

Illinois Legal Update

Insights and Developments in the Law

Spring 2007

In This Issue

**Know Your Rights
as a Patient 1**

**Wrongful Death and
Survival: If the
Worst Happens 2**

**Whistleblower
Collects \$3.7
Million 2**

What Is a Trust?..... 3

**Clinics Can Enforce
Noncompetition
Agreements 4**

Know Your Rights as a Patient

In this era of rising health-care costs, various forms of managed health care, including HMOs and PPOs, are becoming increasingly popular. However, in response to perceived abuses, the Illinois legislature enacted the Managed Care

The Act takes steps to ensure that the care provided to an insured is determined by his or her doctor, not by the insurer.

Reform and Patients Rights Act (the "Act") to protect the citizens of Illinois and to ensure that they receive the health care that they pay for.

For individuals insured through managed care plans provided by their employers, but purchased from third-party insurers, the Act provides certain rights and protections that the participants might otherwise be denied. (The Act does not apply to an employer who is self-insured.)

Rights and Protections

For example, the Act specifies that managed care providers must provide participants with certain basic information about their plan, including the names of participating doctors, the plan's service area, some information about how the plan operates, and (perhaps, most importantly) what the plan covers and does not cover. Plans subject to the Act also have to give participants at least 60 days' notice of a decision to terminate coverage, which gives a participant an opportunity to find new coverage.

But the Act does more than just require the disclosure of important information—it also takes steps to ensure that the care provided to an insured is determined by his or her doctor, not by the insurer. Specifically, the Act prohibits managed care organizations from interfering with a doctor's right to discuss health-care services with an insured, and allows an insured to pick his or her own primary care physician. If a doctor believes that treatment by a specialist is necessary, the Act requires the managed care provider to provide for a "standing referral" to

Continued on page four.

Wrongful Death and Survival: If the Worst Happens

Many of us, at some time or another, will have to deal with an accident that causes some minor injury: a traffic accident, a slip at a store, or a sports injury. Some of us, however, will be called on to deal with a much more serious accident, one that causes the death of a close family member. Although you always hope this will never happen to you, the following article discusses some things you need to know if the worst does occur.

The death of a family member can give rise to two separate but related claims: a wrongful death claim and a survival claim. Generally speaking, both of these claims are negligence claims that arise when someone's death is caused through the carelessness of another. However, despite both being negligence claims, there are important differences between wrongful death and survival claims.

A wrongful death claim is a claim brought on behalf of those family members who have survived the deceased, such as that person's spouse, children, and parents. A wrongful death claim seeks compensation for the survivors for the loss they have suffered due to the wrongful death caused by another.

In contrast, a survival claim seeks compensation for the pain, suffering, and loss of life caused to the deceased personally. Since the deceased is no longer able to bring the claim on his or her own, a survival claim is brought by the representative of the deceased's estate, usually known as the executor or the administrator.

Because wrongful death and survival actions are legally sepa-

rate claims, they allow recovery of different elements of damage. For example, a wrongful death claim brought by the surviving family members includes such items as the loss of companionship and society that they would have enjoyed if the deceased had not died, and recovery for the value of some of the services that would have been provided had the death not occurred. The family can also recover for direct financial losses, such as the loss of a probable inheritance, and for the loss of the financial support that would have been received over the years. In a survival action, the

damages that are recoverable include the pain and suffering the deceased felt before dying, medical bills and final expenses incurred because of the death, and any property damage caused by the accident that led to the death.

The mechanics of making a claim are different in a wrongful death suit than in a survival suit. In a wrongful death suit, the claimants are the survivors, whereas in a survival suit the claimant is the person in charge of the deceased's estate. Fortunately, because the facts un-

Continued on page three.

Whistleblower Collects \$3.7 Million

In a closely watched case, an Illinois jury awarded \$3.7 million in damages to a police officer who blew the whistle on corruption in his department for the retaliation that his testimony brought.

The plaintiff, an officer with the Stickney Village Police Department, testified before a grand jury about corruption in the department, including the loss of money and drugs that the police had seized. As a result of the investigation, one Village official pleaded guilty to theft.

However, the jury heard evidence that, after the officer gave his testimony, the mayor and the police chief retaliated against him by demoting him, taking away his office, assigning him to patrol duty, and even trying to convince a woman to charge him with sexual assault. These acts destroyed the officer's health and forced him into early retirement.

The case was closely watched because a recent decision by the United States Supreme Court held that a public employee's right to speak out about his or her job was not always protected by the First Amendment. Despite this decision, the police officer prevailed on his claims, although the defendants are seeking to have the decision overruled.

What Is a Trust?

A trust is a legal instrument that transfers title to designated property from the owner, called the donor or grantor, to a trustee, who holds the property for the beneficiaries of the trust. The grantor can also serve as the trustee, thereby enhancing control over the trust during the life of the grantor. In such a case, a successor trustee is usually named in case the grantor dies or is incapacitated. Depending on the size or complexity of the trust, the trustee, or cotrustee, might be an institution, so as to bring more expertise to the position.

