

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 42

April 22, 2003

A. 2039

By: M. of A. O'Connell
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 SECTION REFERRED TO: CPLR 213-c

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES (#20)

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 limitations for it. This bill is faulty in that it does not create a new cause of action and therefore establishes a statute of limitations for a cause of action that may not yet exist.

This 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 regarding the liability of HMOs is in flux. Only recently, did the Second Circuit Court of Appeals rule that certain medical malpractice claims against HMOs are not precluded by ERISA. Cicio v. Vytra Healthcare, 321 F3rd 83 (2nd Cir. 2003). The Court of Appeals avoided ruling on the issue of the vicarious liability of an HMO when it reversed on the grounds of mootness an Appellate Division ruling holding that HMOs were liable. Wisholek v. Douglas, 97 N.Y.2d 740, 743 N.Y.S.2d 51 (2002) *rev'g* 280 A.D.2d 220, 722 N.Y.S.2d 316 (4th Dep't 2001). 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 that there is a question regarding HMO liability, the state legislature is considering a bill, A-5733 which would make HMOs responsible for their decisions in providing or denying care to plan subscribers. This bill would amend the General Obligations Law, the CPLR and the Public Health Law to establish this cause of action. This is the type of comprehensive bill that is needed to change the law regarding HMO liability.

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 above reasons, this bill is **DISAPPROVED**

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