

## ***Yarick v. PacifiCare: Claims Against Patient’s Medicare Advantage HMO Preempted By Federal Law***

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Last month, a California appeals court held that a private litigant may not bring state law claims against a Medicare Advantage (MA) health maintenance organization (HMO) because such claims are subject to preemption by the federal law establishing the MA program. Given that federal legislators are considering a massive overhaul of the nation’s healthcare system, the case highlights the kind of confusion and conflict that can result when jurisdictional issues arise in lawsuits. Even more disconcerting, but not necessarily surprising, is the implication that healthcare providers had financial incentives to discontinue life saving care.

### *Yarick v. PacifiCare: Trial Court*

In January 2006, Joseph Yarick was admitted to San Joaquin Community Hospital for a broken leg.<sup>1</sup> Yarick was over the age of 85 and, at the time, received health benefits under the Medicare Advantage<sup>2</sup> program provided through his private insurer’s Medicare managed-care plan. Mr. Yarick had surgery to repair the broken leg and was transferred to Rosewood Health Facility three days later. Over the next three weeks, Mr. Yarick’s medical condition deteriorated; however, officials with Rosewood made the decision to discharge him. At the time Mr. Yarick’s family arrived to pick him up they found him “slumped in a wheel chair and not responsive.”<sup>3</sup> He was transported by ambulance to Mercy Hospital where he was subsequently diagnosed with pneumonia, congestive heart failure, and other medical conditions. According to the complaint, physicians, over the next two weeks, counseled and then pressured Mr. Yarick’s family to terminate efforts at treating him, and instead, to provide “comfort” or end-of-life care. The family resisted. Nevertheless, Mr. Yarick died on February 18, 2006.

Lisa Yarick, as administrator of Mr. Yarick’s estate, brought suit against a host of healthcare providers that were involved in Mr. Yarick’s case. The fourth amended complaint<sup>4</sup> alleged that the care provided, or that was not provided, to Mr. Yarick was due to financial pressures and incentives arising from the healthcare providers’ contracts with PacifiCare – Mr. Yarick’s insurance provider. More specifically, it was alleged that PacifiCare’s contracts with healthcare providers offered insufficient payment to allow the physicians and other providers to make decisions and to provide care “based on patients’ reasonable medical needs, requiring the providers to substitute a standard of financial expediency.”<sup>5</sup> The complaint additionally alleged that some of the contracts provided financial incentives for the refusal to provide reasonably necessary medical care and that

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<sup>1</sup> *Yarick v. Pacificare*, 2009 WL 4263719, \*1 (Cal.App.5th Dist.).

<sup>2</sup> 42 U.S.C. § 1395w-21 *et seq.*

<sup>3</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*1.

<sup>4</sup> The fourth amended complaint set forth causes of action for negligence, elder abuse, and wrongful death.

<sup>5</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*1.

PacifiCare failed to implement and utilize necessary quality control measures that would require providers to give good medical care despite the financial incentives not to do so.<sup>6</sup>

PacifiCare demurred to Yarick's fourth amended complaint on the basis that the causes of action were preempted by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA),<sup>7</sup> and that there were insufficient facts to constitute causes of action. After a hearing, the trial court dismissed all causes of action on the basis that they were preempted by federal law. Lisa Yarick appealed the court's decision.

### The Medicare Advantage Program

Since the 1970s, Medicare beneficiaries have had the option to receive health benefits through private health plans, mainly health maintenance organizations (HMOs), as an alternative to the federally administered fee-for-service (FFS) Medicare program.<sup>8</sup> This option, once referred to as "Medicare+Choice," was subsequently renamed "Medicare Advantage" by the MMA of 2003. The legislation additionally authorized two additional plan types – regional PPOs and special needs plans – and raised federal payments to encourage individuals to participate in the plans. Further, the Act expanded its federal preemption coverage.

Since 2003, the number of individuals enrolled in Medicare private plans has nearly doubled from 5.3 million to 10.2 million in 2009. Last year, the nearly 45 million people on Medicare were enrolled in the FFS program with 23 percent in a private Medicare Advantage plan.<sup>9</sup>

Any organization providing a Medicare Advantage plan contracts with the Centers for Medicare and Medicaid Services (CMS) to receive a monthly payment from Medicare for each person enrolled in the MA plan.<sup>10</sup> In return, the organization must arrange to provide a specified range of services for its enrollees.<sup>11</sup> Additionally, and as is the case with PacifiCare, the organization contracts with a physicians group and hospitals for provision of direct services to its enrollees based upon a negotiated monthly fee<sup>12</sup> for each enrollee – regardless of the number and extent of the services actually provided.<sup>13</sup>

The organization is contractually bound by federal law to provide adequate access to covered medical services,<sup>14</sup> and in turn, service providers are required to provide

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<sup>6</sup> *Id.* (The complaint did not allege that PacifiCare made or participated in care determinations for Mr. Yarick).

