

1993

Insurer May Deny Coverage for Artificial Heart Transplant

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Recommended Citation

Caryn R. Suder *Insurer May Deny Coverage for Artificial Heart Transplant*, 6 Loy. Consumer L. Rev. 24 (1993).
Available at: <http://lawcommons.luc.edu/lclr/vol6/iss1/9>

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that the state had a substantial interest in regulating the activity and 2) that the law was tailored in a reasonable manner to serve the state's interests without overly restricting the protected speech. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980). The Court found that the Board failed to meet the second requirement of the *Central Hudson* test.

The Board argued that the ban protected several substantial interests. It asserted that the ban ensured that consumers were not being misled by fraudulent statements. It also contended that the ban protected consumers' privacy interests by preventing persistent CPAs from overreaching and using aggressive tactics. Furthermore, the Board argued that the ban was necessary to maintain the fact and appearance of CPA independence. The Board reasoned that solicitation would compromise the independence necessary to audit fairly a business or attest to its financial statements because a CPA in need of business might be prone to ethical lapses. Finally, the Board argued that the public perception of CPAs as independent would be undermined by lifting the ban.

Interests Not Directly Served By Ban

The Court acknowledged that the state's interests were substantial. Nevertheless, the ban failed the second prong of the *Central Hudson* test, which required a regulation impinging on commercial expression to advance the state's interest directly. The Court noted that the Board presented no evidence to support its contentions that in-person solicitation by CPAs would lead to fraud, overreaching, or compromised independence. In fact, studies in the field indicated that such consequences were unlikely. Furthermore, the Court pointed out that the blanket ban was over-inclusive, preventing in-person solicitation by honest CPAs as well as fraudulent or overbearing CPAs.

The Board argued in the alternative that the ban constituted a reasonable restriction on the manner in which CPAs

may communicate with prospective clients rather than a direct regulation of the commercial speech itself. In rejecting that argument, the Court noted that, even if the ban were a content-neutral time, place, or manner restriction on speech, the ban would still fail to serve the state's interests in an effective or direct way, and thus could not be upheld.

Prophylactic Rule Unnecessary

Finally, the Board argued that a total ban on CPA solicitation was necessary because the solicitation usually occurred in private offices where it would be difficult to regulate or monitor. The Board relied on *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), which upheld a ban on all in-person solicitation by lawyers.

The Court distinguished the instant case from *Ohralik*. The Court pointed out that lawyers, trained in the art of persuasion, usually deal with uninformed and perhaps desperate clients. In contrast, CPAs approach experienced business executives who have the time and resources to evaluate a CPA's offer of services. The Court concluded that, given the differences in clientele, solicitation by lawyers is more likely to lead to misconduct than solicitation by CPAs, and thus a blanket ban on CPA solicitation is unnecessary.

Blackmun Disapproves Intermediate Scrutiny

Justice Blackmun joined the Court's opinion but wrote separately to voice his disapproval of the majority's finding that commercial speech free from fraud or duress is entitled to only an intermediate level of First Amendment protection.

O'Connor Criticizes Majority's Focus as Too Narrow

Justice O'Connor found the Court's focus on whether the object of the solicitation may be harmed to be too narrow. According to Justice O'Connor, the state has the broader authority to prohibit commercial speech which, though harmless to the listener, may be

damaging to the reputation of the speaker's profession. She also analogized the case to *Ohralik*, because attorneys as well as CPAs have professional expertise that can be used to mislead or coerce a naive potential client. Finally, she contended that the majority avoided analyzing the actual ban under *Central Hudson* by improperly casting the case as an "as-applied" challenge even though the ban applied to all CPAs. She read the majority opinion as implying that the ban satisfies *Central Hudson* by virtue of its failure to state otherwise. Accordingly, Justice O'Connor would reverse the lower court and uphold the ban on solicitation. ♦

Jennifer C. Clarke

Insurer May Deny Coverage for Artificial Heart Transplant

In *Loyola Univ. of Chicago v. Humana Ins. Co.*, 996 F.2d 895 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that an insurer which denied coverage for an artificial heart implant reasonably interpreted its policy's exclusions. The court found that the insurer did not waive its requirement of obtaining prior approval before a subsequent human heart transplant could be covered and held that the insurer could rely on this requirement when denying coverage.

