DOUGLAS DRENKOW
Research & Communications

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The Insurance Companies' "License to Kill": ERISA

A DailyKos.com Dairy Entry, a My.BarackObama.com Blog Entry, An OpEdNews.com Article, and an E-Mail to Progressive Activists

October 27, 2009

Imagine if you will a nightmarish situation in which you or a loved one get ill; and even though you are covered by an employer-based health insurance plan, a treatment that will prevent a lifetime disability or even save your life is withheld by the plan, because they call the treatment "experimental" or "medically unnecessary"—even though your doctors say otherwise!

Now compound the terror that scenario dredges up, from within your most deep-seated instincts of self-preservation, with the prospect of your not being able to sue the health plan for making such a devastating decision. In other words, there would be no downside to the plan for their denial of even life-saving care (other than the public relations mess stirred up by all-too-infrequent articles like this); in fact, there would, of course, be a great financial incentive to simply deny your care, your life be damned.

The fact is, health insurance companies administering employer-based health plans—the very private insurance plans covering most Americans, even under the health reform bills being considered by Congress—have that "license to kill": It is contained in Section 514 of the Employee Retirement Income Security Act of 1974, ERISA—little known to most Americans but very profitably exploited by health insurance companies, costing many people their life savings or even their lives (and shifting the costs of caring for those injured and abandoned by their plans onto state Medicaid rolls).

One of the most notorious cases in which ERISA stood in the way of justice was that of California teenager Nataline Sarkisyan. In 2007, the 17-year-old who had developed leukemia was denied a liver transplant—which her doctors at UCLA, some of the best in the world, said would give her a 65% chance to survive but the insurance company claimed was "experimental"—until pressure exerted by the public, mobilized by her family and the California Nurses Association who kept the case in the media spotlight, caused the insurer to finally relent and approve treatment ... but too late: The lovely young lady, whose only fault was to be human, died just as the family received the approval from the insurance company.

To this day, the family claims that the insurance company killed their daughter. And how can any of us disagree? (It was my honor to meet the

Sarkisyans and videotape the mother, Hilda, for the introduction to my Health Reform Video Challenge submission *(Go here to view and vote on the top 20)*. I stand in awe of this family, and the others who gave me permission to cite their loved ones as victims of our health care system, for their having lost so much but now giving so much in return, in the hope of saving our families from a similar fate. While some in this world embody the very worst in human nature—namely, greed and a selfish lust for power—the Sarkisyans and others represent the better angels of our nature.)

To add injury as well as insult (including literally being given "the finger") to injury, the Sarkisyans—like any of us with insurance caught up in such a horrific turn of events—are in effect prevented by ERISA Sect. 514 from suing the insurance company for their loss, a consequence of the insurance company's denial of treatment.

The problem is that ERISA—set up primarily to prevent the misuse and loss of pension funds, in order to protect American retirees—contains in its Section 514 a "preemption": State laws, as used in civil courts to sue for damages in such cases as the Sarkisyans, are preempted—overridden—by this federal statute. In particular, various, highly criticized Supreme Court interpretations over the years have limited what injured beneficiaries can sue for, to just the actual cost of treatment withheld and not full "compensatory" damages—such as the value of the life, life's work, or life's savings (or home or credit history etc.) lost as a consequence of the treatment being denied, even if by outright fraud—let alone "punitive" damages—which are typically required, in large "doses," to get the full attention and desired reform of large companies in any field, insurance included.

Even critics of ERISA acknowledge that the law as written would never allow punitive damages (For those of you who are attorneys-at-law, please know that ERISA is written primarily in accord with the laws of trusts; you'll find an excellent discussion in this article)—and that is one aspect of the law that should definitely be rewritten by Congress—but the disallowance of compensatory damages as part of the "appropriate equitable relief" that is in fact guaranteed by ERISA is based largely upon a very shaky legal premise: Because so much of the law was written in such painstaking detail, the lack of specific remedies explicitly spelled out in the law for harm done to the plan's beneficiaries purportedly means that the courts shall not "imply" any remedies on their own.

Critics counter that the issue is not the courts' "implying" from ERISA any remedies but the courts' "applying" the law of trusts to award "appropriate equitable relief"—including compensatory damages—that is customary in law for breaches of trust. Indeed, the history of the ERISA law supports these critics' contention: As Justice William J. Brennan Jr. pointed out, in his minority opinion in the landmark case of Massachusetts Mutual Life Insurance Co. v. Russell, Senator Jacob Javits, a main architect of ERISA, remarked when presenting the Conference Committee report to the Senate, that the drafters "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and

obligations under private welfare and pension plans."

No matter, majority opinions of the Supreme Court written by justices as diverse as John Paul Stevens, on the left (who has, however, more recently called for a re-examination of the law), to Antonin Scalia, on the right, have interpreted the ERISA law differently, restricting the options for beneficiaries of employer-based health plans who have suffered wrongdoing. Because the only remedy allowed under ERISA, preempting state laws, is a lawsuit to obtain the actual cost of the treatment denied (what the insurer would have had to pay anyway!)—and because that sum, which excludes any compensatory let alone punitive damages, is often far less than the cost of mounting a lawsuit—few lawyers actually take on such cases.

