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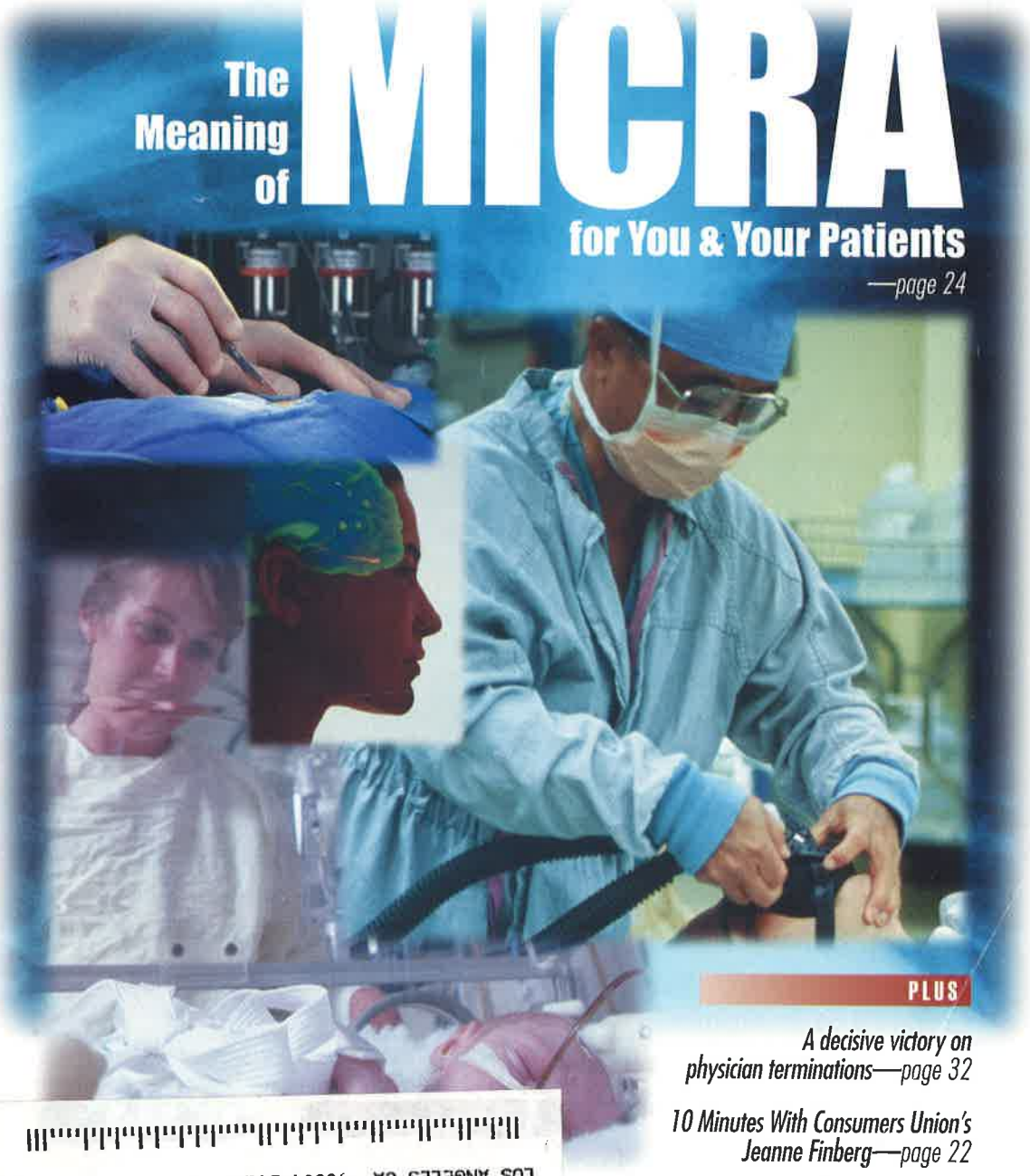

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Dr. Potvin's attorney shows how precedent is made in contesting terminations without cause

By Henry Fenton, Esq.

Let's thank the persistence and perseverance of Orange County OB/GYN and longtime CMA member Louis Potvin, M.D., who would not take no for an answer, when Metropolitan Life Insurance Company terminated him from its network of health care providers in 1992. Let's also thank CMA for supporting him by filing an *amicus curiae* brief on his behalf. These efforts have given California physicians a precedent-setting court decision that provides physicians protections in a variety of circumstances from unfair and arbitrary treatment by HMOs, insurance companies, IPAs, and other managed care entities. In most cases, HMOs must now provide physicians with notice, a hearing, and a legitimate basis for exclusion before they can be excluded or terminated from membership or participation in managed care entities.

