or all of their causes of action without regard, or only incidentally, to Medicare coverage determinations" where "none of their causes of action seeks, at bottom, payment or reimbursement of a Medicare claim or falls within the Medicare administrative review process, and because the harm they allegedly suffered thus is not remediable within that process . . . ." *Id.* at p. 426, fn. omitted. The court stated that "this case presents an even stronger basis for rejecting the failure to exhaust administrative remedies defense."

The decision has broad implications, as it is estimated that as many as 1.6 million seniors in California are enrolled in Medicare Advantage plans. There can be little question that with this decision, consumer attorneys will file suits focused on bringing Medicare-related complaints against HMOs and medical groups.

By: Robert J. McKennon
Partner
McKennon|Schindler LLP
384 Forest Avenue, Suite 20
Laguna Beach, California 92651
877-MSLAW20
(877) 675-2920