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VIRGINIA LEE HUNTER

'Doctors are fighting back — out of desperation. [My client's] practice was destroyed.'

— *Plaintiffs attorney Henry Fenton*

HMOs Swallow A Bitter Pill

An appeal court decision striking down at-will provisions in doctors' contracts is sending shock waves through the managed-care industry

By MIKE McKEE

Obstetrician Louis Potvin didn't go quietly into the night five years ago, when Metropolitan Life Insurance Co. terminated him without cause from its network of health care providers.

Faced with losing most of his patients, the Orange County doctor badgered company executives for an explanation. Told at first that it was purely a business decision, he later learned that MetLife felt he had a problematic "malpractice history."

The explanation infuriated Potvin because he had been hit with only four malpractice claims in his 30-plus years in practice, and three of those were dropped. The fourth settled in 1977 without Potvin admitting liability.

Potvin sued, claiming that at-will contracts like MetLife's — which let companies unilaterally end agreements without saying why — give doctors no recourse to challenge decisions that could devastate their practices. In a market in which managed-care companies possess a stranglehold over doctors' economic survival, he argued, the contracts amount to a severe violation of doctors' right to fair hearings.

The Second District Court of Appeal agreed with Potvin last month in a precedential ruling that's sending shock waves through the managed-care industry. The court held that doctors contracting with managed-care companies are entitled to

See DOCTOR'S page 8

Will DOJ Backslide in Affirmative Action Case?

By BENJAMIN WITTES

WASHINGTON — The U.S. Justice Department last weighed in on the question of whether race can be a factor in job

Walter Dellinger, was opposed to the original reversal. There is no political appointee in place at the helm of the Civil Rights Division to pick up Patrick's

Bar Panel Rejects Change to Paper's Advisory Board

By ALLYSON QUIBELL

Accusations of censorship and

Doctor's Victory Shines Light on Power of HMOs

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the same fair hearing procedures afforded physicians on hospital medical staffs.

"In our view, there is at least a triable issue of fact as to whether . . . plaintiff was deprived of his common law right to fair procedure by an arbitrary delistment," Justice Vaino Spencer wrote for a unanimous panel on April 30 in *Potvin v. Metropolitan Life Insurance Co.*, 63 Cal.Rptr.2d 202.

Plaintiffs attorneys nearly danced in the streets as word spread.

"This means that the at-will provisions that are absolutely standard in every contract between a physician and a managed-care provider are not worth the paper they're written on," says solo practitioner Mitchell Green, who represents doctors in the Bay Area. "At-will no longer exists."

Even better for doctors, there's wide agreement that the ruling — the first of its kind to apply statewide — also covers the doctor-run medical groups with which most physicians contract nowadays.

Potvin comes at a time when managed-care company contracts are under assault from all quarters. In the last couple of years, the San Francisco federal court and the New Hampshire Supreme Court opened the door to fair hearings for physicians. And this year legislation is pending in Sacramento that would make health plans explain their firing rationales and require the plans to arbitrate before terminating or refusing to renew physician contracts.

"There needs to be a fair process for these doctors," says Democratic Assemblyman Martin Gallegos, whose arbitration bill was inspired by people statewide who had abruptly lost their doctors to managed-care cuts.

Contract non-renewal accounts for about 95 percent of the problem, says Gallegos, a Baldwin Park chiropractor. "It's clearly interrupting the doctor-patient relationship."

But managed-care company representatives and attorneys say rulings like *Potvin* and legislation like Gallegos' Assembly Bill 434 — one of two health plan contract bills in Sacramento — ignore the fact that there usually are legitimate business reasons for delisting doctors. A company could be overstocked in a particular medical specialty or a doctor might not be living up to the terms of a contract, they say — and, after all, why wouldn't malpractice be a concern?

"This blanket approach [by the courts and legislators] doesn't appreciate the fact that there are numerous reasons that

STEPHANIE TURNER

DANCING IN THE STREET: As a result of *Potvin*, "at-will no longer exists," says solo practitioner Mitchell Green, who represents doctors in the Bay Area.

should equip a health plan with the ability to terminate without cause," says Mark Reagan, a partner in the San Francisco office of Los Angeles' Foley Lardner Weissburg & Aronson.

"Downsizing or shrinking back is going to happen," adds Bruce Spurlock, vice president of the Sacramento-based California Healthcare Association, which advocates for hospitals and health plans. "If you do that, you're going to have to terminate physicians."

'FIGHTING BACK'

Doctors have long maintained that they've been dumped from provider lists for reasons that have nothing to do with their abilities. They've been pushed out, they say, for defying company officials who second-guess their medical decisions, for complaining about unfulfilled contract promises, or because they face unproven malpractice allegations.

"Health plan organizations have realized that they have incredible economic control over physicians," says Diane Palumbo, an Irvine-based Richter, Senn & Palumbo partner who represents a Contra Costa County medical group in a contract dispute with Alta Bates Health Systems. "If you don't play ball with them, they're going to terminate you."

Palumbo and others, though, believe those days are coming to an end.

"Doctors are fighting back — out of desperation," says Los Angeles lawyer Henry Fenton, who represents Potvin. "[Potvin's] practice was destroyed."

"He says people would ask him, 'Why were you terminated?' And he'd say there was no cause," Fenton recounts. "And they'd say, 'What does that mean?' They were suspicious of him."

The Second District's ruling in *Potvin* built on two earlier cases — the court's own 1994 holding in *Delta Dental Plan of California v. Banasky*, 27 Cal.App.4th 1598, and the Northern District's 1995 ruling in *Ambrosino v. Metropolitan Life Insurance Co.*, 899 F.Supp. 438.

