HOOPER LUNDY & BOOKMAN, INC.
HEALTH LAW PERSPECTIVES

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Medicare Beneficiary May Sue HMO, State High Court Rules

A Medicare beneficiary was not required to follow the administrative appeals process before filing suit against an HMO that refused to provide certain services, the California Supreme Court has ruled in a 5-1 decision in *McCall v. PacifCare of California.*

The case involved a man suffering from progressive lung disease, who was a Medicare beneficiary enrolled in an HMO, PacifiCare California, Inc. His primary care physician was a member of Greater Newport Physicians, Inc. (GNP).

Allegedly, the man's physician, PacifiCare and GNP repeatedly refused to refer the man to a specialist for a lung transplant or provide other needed care, and ultimately forced him to disenroll from PacifiCare in order to get on the Medicare list for a transplant. During that time, his condition progressed. The man died shortly before the appellate court rendered its decision in the case, and immediately after he underwent a lung transplant paid for by Medicare.

The man and his wife brought suit against the doctor, PacifiCare and GNP, alleging eight causes of action for tort damages, including negligence, willful misconduct, four counts of fraud including fraudulent misrepresentation and constructive fraud, and intentional infliction of emotional distress. The complaint also alleged that the HMO, physician and medical group had violated several statutory duties they owed the man.

At issue in the case is whether the man's complaint alleges a claim "arising under" the Medicare Act, even though none of the claims seeks payment or reimbursement of Medicare claims.

The supreme court rejected the argument by PacifiCare and GNP that any state court damage award which is logically dependent on a finding of wrongful denial of benefits would be "inextricably intertwined" with a Medicare claim.

In addition, the court said that clearly Congress, in enacting the Medicare Act, did not intend to displace state tort remedies. That position was strengthened, the court said, by the Balanced Budget Act of 1997 (BBA), which enacted the Medicare+Choice program.

According to the court, the BBA is noteworthy for its addition of an express limited preemption provision to the Medicare Act. By its terms, the court said, Medicare now preempts state laws mandating benefits to be covered, mandating inclusion of providers and suppliers, and coverage determinations. The court also pointed to the preamble to the Health Care Financing Administration's request for final comments on the interim final rule implementing the amendments, which stated that the BBA does not preempt state remedies for issues under the Medicare contracts, including tort claims or contract claims.

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"Because [the beneficiary and his wife] 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, because 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, it follows that the court of appeal correctly reversed the trial court's orders," the court said.

In a dissenting opinion, Justice Marvin Baxter viewed the decision as an opening of floodgates for inappropriate lawsuits. Baxter contended that the majority opinion allows virtually any Medicare HMO plan enrollee to bring suit in state court to challenge an HMO's denial of Medicare benefits. "Enrollees may bypass Medicare's exhaustion requirements simply by styling their challenges as claims for tort damages. As a result, questions regarding which medical appeals procedures are or should be covered by Medicare may now be decided outside of Medicare's exclusive review process by California judges and juries on an ad hoc basis," he said.

Failure To Diagnose Emergency Is Not EMTALA Violation

A hospital did not violate the Emergency Medical Treatment and Active Labor Act (EMTALA) when it transferred a patient after failing to diagnose his emergency condition, the U.S. Ninth Circuit Court of Appeals has ruled, affirming a lower court decision.

The case involved a man who visited the Lake County Mental Health Department (Lake County) to see a psychiatrist. The man had previously been diagnosed with a psychotic disorder, borderline intellectual function and pedophilia. The Lake County staff instructed the man to go to the Redbud Community Hospital emergency room to receive a medical clearance before returning to Lake County.

He did so three times within three days. During his visits, he was examined by both nurses and physicians and prescribed various medications, including the antidepressant Anafranil. None of the Redbud physicians who examined the man nor any other employee diagnosed the man as suffering from an emergency medical condition-as opposed to a psychological or psychiatric condition.

On his final visit, the man's wife brought him to the Redbud emergency room after she found him wandering in the road in the middle of the night. A nurse performed an initial medical evaluation and a doctor performed another examination. The doctor noted that the man was very agitated, but he also observed that the man had a regular heartbeat, and that he presented no other physical symptoms.

The doctor determined that the man was suffering from a psychological disorder that caused his agitation, but that he was not suffering from any physical disorders. The doctor prescribed and administered Haldol, a tranquilizer used to manage psychotic disorders and benedryl, an antihistamine with sedative effects, in an effort to sedate the man and stabilize his conditions.

Later that morning a county crisis worker evaluated the man, finding that he met the criteria for involuntary psychiatric commitment. The worker asked the doctor to clear the man for transfer to East Bay Hospital, which functioned almost exclusively as a psychiatric hospital. The doctor found that the man's condition had stabilized-he was no longer agitated and was sleeping-that he was not suffering from a life threatening condition and that transfer to East Bay did not pose a risk to his condition.

