

# Supreme Court Limits Patients' Rights To Sue Wall Street's HMOs

by Linda Everett

On June 12, the U.S. Supreme Court unanimously ruled in favor of Wall Street's shareholder values against the rights of patients to use a Federal law to sue health maintenance organizations (HMOs) which pay doctors to ration patient care. As the court points out, the "inducement to ration goes to the very point of any HMO scheme" that Congress has promoted for over 27 years, since its 1973 passage of the "Health Maintenance Organization and Resources Development Act." In *Pegram v. Herdrich*, the court protests that allowing suits under the Employee Retirement Income Security Act (ERISA) would, in effect, "be nothing less than the elimination of the for-profit HMO," and might well portend the end of non-profit HMOs as well.

The court's ruling was immediately applauded by the HMOs and managed-care trade groups, and on Wall Street, where HMO stocks soared on news that HMO profits were given precedence over human life. But, the language in *Pegram*, its unanswered questions, and the court's subsequent June 19 rulings, gave rise to enormous speculation among attorneys on both sides of the issue as to what murky prescription the court is formulating to address suits brought by thousands of HMO patients (or their families) who have been harmed, disabled, or killed by the financier oligarchy's ruthless insurance companies and their HMO subsidiaries.

The *Pegram* ruling, written by Justice David Souter, appears narrow. Its explosive potential lies in effectively creating the basis for eliminating *Federal* legal action against HMOs, in favor of (only) malpractice suits in state courts. But, only a few states explicitly allow such suits. And, for years, HMOs have used the 1974 Federal ERISA law to eliminate any liability in state courts for their policies and practices that harm patients by wrongful denial or delay of care. ERISA provides uniform Federal regulation of employer benefit plans (such as HMO health plans) by superseding the hundreds of state insurance laws and other regulations. About 160 million Americans are enrolled in ERISA health plans that are beyond the reach of state regulators. ERISA HMOs, when sued in state court, simply claim that they are not governed by state laws because "benefit plan" issues are regulated by ERISA in Federal court. Which, in part, the Supreme Court's decision appears to support.

As the LaRouche political movement alone has exposed, the creation of HMOs was part of an overall post-industrial policy that including shifting U.S. health care away from its traditional preservation of human life standard, to a Nazi model, in which the medical needs of millions of people were denied, and the nation's health-care infrastructure systematically destroyed. Both were sacrificed in a free-market frenzy to "cut health care costs," while unleashing wholesale looting of the \$1 trillion-a-year health-care industry. Only the elimination of the HMO system, as the LaRouche movement calls for, will free the nation to rebuild its health-care infrastructure through an updated 1946 Hill-Burton Act.

## The Background

In 1991, Illinois geologist Cynthia Herdrich suffered a ruptured appendix and life-threatening peritonitis, after her HMO doctor misdiagnosed an inflamed mass in her abdomen and delayed tests for eight days so that the tests could be performed at the HMO's facility. To further defray costs, the HMO insisted that Herdrich, once her appendix had ruptured, travel to its facility 50 miles from her home for surgery. She sued her doctor (*Pegram*) for medical negligence, and Carle Clinic, in state court in 1996, and won damages. Herdrich said that all of the decisions related to her treatment were based on the profit motives of all the entities involved in the HMO, which is a wholly owned subsidiary of the Carle Clinic, which, in turn, is owned by its physician-shareholders. She sued Carle Clinic for fraud and for not revealing that the HMO's doctors' compensation increased to the extent they minimized use of diagnostic tests, did not use facilities not owned by Carle Clinic, and did not make emergency referrals outside of the group — all schemes devised, set up, and administered by the HMO's physician-owners to reap profits while determining benefit eligibility in the plan.

The ERISA-protected HMO moved the case to Federal court. Herdrich's amended complaint alleged that the HMO violated its fiduciary trust under ERISA with its physician-profit schemes. ERISA requires an employee plan to act for the sole interest of the beneficiaries of the plan — in this case, the patient. The U.S. Seventh Circuit Court of Appeals upheld Herdrich's charges and expounded how managed care had a

deleterious effect on the quality of health care in the country. The HMO appealed that decision to the U.S. Supreme Court, which then overturned the ruling. According to Herdrich's attorney, James Ginzkey, the Supreme Court ignored the conflict-of-interest facts of the case—the doctors in the HMO were also the HMO's administrators and its owners. "While they served in their capacity as administrators to deny claims, they were increasing their bonuses in their capacity as physicians."