Both cases supported the proposition that fair procedure principles apply when a company controls substantial economic interests of a doctor. But each had its weak points.

Delta Dental left questions about how much economic interest must be affected. And *Ambrosino*, which dealt with a substance-abusing doctor, suggested that it might not be arbitrary to delist a doctor based on malpractice history.

Potvin, dealing as it did with malpractice, cleared up the *Ambrosino* ambiguity. And plaintiffs lawyers say it resolved the *Delta Dental* question by accepting judicial findings in *Ambrosino* that a substantial impact could be in effect if a company controls as little as 15 percent of a doctor's business.

"The one finding linking *Delta Dental*, *Ambrosino* and *Potvin* is that managed-care providers are playing a role in today's society that's equivalent to a hospital staff," says plaintiffs attorney Green, who was the victor in *Ambrosino*. "These decisions are leveling the playing field between physicians and managed-care providers."

TODAY'S CONTRACTORS

Ironically, though, *Potvin* and pending legislation might have less impact on managed-care companies than on so-called independent practice associations, through which doctor groups contract with managed-care companies while retaining control over compacts with individual doctors.

Contracts between independent physicians and IPAs are far more common these days than agreements between autonomous doctors and managed-care companies. So in many ways, IPAs are to doctors today what managed-care companies were five years ago.

"If you extend out the logic of [*Potvin*], it would mean that when a physician is terminated by an IPA based upon a without-cause termination provision, the IPA would no longer be able to enforce that provision," says W. Reece Hirsch, a senior health care associate in the San Francisco office of Seattle's Davis Wright Tremaine. "They would need to complete some form of notice and hearing process before going through with a termination."

What that means is that *Potvin* and Gallegos' AB 434 — which includes IPAs in its broad definition of managed-care companies — could actually pit doctors against doctors.

"For most physicians contracting via group, IPA or other arrangement, the *de facto* terminator of physician services will not be the [health care] plan but the physician administration of these organizations," Spurlock of the California Healthcare Association wrote to members of his group, which also represents 45 IPAs. "This means the administrative time and expense is born by physicians."

Gallegos confirms that while doctors in general are pleased about the demise of without-cause contracts, IPA leaders are worried. Many have contacted him, echoing MetLife's concerns in *Potvin*.

"There are some directors of medical groups who fear losing the ability to deselect doctors," Gallegos says. "They are concerned about having to provide reasons for terminations and binding arbitration."

Most attorneys on both sides of the issue say *Potvin* was inevitable. As health maintenance organizations occupied a larger portion of the health care market, doctors' dependence on them has kept pace.

In an *amici curiae* brief filed in *Potvin*, the California Medical Association and the American Medical Association claim that HMOs cover 25.8 percent of California's population, more than any other state. The numbers go as high as 36 percent in Oakland, 46.3 percent in San Francisco and 51.2 percent in Sacramento.

"Just as access to hospital facilities has been deemed essential for the practice of medicine in the past," the *amici* said, "today continued managed-care panel participation is essential if physicians are to be able to continue to practice their professions fully."

That has inevitably created tension.

"Because there have been more cutbacks in HMO provider panels, there have been disgruntled physicians out there looking for a cause of action," says Hirsch, of Davis Wright Tremaine. "And the courts are now beginning to find a legal theory to sustain that cause of action."

Spurlock predicts more cutbacks and more suits because, he says, the American market will be flooded with a 160,000-doctor surplus by 2005.

"With that much excess," he says, "we're going to see challenges."

SEARCHING FOR CAUSE

Even though managed-care companies appear to be cornered at this point, some attorneys contend that *Potvin* and its predecessors leave a lot of questions.

They say it's still not clear what precise level of economic impact would be considered substantial, or how hearing officers and arbitrators would determine whether a firing was arbitrary or based on sound financial factors.

"How does one characterize whether or not a legitimate business reason with which the panel disagrees is arbitrary or simply one with which the panel doesn't agree?" says Stanley Watson, legal counsel for Oakland's Kaiser Foundation Health Plan, which doesn't have without-cause termination contracts. "Surely, they're not going to second-guess the [company's] business manager."

Attorneys on both sides of the issue also warn that the public better be prepared for higher medical costs if hearings and arbitrations are held for every termination or non-renewal. They estimate that fair hearings — complete with lawyers, witnesses and hearing panelists — could cost between $50,000 and $73,000 per case.

Christine Hall, general counsel for the Medical Board of California, says that poses an interesting question: "Will you ever be able to financially terminate someone? Can you imagine what kind of records you'd have to obtain from a plan to prove your case? It would be an incredible kettle of fish."

A few industry spokespeople also fret that the ultimate price could be paid by young doctors as managed-care entities reject their bids for participation, preferring experienced physicians with track records.

"It's going to be a huge incentive to put the barriers on the front end to keep doctors out," says the California Healthcare Association's Spurlock.

Health care lawyer Reagan, of Foley Lardner, fears that non-medical forces are micromanaging the managed-care industry to the point that the original concept of cost containment will be lost.

"It seems to me that we've tried [in the past] to open these [managed-care companies] up so they can be more cost-efficien and provide care," Reagan says. "But now we seem to be trying to regulate them from the inside out."

But some people would argue tha that's OK because doctors play a uniquely important role in society, one that require a close bond with patients that managed care companies shouldn't break withou significant cause.

"We're not talking about the purchas of goods, we're not talking about con tracts to buy widgets," Assemblyma Gallegos says. "We're talking abou health care services. We should not vie these contractual agreements like we vie other contractual agreements."

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STEVE YEATER

NO PAIN, NO GAIN: "Downsizing or shrinking back is going to happen. If you do that, you're going to have to terminate physicians," says medical industry advocate Bruce Spurlock.

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