The man was transferred that morning. At East Bay, a psychiatrist prescribed more Haldol for the man. Shortly after, the man went into cardiac arrest. The East Bay staff began to perform CPR and ordered an ambulance to transfer the man to Brookside Hospital. The man received emergency care there, but died shortly afterward. An autopsy determined that the man died from sudden cardiac arrhythmia, caused by acute psychotic delirium, which was in turn caused by clomipramine (Anafranil) toxicity. None of the physicians or nurses who examined the man at Rosebud diagnosed him as suffering from Anafranil, or any other drug toxicity.

The man's wife and daughter then filed suit in federal district court against the physicians who treated the man, East Bay Hospital, Redbud and Adventist Health Systems, which had previously entered into an association agreement with Redbud.

The district court ruled in favor of Rosebud and Adventist on the EMTALA and Section 1317 claims. The district court also ruled that the agreement between Redbud and Adventist did not make Adventist liable to the man. The survivors then filed an appeal, as well as a suit in state court, which is still pending.

The appeals court concurred with the district court ruling that Redbud had complied with EMTALA's screening requirements, noting that seven other circuits have held that to comply with this

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The FHA/HUD 242 Program
A New Capital Financing Opportunity for California Hospitals

For many years, the Federal Housing Administration (FHA) has helped hospitals outside of California access financing for capital projects, at favorable rates, through its HUD 242 mortgage insurance program.

Now, thanks to recently approved California regulations, the FHA/HUD 242 program is being made available to California non-profit, proprietary and public acute care hospitals. Funds secured through this program may be used to enhance a hospital's credit rating for a wide variety of taxable or tax-exempt bond and other real estate secured financings.

The FHA program, which enhances participating hospital's creditworthiness and thereby enables them to obtain very favorable interest rates, represents a very important development for many California hospitals. Some key characteristics of the FHA program are as follows:

- No limit on the amount of loan that can be insured
- No aggregate cap on the funds FHA will insure
- FHA insures 99 percent of the loan amount
- The loan term may be as long as 25 years
- One-time fees total 0.8 percent of the loan amount
- The fixed annual premium ins 0.5 percent of the loan amount
- Loan to loan value may be up to 90 percent.

California Health Law Monitor and Hooper, Lundy & Bookman and the California Healthcare Association are sponsoring a half-day seminar to provide hospital executives with an overview of the new program, a discussion of issues hospital face in securing financing and the accompanying regulatory and legal components of the program.

Topics covered in the program will include:

- basics, qualification and the application process
- Key structural and legal issues
- The role of OSHPD
- The feasibility process
- Financing structures and strategies

Program speakers include:

- John Whitehead, Operations Officer, HUD Office of Healthcare Facilities
- Dale A. Flournoy, Deputy Director Cal-Mortgage Loan Insurance Division, OSHPD
- Todd E. Swanson, Transactional specialist and principal, Hooper, Lundy & Bookman
- Alan P. Richman, Innovative Capital LLC
- Jim Statler, Golden Consulting
- Peter A. Schnieper, Hospital Transactions Group, ZA Consulting
- Gary J. Goldberg, Summit Financial Group, LLC

The half-day seminar will be held June 11, 2001 at the Westin Los Angeles Airport, 5400 West Century Blvd. Registration will begin at 8:00 a.m. The program will run from 8:30 to 12:15, with a $50 fee per person.

Seating is limited, so please fax your completed form to (310) 551-8181 or mail the form with your check payable to Hooper, Lundy & Bookman, Inc., by ***June 1*** to FHA/HUD Mortgage Insurance Program, c/o Hooper, Lundy & Bookman, Inc., 1875 Century Park East, Suite 1600, Los Angeles, CA 90067.

If you have questions regarding the seminar, please contact Sharon Lee or Todd Swanson at (310) 551-8111.

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requirement, a hospital only must provide a screening examination that is comparable to that offered to other patients with similar symptoms. The court noted that the man was examined by a doctor and nurse on each visit and had multiple laboratory tests conducted. The only thing established was a failure to properly diagnose the man's symptoms, an error that might result in a state tort liability, but not an EMTALA liability, the court said.

The court also rejected an argument by the survivors that Redbud failed to stabilize the man's condition prior to his transfer to East Bay, finding that a hospital's duty to stabilize a patient does not arise until the hospital first detects an emergency medical condition.

CALENDAR

May	**21**	HLB Attorney Linda Kollar addresses Medical Educational Services in Diego on the topic of *Mental Health and the Law: Responding to Subpoenas, Court Orders and Law Enforcement.*
May	**22-23**	HLB Attorneys Gina Reese and Jodi Berlin present two sessions at the annual conference of the California Association for Health Services at Home. Topics include *Corporate Compliance, Synopsis of Stark II, Advanced Directives, CLAS.*
June	**13**	HLB Attorney Linda Kollar addresses the Child Welfare League of America in Denver on the topic of *"Reaching the Summit: Risk and Resiliency in the Foster Family Agency.*
June	**26**	HLB Attorney Ken Burgess speaks at the Ohio Assisted Living Association's summer conference, Columbus on the topic of *ADA and Olmstead.*

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