



CMA Weekly Alert – February 22, 2007

## HEALTH CARE RIGHTS IN THE NEWS

### PART ONE

#### **A ROBUST PATIENT'S BILL OF RIGHTS: REMEMBERING THE DYING AND HOSPICE CARE**

Last fall, just before the November 2006 elections, Congressman Charles Whitlow Norwood Jr., a Republican from Georgia, found out that the lung cancer that he battled for several years had metastasized to his liver. Over the last few months, he received aggressive treatment, but finally decided to forego further treatment, reportedly stating, “That’s it. I’m going home.”

But before leaving the House of Representatives, Congressman Norwood took a final step to ensure that Americans have better access to health care and that they can sue health maintenance organizations for improper medical decisions. He reintroduced the original version of legislation (HR 979) to create a “Patient’s Bill of Rights.” And then he took his leave, returning to his home in Augusta, Georgia, where he received hospice care until his death on February 13, 2007.

Hospice is end-of-life care that provides comfort, compassion and dignity. It promises a team oriented approach to expert medical care, pain management, and emotional and spiritual support expressly tailored to the patient’s needs and wishes. Since 1983, it has been covered by Medicare and today is also covered by most other public health insurance programs, including Medicaid, and by private insurance. Yet, despite the availability of this care, far too few Americans access it. For example, in the year 2000, only 23% of Medicare beneficiaries who died accessed the hospice benefit prior to their deaths. This is a tragedy. Americans who die without the support of hospice care often die with needless pain and often die in emergency rooms, without the support of friends or family.

As we remember Congressman Norwood and his efforts to ensure Americans the legal right to receive adequate health care, let us also remember the rights of the dying. Let us work to ensure that a “Patient’s Bill of Rights” is passed into law and that it encompasses the rights of the dying, specifically guaranteeing their right to hospice care including adequate pain management.

*For more information about hospice, visit the Center for Medicare Advocacy’s website at [http://www.medicareadvocacy.org/FAQ\\_Hospice.htm](http://www.medicareadvocacy.org/FAQ_Hospice.htm), or contact attorney Terry Berthelot ([tberthel@medicareadvocacy.org](mailto:tberthel@medicareadvocacy.org)) in the Center for Medicare Advocacy’s Connecticut office at (860) 456-7790.*



CMA Weekly Alert – February 22, 2007

## HEALTH CARE RIGHTS IN THE NEWS

PART TWO

### COVERING THE UNINSURED: THE FATE OF “FAIR SHARE HEALTH CARE” IN MARYLAND

**Introduction:** Several political candidates, and President Bush in his State of the Union Address, have suggested proposals to extend health care to the more than 46 million Americans who do not have health insurance. Unwilling to wait for the federal government to act, several state and local governments have enacted or are considering enacting their own health care programs to cover the uninsured. The direction that these state and local legislative efforts take may be modified as a result of a recent decision by the United States Court of Appeals for the Fourth Circuit. That Court upheld a district court decision that Maryland’s Fair Share Health Care Fund Act is preempted by the Employee Retirement Income Security Act (ERISA), and therefore is not enforceable.<sup>1</sup>

**Legislative Background:** The Maryland General Assembly overrode a gubernatorial veto of 2005 legislation and passed the “Fair Share” Act in January 2006. The law requires all for-profit employers with 10,000 or more employees who do not spend at least 8% of their payroll on health insurance costs to pay the difference into a fund supporting the Maryland Medical Assistance program. Non-profit organizations of a similar size are required to spend at least 6% of payroll on health care. Failure to make payments into the fund results in a civil penalty of \$250,000. The law, which was to take effect in January 2007, also includes reporting requirements. While Maryland has four employers with workforces that exceed 10,000, only one, Wal-Mart, would actually be subject to the new law.

The law was enacted because Maryland legislatures perceived that 1) the Maryland Medical Assistance Program costs are rapidly rising, and 2) Wal-Mart provides its employees with a substandard level of healthcare benefits. Testimony at state legislative hearings indicated that many of the children of Wal-Mart employees receive health care through the state children's health insurance program (SCHIP). The purpose of the Act, as characterized by the majority opinion, was to force Wal-Mart to increase its spending on employee health care.

**Procedural Background:** The Retail Industry Leaders Association (RILA), a trade association of which Wal-Mart is a member, challenged the statute as preempted by ERISA. Maryland filed a motion to dismiss RILA’s complaint for lack of jurisdiction, arguing against standing and ripeness, and asserting the complaint was barred by the Tax Injunction Act, 28 U.S.C. § 1341 (prohibiting federal courts from enjoining, suspending, or restraining a State’s collection of taxes). These claims were rejected, and the state appealed from the decision of the district court granting RILA’s motion for summary judgment.

**The Fourth Circuit agreed with the District Court that it had jurisdiction to hear the case.** The Fourth Circuit held that RILA had associational standing to press the rights of its members because:

1. One of its members (Wal-Mart) would otherwise have standing to sue in its own right. Wal-Mart had standing because it faced the imminent injury of having to either increase its healthcare spending or make a payment to Maryland, and because the company was already subject to administrative burdens imposed by the reporting requirements of the statute;
2. The interests RILA sought to protect were germane to the organization's purpose; and
3. Neither the claim nor the relief requested required participation of individual members in the lawsuit. Although members of RILA (including Best Buy, IKEA and Target) compete in the marketplace with Wal-Mart, those companies serve on the RILA board of directors. Their joint decision to pursue the case eliminates the possibility that they have conflicts of interest requiring members to join the suit individually to protect their own interests.