What happened to Dr. Potvin has happened to scores of other well-established and well-respected physicians (also see February 1997 *California Physician*). They have received letters of termination or nonrenewal from managed care entities without explanation or on the basis of "business reasons," without any further clarification. In most instances, their efforts at reversing the decision have been to no avail. Physicians have been told that the action was taken pursuant to the clause in their contract that permits termination without cause.

In 1988, Dr. Potvin had entered into a written provider agreement with MetLife, and in July 1992, suddenly and without warning or explanation, MetLife terminated the contract and removed him from its provider list. Faced with losing most of his patients, Dr. Potvin immediately sent his first letter to MetLife seeking the reasons for his termination. In January 1993, MetLife wrote back that the termination was a business decision and that he was entitled to no other explanation.

In March 1993, MetLife informed Dr. Potvin that the termination was related to his malpractice history of three claims and one action. MetLife reaffirmed the decision to terminate his agreement and informed him that it was consistent with the clause in his contract that permitted termination with or without cause on 30 days notice. Dr. Potvin wrote back, stating that he had not been at fault in the malpractice action filed against him in 1977, that his insurer had settled that case in 1987 without admitting liability, and that the other three malpractice claims had been dropped. Although Dr. Potvin repeatedly requested a hearing, MetLife would not provide one.

Having suffered a major loss of patients and having no other recourse, Dr. Potvin filed suit in July 1994. In 1996, a Superior Court judge determined that MetLife could terminate the contract.

Dr. Potvin appealed. This May, a California appellate court concluded that Dr. Potvin had the right to be notified of the charges against him and allowed a hearing before he was terminated by MetLife. The court also held that Dr. Potvin had rights that protected him against termination for arbitrary or capricious reasons.

The decision of the Court of Appeal in *Potvin v. MetLife* is contained in a published opinion. As such it constitutes a legal precedent in California. MetLife, however, has petitioned the California Supreme Court for review, and it is not certain whether such review will be granted. If it is not granted, then the decision will remain the law in California. If it is granted, then additional arguments will be presented and the California Supreme Court will render a decision interpreting the law and facts of the case.

What *Potvin* does for physicians

The precise impact of the *Potvin* case remains to be seen, but the appellate court decision suggests that it will lead to the following changes:

Managed care entities must provide physicians with fair procedure and due process even though the contracts provide for termination without cause. Physicians who contract with insurance companies and other managed care entities typically enter into contracts that provide that the contracts may be terminated without cause by the managed care entity or by the physician. Physicians generally are not in an economic position to negotiate those clauses when insurance companies and other managed care entities insist on including them. The MetLife physician agreement Dr. Potvin signed said that the agreement could be terminated by either party at any time without cause. Nonetheless, the court held that the fair procedure and due process protections extended to prevent Dr. Potvin's termination in the absence of fair procedure or for arbitrary, capricious, or other reason contrary to public policy. Under the rationale of the *Potvin* case, the same rule would apply to all other managed care contracts containing clauses permitting termination without cause.

The rationale of Potvin applies not only to large insurance companies such as MetLife but to managed care entities in California, in general, including IPAs. In *Potvin,* the court relied on the fact that MetLife controlled substantial economic interests affecting Dr. Potvin, as evidenced by the destructive effect on his practice. It referred to an earlier case, *Ambrosino vs. Metropolitan Life Insurance Company,* which had applied the common law right to fair procedure to a podiatrist terminated from MetLife's provider network, after he was disciplined for a short-term chemical dependency by the California Board of Podiatric Medicine. In that case, noted the *Potvin* court, fair procedure rights were appropriately extended to Dr. Ambrosino in that about 15 percent of his patients were insured by the insurance company. Because of the pervasive impact of managed care entities of all kinds on the practices of physicians with whom they contract, it is logical that the rationale of *Potvin* would extend to all sorts of managed care entities, including IPAs, that control substantial economic interests of the physicians with whom they contract.

An appropriate analogy is presented by the California cases that have considered physicians' rights related to hospital staff privileges. Those cases recognize that regardless of the size of the hospital, hospital staff privileges are integral to physicians' fundamental right to practice their profession. The same is true of the right to be a member of or contract with managed care entities. Exclusion by or termination from such entities effectively interferes with the right of physicians to practice their profession to such a degree that it is imperative that fair procedure and due process rights be extended to physicians, *vis à vis* all sorts of managed care entities.