<sup>7</sup> Pub. L. No. 108-173, 117 Stat. 2066; 42 U.S.C. § 1395w-26(b)(3).

<sup>8</sup> The Henry J. Kaiser Family Found., *Fact Sheet: Medicare Advantage*, <http://www.kff.org/medicare/upload/2052-13.pdf> (last updated Nov. 2009).

<sup>9</sup> *Id.*

<sup>10</sup> 42 C.F.R. § 422.250 *et seq.* (2008).

<sup>11</sup> 42 C.F.R. § 422.300 *et seq.* (2008).

<sup>12</sup> Known as a "capitation" payment.

<sup>13</sup> 42 C.F.R. § 422.208(a) (2008).

<sup>14</sup> 42 C.F.R. § 422.112(a)(1) (2008).

medically necessary care in a competent manner.<sup>15</sup> However, it is easy to see that any provider receiving capitation payments would make more money in any given month if it reduced costs by providing less care.

### PacifiCare's Program

The Medicare Advantage program pays all or most of the premium for the private health insurance plan in lieu of paying Medicare benefits directly to service providers.<sup>16</sup> PacifiCare is a health insurance company and, thus, does not directly provide medical services. Instead, it contracts with local health care providers, who then provide physician, hospital, and other medical services to its Medicare Advantage HMO plan, Secure Horizons. Secure Horizons plan members then receive the services.<sup>17</sup>

CMS is obviously aware that Secure Horizons and other MA organizations and HMOs may be financially motivated to provide less care. As a result, federal regulations require the following of providers:

- the actual and timely provision of contracted services;<sup>18</sup>
- noninterference by entities receiving capitated payments in the individual medical decision of the actual service provider;<sup>19</sup>
- extensive quality assurance programs and review measures;<sup>20</sup> and
- an administrative grievance procedure that allows the patient, or representative, to challenge a determination that a service is not covered by the plan or is not medically necessary.<sup>21</sup>

Although federal regulations dictate that CMS periodically review all contracts and usage data, with a view to ensuring quality and availability of services,<sup>22</sup> it is unclear how often such reviews take place.

### Yarick v. PacifiCare: Appellate Court

On appeal, the Court addressed Yarick's causes of action against only PacifiCare; similar actions against a number of other defendants remain pending. In Yarick's fourth amended complaint, it was alleged that PacifiCare had a duty to "arrange [its] business and financial affairs" so that it did not "subject health care providers...to undue business or financial incentives to limit the quality or quantity of care reasonably acquired by patients," pursuant to California Health and Safety Code.<sup>23</sup> Additionally, the complaint alleged that PacifiCare owed Mr. Yarick other duties created under California law which

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<sup>15</sup> 42 C.F.R. § 422.112(a)(6)(i) (2008).

<sup>16</sup> See 42 C.F.R. § 422.1 *et seq.* (2008).

<sup>17</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*2.

<sup>18</sup> 42 C.F.R. §§ 422.101(a), 422.112(a), 422.504(a).

<sup>19</sup> 42 C.F.R. §§ 422.206, 422.208(c)(1), 422.504(a).

<sup>20</sup> 42 C.F.R. §§ 422.152, 422.202(b), 422.504(a).

<sup>21</sup> 42 C.F.R. § 422.560 *et seq.*

<sup>22</sup> 42 C.F.R. §§ 422.256(b)(2), 422.503(d).

<sup>23</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*3; CAL. HEALTH & SAFETY CODE ANN. §§ 1367.01; 1367.03.

were subsequently breached resulting in the denial of necessary medical care and ultimately caused “severe personal and physical injury” to Mr. Yarick.<sup>24</sup> Because the Court found that each of Yarick’s claims was preempted by federal law, they were dismissed.

