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COURT URGED TO REIN IN SUITS UNDER FEDERAL PENSION LAW

***(Pegram v. Herdrich,* No. 98-1949)**

The Washington Legal Foundation (WLF) this week urged the U.S. Supreme Court to rein in the continuing expansion of civil lawsuits brought under the Employee Retirement Income Security Act of 1974 (ERISA), the federal pension law.

In a brief filed in *Pegram v. Herdrich*, WLF urged the High Court to overturn an appeals court decision that threatens to undermine health care in this nation by allowing a patient to sue his health care provider under ERISA any time the provider takes into account cost considerations when deciding how to treat the patient.

The case involves an Illinois woman whose doctor (in a decision designed to reduce costs) delayed performing tests that would have revealed appendicitis. Her appendix burst before the tests were performed, and the woman was hospitalized for several days with peritonitis. The woman then filed a medical malpractice claim under Illinois state law; that suit has been concluded with the payment of a $25,000 judgment against the doctor.

The issue before the Supreme Court is whether the Plaintiff should *also* be permitted to file an ERISA suit against her HMO (health maintenance organization) and the doctor, based on a claim that they violated their fiduciary duties under ERISA to act in her best interests. The Plaintiff claims that ERISA prohibits any employer-financed health care plan from providing financial incentives to their doctors to reduce the costs of services rendered. In this case, the HMO had agreed to pay the doctor who treated the Plaintiff a bonus if the plan maintained profitability by containing the aggregate cost of treating patients enrolled in the health care plan.

The U.S. Court of Appeals for the Seventh Circuit in Chicago held that both health care plans and their doctors owe a fiduciary duty under ERISA to act solely in the best interests of their health plan members when making medical treatment decisions. The appeals court said that health care plans and doctors breach that duty when they create financial incentives that could cause doctors to provide sub-optimal care in order to save costs.

"The number one problem in health care today is finding ways to hold down costs so that quality health care will continue to be affordable to all Americans," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The appeals court decision substantially undercuts that effort by essentially prohibiting all cost-containment measures. One of the principal purposes of HMOs and other forms of managed care is to contain costs by ensuring that unnecessary tests and procedures are not performed; but unless health plans are permitted to reward physicians who are successful in controlling costs, costs will never be contained. The result will be to make quality health care unaffordable to an increasing percentage of the population," Samp said.

In its Supreme Court brief, WLF argued that the fiduciary duties owed by those who run employer-sponsored health care plans do not extend to individual treatment decisions. Rather, WLF argued, those administering an employer-financed health care plan owe a fiduciary duty to the plan itself -- meaning that they must act based in the best interests of *all* plan participants. Because plan participants as a group have an interest in controlling total plan costs in order to preserve assets for participants' future medical needs, it is highly appropriate for ERISA fiduciaries to adopt cost-containment measures, WLF argued.

WLF's brief argued that if allowed to stand, the appeals court decision would have catastrophic effects on health care in this country. The decision below would outlaw cost-containment measures implemented not only by HMOs but also by fee-for-service physicians, WLF argued.

WLF argued that ERISA imposes a fiduciary duty on HMOs to deal fairly with plan members when deciding whether to pay for particular medical services. But the initial decision regarding the appropriate level of medical care is not subject to regulation under ERISA, WLF argued; rather, such decisions are made by treating physicians and are subject to review under state tort law.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a significant portion of its resources to promoting civil justice reform, including efforts to rein in overly expansive theories of tort liability. WLF filed its brief with the pro bono assistance of Lonie A. Hassel and William Hanrahan of the Groom Law Group, Chartered, a Washington, D.C. law firm. The Supreme Court agreed in September to review this case; that decision was a victory for WLF, which filed a brief last July asking the High Court to hear the case.

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