Testamentary Trust

A testamentary trust, created in a will, takes effect when the grantor dies. It names the beneficiaries and gives directions for payment of the income from the trust and for disposition of the assets. The testamentary trust has the advantage of increasing the odds that an inheritance is used prudently. The trustee can manage the assets of the trust until such time as the beneficiaries are prepared to do so, as opposed to an immediate transfer of assets to the beneficiaries.

Living Trust

The second category of trusts is the living, or inter vivos, trust, which is created during the grantor's lifetime. An important decision for a living trust is whether the trust will be revocable by the grantor or irrevocable. In either case, the assets

are retitled in the name of the trust. As the name suggests, a revocable trust may be dissolved entirely by the grantor. But short of that, the grantor may also change beneficiaries, replace the trustee, or change the composition of the assets in the trust. Revocable trusts do not remove assets from the grantor's estate. The trust pays taxes on its income, and if any assets remain in the trust at the death of the grantor, they are part of his estate and at least potentially taxable as such. A revocable trust has few tax advantages.

As the name suggests, a revocable trust may be dissolved entirely by the grantor.

An irrevocable trust permanently takes assets out of the grantor's estate and puts them into the trust. While tax savings can be realized with an irrevocable trust, this type of trust is not to be entered into lightly, as it will take action by a court to alter it later. For tax purposes, the trust becomes a separate entity. Assets in the trust generally are not subject to estate taxes on the death of the grantor, but the transfer of assets into the trust may be subject to gift taxes.

When the grantor for a living trust dies, the trust assets pass directly to the beneficiaries. This is a

distinct advantage over having to go through probate, the often costly and time-consuming process of administering a will. A living trust also maintains the privacy of the estate, because bypassing probate also means that no public record is created, as occurs with probated wills.

Effective use of trusts in estate planning requires not only awareness of these trust basics, but familiarity with specialized trusts that might be a good fit for particular cases, such as those involving life insurance policies and charities. To decide on and implement the best option, use the services of qualified professionals.

Wrongful Death

Continued from page two.

derlying the claims are usually related, and because the estate representative is often also a survivor of the deceased, wrongful death and survival claims are often brought and tried together.

While nobody looks forward to dealing with a wrongful death or survival suit, the sad fact is that it is sometimes necessary. Hopefully, this article will make it easier to deal with these issues if the occasion ever arises.

Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Illinois law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Clinics Can Enforce Noncompetition Agreements

A recent decision by the Illinois Supreme Court could potentially have a significant effect on the provision of health care for Illinois residents.

The case involved an agreement between a medical clinic in Chicago and two doctors who worked there. The doctors signed noncompetition agreements that provided that if they left the clinic they could not open offices for a certain number of years within a specified distance of any of the clinic's branches, or practice in hospitals where clinic doctors had practiced.

The purpose of such an agreement is to protect an employer by limiting the ability of a former employee to open up a competing enterprise and take away the former employer's business. Noncompetition agreements are generally enforceable, although courts will refuse to enforce an agreement that restricts the former employee's ability to compete for too long or in too large an area.

The doctors left their employment with the clinic and sued to have the noncompetition agreements declared unenforceable because they were contrary to public policy. The doctors argued that enforcing such an agreement against a doctor would interfere with the doctor's relationships with his clients, prevent people from seeing doctors of their choice, and interfere with the delivery of medical care by preventing doctors from working in certain areas.

The clinic argued that enforcing noncompetition agreements actually improved health care by encouraging established clinics to hire young doctors and to give them experience by providing cer-

tain protections against competition.

The court sided with the clinic. It found that, although the doctors made some strong arguments, they had not shown that the harm of enforcing noncompetition agreements against doctors was great enough to justify finding these agreements totally unenforceable.

The court rejected the doctors' backup argument that the agreements were unenforceable because the clinic had previously breached its obligation to the doctors. From this decision, it appears that Illinois courts will enforce a covenant not to compete against doctors in the same way as they enforce them in many other professions.

Patients Rights Act

Continued from page one.

the specialist. It requires plans to cover necessary emergency care no matter who provides it, and specifies that, if a doctor prescribes a drug, no substitution of a different drug may be made unless the insured consents.

Enforcement

The Act also provides enforcement mechanisms. If the managed care provider refuses to cover a treatment because it finds that the treatment is not medically necessary, the Act allows the insured to request that the insurer reconsider its decision. If the insurer still refuses to cover the procedure, the insured may appeal this refusal to an outside reviewer (one not employed by the managed care plan) for an independent determination of whether the procedure is necessary. The Act also prohibits retaliation against doctors who advocate a medically appropriate treatment, no matter how expensive it may be. Finally, the Act prohibits managed care providers from requiring that the participant waive any of these important rights in return for coverage.

Health care is expensive, and managed care is one option to help contain costs. However, the Act makes sure that this cost saving does not come at a greater cost, one measured not in dollars but in lives. If you have any questions about the Act, you may contact the Illinois Department of Financial and Professional Regulation, Division of Insurance, at (877) 527-9431 or online at www.idfpr.com.

Thank You!

Thank you for choosing our firm for your legal needs. We hope that you will continue to count on us when you need legal help. We are just a phone call away.

We also appreciate the trust that you have placed in us by referring your friends, family, and associates to us for legal services. Thanks!