The Insurance Policy

Billy Via, a 44-year-old, was a qualified participant under a group health plan provided by Humana Insurance Company (Humana). After suffering a heart attack, he was admitted to Loyola University Medical Center (Loyola) on July 9, 1988, to undergo coronary artery bypass surgery. Prior to his surgery, Via assigned the benefits under his health plan to Loyola. Humana authorized his admission to Loyola for seven days of care.

After surgery on August 3, 1988, Via could not be weaned from the cardiac bypass machine. Via's surgeon had two options: allow him to die or implant a Jarvik-7 artificial heart until a human heart became available for transplant. The surgeon implanted the Jarvik-7. On September 5, 1988, Via received a human heart. Nonetheless, he died two weeks later.

At first, Humana refused to cover any of Via's hospitalization at Loyola. About 6 months after the lawsuit was filed, however, Humana agreed to pay for all medical expenses incurred prior to the Jarvik-7 implant. In a letter to Loyola, the vice-president of medical affairs at Humana stated that Humana would not cover the Jarvik-7 implant because it was experimental. Humana would also deny coverage for the subsequent human heart transplant because it had decided that Via did not meet Medicare guidelines for a good transplant candidate.

The "Major Transplant Benefit Rider" to the health plan stated in relevant part:

[W]e will pay benefits ... for covered major transplant expenses ... incurred by an insured person for an approved major transplant.

....

For a major transplant procedure to be considered approved ... prior approval from our Medical Affairs Department in advance of the procedure is required. Such approval will be based on written criteria and procedures established by our Medical Affairs Department ... If approval is not given, benefits will not be provided for the procedure.

No benefit is payable for or in connection with a major transplant if: 1. Our Medical Affairs Department is not contacted for prior authorization of the procedure. 2. Our Medical Affairs Department does not approve coverage for the procedure ...

based on a determination that the procedure is experimental for the condition involved.

Loyola brought suit under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §1132(a)(1), for recovery of expenses associated with the artificial and human heart transplants. These expenses totaled approximately \$500,000. The United States District Court for the Northern District of Illinois granted Humana's motion for summary judgment and denied Loyola's cross-motion for partial summary judgment. Loyola subsequently appealed the district court ruling.

The Standard of Review

Although Loyola argued for a *de novo* standard of review, the Seventh Circuit found that the district court's choice of the arbitrary and capricious standard was appropriate. This standard applies if the administrator's discretion is unrestrained or limited only by the requirement of good faith. Under the arbitrary and capricious standard, the denial of benefits must be based on a reasonable interpretation of the insurance plan documents. In addition, the administrator must make an informed judgment and articulate an explanation in light of relevant facts. Under these circumstances, the administrator's decision is final and the denial of benefits will not be overruled.

The Seventh Circuit held that the plan gave Humana's Medical Affairs Department (Department) discretion in establishing the criteria for coverage and in applying the criteria to each patient's case. The court acknowledged that the Humana plan did not contain any "magic words" granting discretion to the plan administrator. The court noted, however, that the Major Transplant Benefit Rider provided that prior approval from the Department was required for a heart transplant to be covered and that such approval was to be based on written criteria and procedures established by the Department. Furthermore, the plan provided that benefits would not be payable if the

Department determined that the procedure was experimental for the condition involved. Other portions of the plan specifically excluded experimental procedures as determined by the company and gave Humana the authority to interpret the meaning of "experimental."

Necessary Treatment Can Still Be Experimental

In arguing that a genuine issue of material fact existed as to whether the Jarvik-7 was "experimental for the condition involved," Loyola claimed that Via's artificial heart implant was not an experiment. Instead, Loyola maintained that the implant surgery was a successful bridge to the transplant of a human heart and was done to save Via's life.

The Seventh Circuit explained that a procedure could be medically necessary and still be experimental. The court noted that even Loyola's experts testified that use of the Jarvik-7 was experimental, and that the handbook and consent form given to Jarvik-7 patients by Loyola described the artificial heart's use as part of an experimental study. In finding that no issue of material fact existed, the court stated that the experimental nature of the Jarvik-7 implant was not diminished simply because implantation "was the only choice and happened to be successful."

Requirement of Prior Approval Not Waived for Human Heart Transplant

In its next argument, Loyola asserted that Humana waived its requirement of prior approval for the human heart transplant, and therefore should cover this portion of Via's expenses. Loyola conceded that it had not obtained prior approval, and offered two reasons in support of the waiver argument.