The court also rejected Maryland's assertion that RILA's claims were not ripe for review, noting that the appeal presented "purely legal questions that, because of their certain applicability to Wal-Mart, are ripe for review." Finally, the court held the litigation was not barred by the Tax Injunction Act because the Fair Share Act was a healthcare regulation (with "a quintessential fee or penalty" mechanism), not a tax.

**The Fourth Circuit invoked the legislative purpose of ERISA's preemption provision in holding that ERISA preempted the Fair Share Act.** The preemption provision of ERISA was enacted to allow employers to administer the same benefit structures to employees nationwide, without being forced to comply with conflicting state requirements. The clause preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The Supreme Court has defined "related to" in the clause as "a *connection with* or *reference to* such a plan." The Fourth Circuit characterized the Fair Share Act as "state-imposed regulation of employers' provision of employee benefits," and found a conflict with ERISA's goal of facilitating uniform, nationwide regulation of employee benefit plans.

In doing so, the Court dismissed Maryland's argument that the Act did not have an impermissible connection with an ERISA plan because employers could comply with its requirements in several ways, only one of which involved changing the structure or administration of the employers' ERISA plans. Despite the non-ERISA-implicating option expressly provided in the statute for complying (paying an assessment to the Fair Share Health Care Fund) and other means suggested by the state (ex., setting up non-benefit-related health care services, such as on-site clinics or free vaccination programs), the nature and effect of the Act is such that the "only rational choice employers have under the Fair Share Act is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold." The Court determined that it would not be a rational business choice for a company to pay an assessment to the Fund rather than increasing employee benefits, which would attract and retain employees. Therefore the Act, by effectively regulating employers' structuring of employee health plans, would deny Wal-Mart the ability to administer a uniform healthcare plan nationwide.

**The dissent emphasized the state's legitimate interest in addressing the Medicaid funding crisis and invoked Supreme Court precedent to find against federal preemption of the Fair Share Act.** The dissent determined that the Supreme Court found an impermissible connection

between a state statute and an ERISA plan where the statute “requires establishment of a plan, mandates particular employee benefits, or impacts plan administration.” Contrasting those situations with the Fair Share Act - which allows an employer to maintain a uniform national plan, although at a cost - the dissent stated that the Fair Share Act was an indirect economic incentive to change health benefits, rather than a requirement to do so. Thus, it was not the type of law Congress intended to preempt. Further, the Supreme Court rejected ERISA preemption challenges in two cases in which a state regulation affects a traditional area of state concern, and employers have an effective choice of how to proceed.

**The Fourth Circuit decision raises implications for state level reforms aimed at expanding health coverage to the uninsured.** States that have enacted or are attempting to enact health reforms that require employer contributions may be vulnerable to ERISA challenges, even if the state laws do not explicitly refer to or necessarily affect an ERISA plan. States need to consider whether their proposal could be characterized as a mandate, rather than a voluntary program. Voluntary programs such as income tax credits for small firms offering health coverage, purchasing pools to lower group rates, and subsidies to help cover lower wage workers, may not fall afoul of ERISA preemption in that they do not relate to ERISA plans. Mandatory programs may be more vulnerable. In particular, three local ordinances (in New York City, Suffolk County, NY, and San Francisco) modeled on the Maryland Act require employers to either pay a certain amount for health care or pay an assessment to the state.

A new Massachusetts law may also be vulnerable to ERISA preemption because it involves two employer assessments and requires employer involvement in employee health insurance coverage in some way. However, the Massachusetts assessment of \$295 per full-time employee per year against employers who do not contribute to employee health insurance premiums is so small compared to the cost of insuring workers that a court may find employers have a viable, non-ERISA-implicating choice.

**Conclusion:** “Pay-or-play” laws, while mandatory, may be protected from preemption because they do not bind “plan administrators to a particular choice.” Under such plans, all employers are required to pay an assessment, but the state provides a credit against the assessment in the amount the employer spends on employee health care. A firm operating in more than one state need not alter its uniform national plans, but instead may pay into a state pool where employees in that state can obtain coverage. Because they apply to many - or all - firms, rather than just one as in the Wal-Mart case, these laws can be more plausibly described as imposing a tax on firms rather than a penalty.

For a more complete discussion of these issues, and an analysis of the RILA decision’s implications for reform in Vermont, Wisconsin and California, see Patricia A. Butler, “ERISA Implications for State Health Care Access Initiatives: Impact of the Maryland “Fair Share Act” Court Decision,” Robert Wood Johnson Foundation’s State Coverage Initiatives Program, at <http://www.statecoverage.net/SCINASHP.pdf>.

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<sup>1</sup> Retail Industry Leaders Association v. Fielder, 2007 WL 102157 (4<sup>th</sup> Cir. January 17, 2007).