Beacon Award for David Truman

Monumental win for patients against managed care

The Beacon Award for Advocacy is not lightly given. It is not an annual award; rather, it is one that is made when a person — NYSPA member or non-member — makes an unusually substantial contribution to the profession of psychology. In previous years, Beacon Award recipients have included Dr. Karen Shore, Dr. Franklin Goldberg and television star Montel Williams.


TRUEMAN

In 2003, NYSPA is proud to present the Beacon Award to NYSPA member David L. Trueman, Ph.D., Esq. He is a member of the faculty at Adelphi University's Derner Institute of Advanced Psychological Studies and at the Columbia University School of Law, and also maintains a clinical psychology practice and a law practice. In that latter role, Dr. Trueman pursued and won a case against managed care companies on behalf of consumers that has implications for the entire field of healthcare, including psychology. And, its impact will be felt not only in New York, but in Vermont and Connecticut, as well.

Dr. Trueman's winning case, and its implications, is chronicled below, in excerpts from one of his articles about Cicio v. Vytra Healthcare et al. If you have questions, or would like to discuss this case, please call or write Dr. Trueman at The Law Offices of David L. Trueman, P.C., 18 East 48th Street, 10th Fl, New York, NY 10017, (212) 758-0993 or 221 Mineola Boulevard, Mineola, NY 11501, (516) 742-1460, or e-mail him at truemanlaw@erols.com.

Dr. Trueman's case produced a monumental victory against HMOs and managed care organizations. It often has been impossible to sue an HMO because of the federal law, ERISA (Employee Retirement Income Security Act of 1974), which governs health care benefits that one receives from an employer (unless the employer is a governmental or church entity).

In the past, this law has led to the dismissal of any suit against an HMO where there was a claim that the company's wrongful denial of physician-recommended care in the utilization review process caused the injury or death of a patient.

Dr. Trueman was successful in eliminating this ERISA loophole in the Second Circuit, the federal area of jurisdiction governing New York, Connecticut, and Vermont, thus aiding the 23 million residents of these states. It is a major victory for consumers that allows everyone to hold their HMOs responsible for their actions. Indeed, as a result of this decision, patients will be able to obtain compensation for their injuries, as well as punitive damages — if it can be demonstrated that there was an on-going pattern of wrongful conduct by the company.

The case, *Cicio v. Vytra Healthcare et al*., concerned Carmine Cicio, who developed multiple myeloma, a blood cancer that could no longer be treated by conventional chemotherapy. To save his life, his doctor recommended that he receive a double stem cell transplant. Without the treatment Mr. Cicio had no chance of survival; his oncologist said the double transplant would improve his chances dramatically.

Vytra's medical director, Brent Spears, denied an initial request for the tandem transplant, stating that it was "experimental/investigational." When Mr. Cicio's physician appealed, arguing that the treatment was a well-established technique, and forwarded to Dr. Spears citations from major medical journals, the company still denied the double stem cell transplant. Instead, it approved a single transplant, which, although producing a significantly better chance of survival than nothing, was not what Mr. Cicio's physician requested.

Despite the urgency of the request and the obvious need for treatment of the dying man, the company and Dr. Spears took one month to make each decision, resulting in a two month delay in providing approval for any treatment!

Tragically, by the time care was approved, Mr. Cicio had passed his window of opportunity and died some weeks later.

A suit was filed on behalf of Mrs. Cicio against both Vytra and Dr. Spears in state court alleging that the company and its medical director had been grossly negligent, had engaged in medical malpractice, and had caused Mr. Cicio's death. Pursuant to ERISA, the defendants removed the case to federal court and had it dismissed in its entirety.

However, the Court of Appeals for the Second Circuit (the federal area comprising New York, Connecticut, and Vermont), that is the highest federal court below the U.S. Supreme Court, in *Cicio v. Does ("Cicio II")*, disagreed and overturned the decision. The Court ruled that the company intruded into the medical process and, by making utilization review decisions that considered Mr. Cicio's "constellation of symptoms," it was no longer a decision about eligibility for benefits but, rather, was a "mixed eligibility and treatment decision" which is no longer preempted by ERISA.

This new category, "mixed eligibility and treatment decision" comes from a U.S. Supreme Court case *(Pegram v. Herdrich)* that ruled that managed care companies make three types of decisions:

1. Pure eligibility decisions, which entail determinations when there is no question about a condition or about its treatment and the only decision is "whether a plan covers an undisputed [condition]." These are clear benefit decisions involving no medical determination, and merely assess whether the recommended treatment is excluded or is available pursuant to the policy, not whether it is medically necessary.

2. Pure treatment determinations, that include traditional medical treatment, consultation, and decision making, and

3. Mixed eligibility and treatment decisions, wherein administrative and treatment decisions are inextricably intertwined. According to the Court these decisions occur "countless" times a day when HMOs make "administrative medical decisions" in considering a patient's "constellation of symptoms" and the type of treatment he/she should receive.

The Court of Appeals determined, consistent with the Supreme Court in Pegram, that a state law malpractice action, if based on a "mixed eligibility and treatment decision," is not subject to ERISA preemption when that state law cause of action challenges an allegedly flawed medical judgment as applied to a particular patient's symptoms.

Pegram demonstrates that the mere presence of an administrative component in a health care decision no longer has determinative significance for purposes of preemption analysis when the decision also has a medical component.

Vytra Healthcare and its codefendants requested a rehearing, but were denied; they will appeal to the U.S. Supreme Court. If the Supreme Court takes the case, its ruling will affect all the courts in the country. If it does not hear the case, then the decision stands in the Second Circuit and will likely be accepted by other courts throughout the country.

The implications of this decision are considerable. HMOs will finally be held responsible for their actions, patients will be able to be compensated for their injuries due to negligent actions and these companies will now be exposed to potential punitive damages. And we can expect that managed care organizations will be more careful in their consideration of their members' health care needs.