First, Loyola claimed that the prior approval requirement was waived because Humana did not use lack of prior approval as a basis for denying coverage in its denial-of-benefits letter. Noting that waiver is "a voluntary and intentional relinquishment of a known right," the court rejected Loyola's argument that the omission constituted a

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waiver. The court found that nothing in Humana's letters suggested that Humana intended to surrender the right to enforce other provisions of its policy. Moreover, in a letter to Via's widow, Humana referred to the lack of prior notification when it explained its denial of benefits.

Second, Loyola contended that a Humana employee told Loyola employee Cynthia Sepkowski that Humana would not make a determination about coverage until the final billing. Loyola argued that the difference in what Humana told Sepkowski and Humana's position in court created an issue of fact as to whether the Humana employee's statement resulted in waiver.

In rejecting this second argument, the court held that even accepting Loyola's version of the facts, the Humana employee's statement did not establish a waiver. In examining Humana's conduct, the court noted that the transplant case specialist at Humana's Department of Medical Affairs had on three separate occasions informed Loyola of the prior approval requirement and requested documentation of Via's condition and diagnosis. The court found that these actions throughout Via's hospitalization demonstrated Humana's intent to adhere to, not waive, the requirement of prior approval.

Estoppel Claim Also Fails

Loyola also asserted an estoppel claim, arguing that the statement from the Humana employee to Sepkowski prevented Loyola from seeking public assistance for Via's care. At the time Via was hospitalized, Loyola had a contract with the Illinois Department of Public Aid, which provided benefits for transplant patients. Under Illinois law, a patient could not qualify for public aid if the patient had substantial assets or private medical insurance. Loyola claimed that because Humana refused to make a determination about coverage, Via was deprived of the chance to spend his assets and thus qualify for public aid.

The Seventh Circuit found that

Loyola's claim was inconsistent with its actions, because Loyola showed no reliance on Humana's actions. The court further concluded that Humana never suggested to Loyola that it would cover the transplants. "[E]stoppel occurs when one party knowingly misrepresents or conceals a material fact and the other party, not knowing the truth, reasonably relies on that misrepresentation or concealment to his detriment." The court concluded there was no misrepresentation or concealment. The facts showed that Sepkowski was told that "there was no guarantee of payment for anything," and two weeks later, Sepkowski herself noted on the billing records that she was checking on the status of coverage. Thus, the court maintained that if Loyola truly believed that no further action was necessary until final billing, Sepkowski would not have checked on the status of coverage. Moreover, Loyola's assumption that Humana would make a coverage determination at a later date was unreasonable. Finally, even if Loyola did not assume coverage, it was not prevented from attempting to obtain public aid.

Humana's Humanity Not the Issue

In its final argument, Loyola maintained that Humana should at least pay for basic hospital expenses and other care given to Via after his operations. Loyola focused on Humana's seemingly overlapping and inconsistent reasons for denying coverage for parts of Via's care. Humana denied coverage for all of Via's hospital expenses after the Jarvik-7 implant because it believed those expenses were connected to an experimental procedure and thus were excluded by the Major Transplant Benefit Rider. Additionally, Humana specifically denied coverage for the human heart transplant because Loyola had not obtained prior approval for the procedure. Loyola questioned Humana's concern over prior approval for the human heart transplant when the transplant simply could have been denied as an expense related to the experimental Jarvik-7 implant.

The Seventh Circuit concluded that Humana was justified in denying coverage for portions of Via's heart transplant care. Under the arbitrary and capricious standard, health benefits may be denied based on a reasonable interpretation of the language in the health plan. In Via's case, Humana denied him benefits for expenses incurred after the insertion of the Jarvik-7. The Seventh Circuit found this determination reasonable.

Although Via's health plan expressly included post-discharge services, supplies, care and treatment falling within the definition of "major transplant," the policy's exclusion clause denied coverage for "experimental" procedures. Since Via first received the "experimental" Jarvik-7, Humana found that he would not have needed the human heart transplant if he had not been kept alive by the Jarvik-7. Thus, Humana concluded that both the Jarvik-7 implant and the subsequent human heart transplant were "experimental" and denied Via coverage on that basis. In the Court's view, Humana reasonably interpreted the language of the health plan and was justified in denying Via coverage for the hospital expenses incurred after the Jarvik-7 implant.

The court acknowledged that Humana appeared to be telling Via "we will not cover you because you should be dead." Nonetheless, the court could not render a judgment based solely on the morality of Humana's actions. The court's role in a contract case such as this one was to examine the language of the benefit plan, and determine whether Humana reasonably interpreted it. The court determined that Humana did so. Loyola surgeons were free to perform procedures to save Via's life, but Humana was not required to pay for them. ♦

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