

Court allows Jupiter man to test legal weapon against HMO

By: Tomm Collins, Review Staff

The 4th District Court of Appeal has given a Jupiter man the go-ahead to pursue a tort lawsuit against his late wife's HMO on a common-law theory that, if successful, could offer a powerful new weapon against health maintenance organizations.

The appellate court held that Gilbert Greene can amend his complaint against Well Care HMO Inc. of Tampa, and make his argument in trial court that the HMO was guilty of bad faith in denying coverage of a novel bladder treatment for Greene's late wife, Lise.

HMO subscribers have had a hard time successfully suing their plans for several reasons. First, HMOs generally have convinced courts that they don't provide medical care and aren't subject to medical malpractice suits. Second, novel theories of how plans interfere with care through their financial arrangements with medical providers generally have not found favor with judges.

Third, most working Americans have coverage through employer-sponsored health plans, which typically are exempted from state regulation by the federal Employee Retirement Income Security Act. Lawsuits challenging benefit denials by ERISA-protected plans cannot be brought in state court. Lise Greene, however, was a real estate agent who purchased her own coverage, so the ERISA preemption did not apply to her case.

Traditionally, courts have regarded the relationship between a patient and an



DENIED NOVEL TREATMENT: Lise Greene and her lawyer, Gary Farmer, shown in 1999. Her HMO rejected the use of a hyperbaric chamber to treat her diseased bladder. She died last February.

HMO as a debtor-creditor arrangement, with no special obligations between the parties. But other types of insurers have a fiduciary duty to the people they insure, courts have found. If an insurer mishandles a policyholder's claim, for instance, a court could find the carrier guilty of bad faith and hold it liable for damages. If Greene succeeds with his bad-faith claim, it would mark a significant change in the standard of conduct for HMOs.

Lise Greene, who died last February at age 61, suffered from hemorrhagic cystitis — a thinning of the veins and arteries in the bladder — induced by radiation therapy she underwent starting in 1996 to treat

uterine and cervical cancer. As a result, she suffered bleeding inside her bladder, which created blood clots and blockages in her urinary tract.

But Well Care deemed the treatment experimental, even though both her primary care physician and a urologist to whom Well Care had referred her recommended the treatment, according to the 4th District opinion.

The Greenses sued Well Care in 1998 in Palm Beach Circuit Court. Judge Edward Fine ordered Well Care to provide the hyperbaric therapy. In his ruling, Fine said Well Care's definition of experimental was ambiguous because the HMO failed to

identify what medical journal articles it had relied on.

Greene responded well to the hyperbaric treatments. But she eventually died from cardiac failure. Her cancer treatments had permanently damaged her heart.

In their suit, the Greenses also sought damages from Well Care for alleged unfair trade practices and bad-faith handling of a claim, based on the state HMO Act. But Fine said the plaintiffs had no statutory claim under that act against Well Care. And he denied them an opportunity to amend their complaint to charge Well Care with a common law breach.

On appeal, the Greenses' attorney, Gary Farmer, a partner at Gillespie

Goldman Kronengold & Farmer in Fort Lauderdale, argued that the legislative intent behind the HMO Act gave the Greenses a right to sue.

But the 4th District agreed with Fine that the Greenses had no statutory grounds for suing. It said the act offered only the limited remedy of allowing patients to contest the terms and conditions of their HMO contract. That is, the statute gave the Greenses the right only to challenge Well Care's determination of what was medi-

cally necessary, and to recover legal fees if they won.

The appellate judges noted that Gov. Lawton Chiles vetoed a 1996 version of the act that included a civil liability provision. The language of the act, the judges wrote, "did not and does not provide for an implied civil action."

But the appellate court also ruled that the Greenses should have been given the opportunity to amend their complaint to include the common-law theory of bad-faith. "It is Well Care's decision, not that of the physician, as to what medical services are medically necessary for a patient," the judges wrote. "Since Well Care has placed itself in charge of such decisions for a patient, the relationship is certainly more than one of debtor and creditor."

Farmer says the appellate decision advances the cause of patients' rights in HMOs. Though ERISA will continue to block lawsuits by the majority of HMO subscribers unless Congress establishes the right to sue employer-sponsored plans, common-law actions like the Greenses' could open the door to actions by categories of employees not covered by ERISA. These include self-employed people and government employees.

Farmer said he was pleased, but not surprised, by the court's recognition of a common-law right to sue an HMO for bad faith. "Whenever you're trying to create new law, the odds are against you," he says.

But Well Care's appellate attorney, Nancy W. Gregoire, a partner at Bunnell Woulfe in Fort Lauderdale, says she doubts that Greene will succeed in proving bad faith when the trial court rehears the case. Courts traditionally have rejected bad-faith claims against HMOs, she says.

"All of these are sad cases, these are horribly sick people who need help," Gregoire says. "But on the other side, we're dealing with a contract for which you pay money, and it can't be all things to all people. Well Care is a very, very good HMO plan, but it's not full-coverage benefits for everything under the sun."

Gilbert Greene says he's encouraged by the 4th District ruling. The 64-year-old mortgage broker says he promised his wife he'd pursue the case after she died.

"We're not going to go away," Greene says. "I feel very strongly that we can do something to get [Well Care's] attention so that they'll let doctors make the medical decisions."