### Preemption

In explaining its basis for dismissing Yarick’s claims, the appellate court devoted several pages to discussing express and implied aspects of federal preemption.<sup>25</sup> Where federal legislation contains an express preemption provision, the plain meaning of the text is examined to determine Congress’ intent.<sup>26</sup> Regarding the federal Medicare Advantage program, the law states:

[t]he standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part.<sup>27</sup>

The House Conference Report that accompanied the MMA emphasized the expansive role federal preemption plays in controlling the program:

[t]he conference agreement clarifies that the MA program is a federal program operated under Federal rules. State laws, do not, and should not apply, with the exception of state licensing laws or state laws related to plan solvency.<sup>28</sup>

In addition to preemption directly expressed by words in a statute, it is implied where “the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>29</sup> Further, preemption is implied where “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” also known as “conflict” preemption.<sup>30</sup>

The Court noted that in Mr. Yarick’s case, the federal statute expressly preempted application of state laws where “standards” for MA plans are established pursuant to the Medicare law. This conclusion was made despite Yarick’s assertion that PacifiCare was

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<sup>24</sup> *Id.*

<sup>25</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*4. (“Valid federal legislation prevails over state law pursuant to the supremacy clause of the United States Constitution, article VI, section 2. Where federal law and state law do not directly conflict, however, courts will determine that federal law preempts state law where preemption is the ‘clear and manifest purpose of Congress’) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)); see also 42 U.S.C. §1395w-26(b)(3).

<sup>26</sup> *Id.* (citing *CSX Transp., Inc., v. Easterwood*, 507 U.S. 658 (1993)).

<sup>27</sup> 42 U.S.C. § 1395w-26(b)(3).

<sup>28</sup> H.R. REP. NO. 108-391, at 557.

<sup>29</sup> *Yarick v. Pacificare*, 2009 WL 4263719 at \*5 (citing *Gade v. Nat’l Solid Wastes Mgt. Ass’n.*, 505 U.S. 88 (1992)).

<sup>30</sup> *Id.*

bound by California state law standards for HMO organizations. In discussing express preemption, the Court concluded that, in the case of HMO organizations under the MA program, state law was preempted by quality improvement provisions contained in the Code of Federal Regulations.<sup>31</sup> Preemption additionally covered Yarick's remaining claims of breach of duties imposed by California's Health and Safety Code.

The Court also found that implied or "conflict" preemption applied to Yarick's causes of action. "In particular," the appeals court said, "federal regulations provide that CMS will not approve contracts that do not assure reasonable and timely access to medical services or that fail to provide a quality assurance program to prevent exactly the kinds of inappropriate medical decisions appellant alleges here."<sup>32</sup>

The Court went on to reason that:

[i]f state common law judgments were permitted to impose damages on the basis of these federally approved contracts and quality assurance programs, the federal authorities would lose control of the regulatory authority that is at the very core of Medicare generally and the MA program specifically.<sup>33</sup>

Finally, the Court rejected plaintiff's assertion that the tort claims were exempted from preemption because the claims "can be tied to state licensing standards," finding that "this is not a proceeding to revoke respondent's license or to review a denial of that license."<sup>34</sup>

### Conclusion

Federal preemption regarding the MA program is not a new phenomenon. There is a host of case law devoted to the legislation.<sup>35</sup> The problem arises when courts use the law and other guidance to support both exceedingly expansive and exceedingly narrow interpretations of Medicare Advantage preemption.<sup>36</sup> Additionally, some lower courts are split on whether the MA preemption clause can completely preempt state law claims.<sup>37</sup> This confusion may likely continue in healthcare litigation as changes are proposed to the nation's health care system as well as Medicare and Medicaid.

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<sup>31</sup> 42 C.F.R. § 422.152 *et seq.*

<sup>32</sup> *Yarick v. PacifiCare*, 2009 WL 4263719 at \*6 (citing 42 C.F.R. § 422.504).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*7.

<sup>35</sup> *See e.g., Do Sung Uhm v. Humana, Inc.*, 2006 WL 1587443 (W.D. June 2, 2006); *Clay v. The Permanente Medical Group*, 540 F.Supp.2d 1101 (N.D. Cal. 2007); *Masey v. Humana, Inc.*, 2007 WL 2788612 (M.D. Fla. Sept. 24, 2007); *Dial v. Healthspring of Ala.*, 612 F.Supp.2d 1205 (S.D. Ala. 2007); *Harris v. PacifiCare*, 514 F.Supp.2d 1280 (M.D. Ala. 2007). *See also* Peter J. Leininger, *Medicare Advantage Preemption Goes Under the Microscope: How Broad Is It?*, Am. Health Lawyers Ass'n Member Briefing (Apr. 2008).

<sup>36</sup> Peter J. Leininger, Member Briefing, *Medicare Advantage Preemption Goes Under the Microscope: How Broad Is It?*, AM. HEALTH LAWYERS ASS'N (Apr. 2008).

<sup>37</sup> *Id.*

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