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**CURRENT BULLETIN**  April, 2003

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### **U. S. Supreme Court Upholds Any Willing Provider Law**

On April 2, 2003, the U. S. Supreme Court ruled unanimously that Kentucky's so-called "any willing provider" law is not preempted by the Employee Retirement Income Security Act of 1974 (ERISA). Depending on how states react to this law, this may be a major setback to cost control efforts.

In 1994, Kentucky passed a law prohibiting managed care plans from discriminating against any provider that practices within the geographic area served by the plan and who is willing to agree to the plan's terms and conditions. Managed care plans operating in Kentucky sued, claiming that the law was preempted by ERISA.

ERISA preempts state laws that relate to employee benefit plans, but ERISA also "saves" from preemption state laws that regulate insurance. In *Kentucky Association of Health Plans, Inc., et al. v. Miller* (Docket No. 00-1471, the Supreme Court agreed with lower courts that Kentucky's law regulates insurance, not benefit plans.

Seven other states (Georgia, Idaho, Illinois, Indiana, Minnesota, Virginia and Wyoming) have similar laws that regulate physicians. More than 20 states have any willing provider laws that apply to pharmacies. Some states have not passed any willing provider laws under the belief that such laws would be preempted. This decision may lead more states to pass any willing provider laws. If so, managed care plans will not be able to form selective networks based on either quality or price.

Some observers are calling this decision the death knell for managed care. Others are saying the industry has already moved to such broad networks that it does not matter.

### **U. S. Supreme Court Upholds HMO Arbitration Provisions**

The U. S. Supreme Court also ruled that physicians' claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) can be subject to arbitration. The case is *PacifiCare Health Systems, Inc., et al. v. Book, et al.*

A group of doctors filed suit against a number of managed care organizations alleging that the HMOs unlawfully failed to reimburse the physicians for health care they had provided. The suit included causes of action under RICO, ERISA, prompt-pay statutes, and claimed breach of contract and unjust enrichment.

According to the defendant HMOs, their contracts compelled arbitration. The physicians claimed that arbitration would deny them meaningful relief under RICO because the arbitration provisions prohibited punitive damages. RICO authorizes treble damages. The Supreme Court reversed the lower courts and said that RICO did not override the arbitration provisions.

## Privacy Regulations Challenged By Lawsuit

The week before compliance with privacy regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) was required, a coalition of privacy advocates and medical professionals filed suit in Philadelphia challenging the new rules. They claim the rules will give insurance companies, drug companies and police free access to individual medical records because the latest regulations removed a duty to obtain a patient's consent before disclosing protected health information that had been in the original regulations.

## Association Health Plan Bill Advances

On April 8, 2003, the House Education and Workforce Subcommittee on Employer-Employee Relations approved H. R. 660, the Small Business Health Fairness Act of 2003. This bill would exempt Association Health Plans (AHPs) from state regulation.

Under this bill, associations would be allowed to self-fund health benefits for their members. Advocates say this bill would make coverage more affordable by allowing small employers to band together to increase their purchasing power and escape burdensome state mandates.

Opponents claim that exempting AHPs from state regulation would lead to the problems experienced with multiple employer welfare arrangements (MEWAs), which have left consumers with millions of dollars in unpaid claims. Opponents point out that the massive failures of MEWAs, which are essentially the same as AHPs, proved that state regulation is critical to protecting consumers. Opponents go on to say that because AHPs would be exempt from participating in state guarantee funds, there would be no back up to ensure unpaid providers and patients are protected.

Advocates include the Self Insurance Institute of America and the Bush Administration. Opponents include the National Association of Insurance Commissioners, the Health Insurance Association of America and the National Association of Health Underwriters.

A similar bill received approval in the House before, but did not pass the Senate. A similar fate is likely for H. R. 660.

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*Garner Consulting does not practice law. Please seek qualified counsel if you need legal advice. For employee benefits or managed care consulting, please call Zaven Kazazian or Andy Keowen at (626)440-0399.*

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