The right of fair procedure and against arbitrary or capricious termination of managed care contracts extends also to exclusion or nonrenewal of such contracts. The appeals court in *Potvin* relied on language in another case, *Delta Dental Plan v. Banasky* (1994), and stated: "The California courts have long recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which control important economic interests." Thus, the court in *Potvin* recognized that the right to fair procedure must be accorded, not only in termination situations but also situations where an individual is denied a contract or membership in the first instance. Although the appellate court in *Potvin* did not need to decide that precise issue, since it was not presented, it is logical that fair procedure and due process rights would apply to the exclusion of physicians by managed care entities, and that, indeed, is the rule in California with respect to the denial of medical staff privileges. A physician who applies for and is denied hospital staff privileges is entitled to fair procedure and such privileges may not be denied in the absence of reasons related to patient care or other legitimate reasons.

At a minimum, the appellate court held that physicians terminated by managed care entities are entitled to specific charges setting forth reasons for the termination and an opportunity to be heard before a decision is made as to whether the agreement will be terminated. Analogizing to other fair procedure cases involving medical staff privileges, this probably means that the physician is entitled to a hearing before an impartial decision maker. Additionally, the physician is entitled to retention if it appears that the real reasons for termination or exclusion are arbitrary, capricious, or in violation of public policy.

Patients are better served. To subject insurance companies, HMOs, and other managed care entities to fair procedure and due process protections also protects the general public because such protections will deter interference with existing physician-patient relationships and discrimination against physicians who seek a high level of patient care on behalf of their patients. Managed care entities are prevented from excluding or terminating physicians unless they can provide an objective basis for the termination in terms of quality of care or other legitimate reasons and unless they can establish such a basis following notice and a hearing.

Grounds for recourse. The Court of Appeal was absolutely correct in extending the fair procedure and due process protections California common law accorded to physicians who contract with managed care entities. These protections are critical to the right of physicians to practice their profession.

Based on the court of appeal decision in *Potvin,* physicians who were previously terminated or rejected by managed care entities may have had their rights of fair procedure and due process violated. They should immediately obtain appropriate legal advice and pursue their rights. Statutes of limitations may apply to physicians who delay in seeking to obtain an appropriate legal remedy. CP

Mr. Fenton is a Los Angeles health care attorney who represented Dr. Potvin in this case.

How far do the Potvin protections for physicians go?

Obviously, this case will be of tremendous benefit to physicians terminated by managed care plans. The decision, which falls squarely within CMA policy calling for CMA to encourage and support efforts to remove managed care contract termination provisions allowing for physician termination without cause, will significantly enhance CMA's ability to be successful on this issue before other courts and the Legislature. The Court's ruling provides a fundamental protection for those giving and receiving care in today's health delivery system. Because of the impact of terminations without cause on the physician-patient relationship and the physician's ability to practice medicine, basic fairness must be ensured before decisions are made that adversely affect participants' status in managed care organizations. The *Potvin* decision assures basic fairness and that neither physicians nor their patients suffer needlessly.

Unfortunately, the court ruled that MetLife was not a "peer review body" for the purposes of reporting and providing fair hearings pursuant to Business & Professions Code §§805 and 809 *et seq*. The court reasoned that Metropolitan Life is an insurance company, and as such did not fall within Business & Professions Code §805(a)(1)(D)'s definition of the term "peer review body." According to the court, a health insurer that contracts with its physician panel does not "consist of," or "employ" physicians. In addition, the court did not believe that Metropolitan Life had a "committee...which functions for the purposes of reviewing the quality of professional care rendered by members or employees of that entity." The court believed that there was evidence that only one person performed the review (as opposed to a committee) and that the review was not undertaken to assess the quality of professional care provided by Dr. Potvin, but rather, Dr. Potvin's past malpractice history. The court explained that, if the Legislature wishes to include insurance companies within the purview of the peer review and fair hearings statutes, it is up to the Legislature to amend those statutes.

—By CMA attorney Astrid Meghrigian

CMA's influence in the Potvin case

CMA filed an *amicus curiae* brief that was accepted by the Court of Appeal when it considered *Potvin v. MetLife*. Part of CMA's argument was:

"The simple realities of the medical profession today place great reliance upon the granting and retention of unrestricted medical staff privileges and the ability to participate in managed care networks.... Additionally, physicians whose privileges have been restricted or terminated may find their opportunities to provide care to patients who receive health benefits from HMOs, PPOs, and other delivery systems, or who receive care from ambulatory care centers, severely curtailed, if not entirely foreclosed. Just as access to hospital facilities has been deemed essential for the practice of medicine in the past, today, continued managed care panel participation is essential if physicians are to be able to continue to practice their professions fully."