

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW & RULES

REPORT NO. 73

August 2, 2001

S. 2864

By: Senator Balboni

A. 3740

By: M of A O'Connell

Senate Committee: Codes

Assembly Committee: Codes

Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to creating a cause of action for medical abandonment

LAW AND SECTIONS REFERRED TO: CPLR 213-c

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW & RULES (#22)

THIS BILL IS DISAPPROVED

This bill would add a new section 213-c to the CPLR purportedly to create a new cause of action for medical abandonment against Health Maintenance Organizations (HMO) and to establish a three year statute of limitation for it. This bill is faulty in that it does not create a new cause of action and therefore establishes a statute of limitation for a cause of action that may not yet exist.

The bill provides that notwithstanding any provision of law, an action to recover damages for personal injury or wrongful death caused by the arbitrary, capricious, negligent or other tortious decision of a HMO to withhold or diminish medical care or treatment may be commenced within three years from the date of the decision. The bill's language does not establish a cause of action although the sponsor's memorandum of support states that it does. At the most, it implies the existence of a cause of action although this is in doubt.

The current law is unclear as to the liability of HMOs for withholding or diminishing health care. There is no New York appellate case which has held an HMO liable for personal injuries due to withholding of care or for negligence. There is one lower court case which has ruled that there may be such liability under certain circumstances. Blaine v.

Community Health Plan, - Misc.2d - ,1998 N.Y.Misc. Lexis 644 (Sup. Ct., Albany, Co. 1998). But see, Witt v. Levine, N.Y.L.J., 10/20/98, pg. 25 (Sup. Ct., N.Y. Co. 1998). Two California cases have also indicated there might be liability. See, Thomas A. Moore, et al, Medical Malpractice, "HMO liability Part II", N.Y.L.J., August 5, 1997, pg. 3. It has been suggested that possible causes of actions include negligence, breach of contract, breach of implied or express warranty, fraud, misrepresentation and false advertising. Id. There is a split of opinion whether an HMO can even be held liable for medical malpractice. See, Thomas A. Moore, et al., Medical Malpractice, "The Liability of Health Maintenance Organizations", N.Y.L.J., July 1, 1997, pg.3. If a bill is to establish a cause of action for medical abandonment by an HMO it should be done clearly and with a lot more consideration than this bill gives.

Recognizing there is a question regarding HMO liability, the state legislature is actively considering a bill A-1400 which would make HMOs responsible for their decisions in providing or denying care to plan subscribers. This bill would amend the Public Health Law, the Insurance Law, the General Obligations Law and the CPLR to establish this cause of action. This bill passed the Assembly on Feb. 8, 1999 and was sent to the Senate Judiciary Committee for consideration. A similar bill passed the Assembly last year but died in the Senate.

Establishing a specific cause of action for medical abandonment by HMOs might be appropriate, with a three year statute of limitations. However, this bill, which does not directly establish such cause of action, imposes a statute of limitations for a possible non-existent cause of action. By ignoring the ramifications of indirectly creating a new cause of action in a complicated area of the law, this bill can only do more harm than good.

For the foregoing reasons, this bill is **DISAPPROVED**.

Person Who Prepared The Report: Kim Steven Juhase, Esq.

Chair of the Committee: Steven M. Critelli, Esq.