As federal law, ERISA does allow the victorious side to possibly recoup attorney's fees, which many state laws do not; however, given the uncertainties of any trial and the limitations imposed upon a victim at an ERISA trial—trial by judge, not jury (which admittedly can work to either side's advantage); very limited "discovery" (of documents held by the other side) and documentation limited to what the insurance company chooses to have on file; and an almost insurmountable legal standard of "arbitrary and capricious" to meet in proving a denial to be wrong—in addition to no prospect of winning compensatory or punitive damages, few lawyers in fact ever dare risk undertaking such a case, typically against the client's employer and/or a large insurance corporation. The bottom line is that under ERISA, legal remedies for treatments denied are themselves effectively denied. And how in the world is that "relief" "appropriate" or "equitable" for a deliberate action that injures someone for life or costs that person their life savings or even their very life?

Furthermore, as the late Judge Edward Roy Becker, of the Third Circuit Court of Appeals, observed: "[A]t the same time as ERISA makes it inordinately difficult to bring an injunction to enforce a participant's rights, it creates strong incentives for HMOs to deny claims in bad faith or otherwise 'stiff' participants. ERISA preempts the state tort of bad-faith claim denial ... so that if an HMO wrongly denies a participant's claim even in bad faith, the greatest cost it could face is being compelled to cover the procedure, the very cost it would have faced had it acted in good faith. Any rational HMO will recognize that if it acts in good faith, it will pay for far more procedures than if it acts otherwise, and punitive damages, which might otherwise guard against such profiteering, are no obstacle at all. Not only is there an incentive for an HMO to deny any particular claim, but to the extent that this practice becomes widespread, it creates a 'race to the bottom' in which, all else being equal, the most profitable HMOs will be those that deny claims most frequently."

Wendell Potter—the former Cigna-spokesperson, who quit that P.R. job after his conscience got the better of him in the wake of the Sarkisyan case and who is now courageously speaking out about abusive insurance company practices—told the Civil Justice Foundation: "HMOs and insurers are largely free to deny

access to care without fear of reprisal or financial consequences."

Likewise, Jamie Court, president of Consumer Watchdog, has said: "If the insurer decides they don't want to pay for the treatment because they can save a lot of money, there is not a dime available in damages if the person dies or is injured. It's cheaper to kill you. If you die, you can't go to court."

Patient lawyer Scott Glovsky, like many others, puts it more bluntly: "ERISA is a license to kill."

Of course, the industry group AHIP (America's Health Insurance Plans) counters that if wrongful death and other lawsuits are not limited by ERISA, "it will bankrupt these [health] plans, and employers would no longer be able to offer coverage."

Grigor Sarkisyan, Nataline's father, has perhaps the best response to that: As he told me, he works very hard at his job to pay big premiums to the insurance company—to *not* cover his family when they get sick!

As Mr. Sarkisyan also warned me, remember that the bulk of health insurance reforms being debated in Congress will be undercut if this ERISA loophole is not closed, because most of the health care system will continue to be based on the same workplace health plans covered by ERISA. *The odds are, that includes your plan!*

As ERISA-expert attorney Richard Johnston sums up: "What you have is a piece of paper saying some company will pay your claim if it feels like it. You don't have insurance at all—you only think you do."

Like the health reform debate in general, this fight against ERISA Sect. 514, or at least its interpretation by the courts, has been going on for years. In 2001 none other than the late-Sen. Edward M. Kennedy led an unsuccessful fight against this grave injustice. As Teddy Kennedy said: "Patients should have the right to hold their HMO accountable in court when its negligence causes the injury or death of a patient. No other industry in America enjoys immunity from accountability for its actions, and the insurance industry does not deserve it either."

As bereaved mother Hilda Sarkisyan has told me, and anyone else willing to listen, "I want to get rid of this ERISA law and replace it with Nataline's law." Consumer Watchdog is running a campaign to do just that *(Visit this link to send an e-mail to your senators; I just did).*

I can think of no more fitting tribute to this lovely young lady, so in love with her God-fearing family and life in general, than for the Congress, reforming our health care system, to amend or replace this tragically flawed law—or for the Supreme Court to change its interpretation—so that we the people may have the federal legal power to effectively persuade workplace-based health insurance plans to truly cover—not deny coverage to—the more than 100 million Americans in such plans, now as well as under reform.

If you think this nightmare couldn't happen to you or your loved ones, just ask the Sarkisyans.

The Sarkisyan family has set up a foundation in memory of Nataline, who was studying to become a fashion designer. The foundation hosts annual fashion shows and has raised money to provide scholarships for young people going to fashion school, culinary school, and medical school. For more information please visit http://www.myspace.com/fashionlegacy.