While the court upheld HMO-doctor financial incentive schemes, it left open the issue of whether HMOs are "obligated to disclose" such schemes to patients. On July 31, the Supreme Court will say whether it will take up *Ehlmann v. Kaiser Foundation Health Plan of Texas*, a class-action suit whose plaintiffs charge that ERISA's fiduciary trust obliges HMOs to disclose to patients any financial incentives it has with doctors to limit treatment or service.

### State Malpractice Suits Not Prohibited

On June 19, the U.S. Supreme Court took up two potentially explosive cases in which the ERISA-protected HMOs were found to be medically negligent in state courts. In *U.S. Healthcare System v. Pa. Hospital Insurance et al.*, U.S. Healthcare appealed to the U.S. Supreme Court, a 1998 Pennsylvania Supreme Court ruling (*Pappas v. Asbel v. U.S. Healthcare*), which said that HMOs cannot avoid liability under ERISA. Pennsylvania's highest court drew upon a 1995 U.S. Supreme Court ruling that said: "[N]othing in the language of [ERISA] or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern. . . . Congress did not intend to preempt state laws which govern the provision of safe medical care." A concurring opinion is cited from *Dukes v. U.S. Healthcare*: "[P]atients enjoy the right to be free from medical malpractice regardless of whether or not their medical care is provided through an ERISA plan. . . . [Q]uality control of benefits, such as the health care benefits provided here, is a field traditionally occupied by state regulation."

The U.S. Supreme Court granted *certiorari* in the case, but vacated the ruling and sent the case back to the Pennsylvania Supreme Court for "further consideration in light of *Pegram v. Herdrich*." Attorneys with the case told *EIR*, that although the Supreme Court in *Pegram* said that Federal breach of trust claims are not permitted under ERISA, state court medical malpractice suits for negligent treatment decisions are *not prohibited* under ERISA. The U.S. Supreme Court agrees with the Pennsylvania court's decision, but wants a "less sweeping" conclusion.

The suit originated when Basile Pappas suffered permanent and total paralysis when his HMO denied emergency treatment after three hospital emergency and neurological specialists had diagnosed that Pappas's paralysis constituted a neurological emergency. Pappas settled the case against his

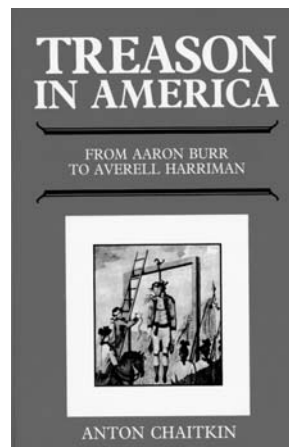
physician out of court. The quasi-state insurance company that paid the settlement was the Pennsylvania Hospital Insurance Company and the Commonwealth of Pennsylvania Professional Liability Catastrophe Loss Fund (the CAT Fund), which provides major malpractice coverage to hospitals and doctors in the state. The CAT Fund sued U.S. Healthcare to recoup the money it paid because the HMO wrongfully denied treatment. It won an appeal in Pennsylvania Superior Court, which ruled: "We see no reason why the duties applicable to a hospital should not be equally applicable to an HMO. . . . When a benefits provider, be it an insurer or a managed care organization, interjects itself into the rendering of medical decisions affecting a subscriber's care it must do so in a medically responsible manner."

Besides the obvious impact of this HMO's hideous policy on the Pappas family, like thousands of others harmed by HMO policies who are now dependent on county, state, and/or Federal agencies for support, the larger issue is the impact that HMOs have on the workforce in general. Why aren't county, state, and Federal officials up in arms about how Wall Street's HMOs are scuttling their skilled workforce, destroying their tax base, and robbing them blind? As one attorney told *EIR*, these workers, once injured, can no longer contribute to the Gross National Product.

In a second decision on June 19, *U.S. Healthcare v. Bau-*

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man 99-1383, the U.S. Supreme Court denied *certiorari* and affirmed the U.S. Third Circuit Court of Appeals ruling which shot down the HMO's contention that it is completely "pre-empted" from state laws governing medical negligence and malpractice. In this case, Steven and Michelle Bauman brought suit against U.S. Healthcare after the death of their newborn daughter, Michelina. Both she and her mother were discharged from the hospital, 24 hours after her birth. The next day, Michelina became ill, from a Group B streptococcus infection, which had been undiagnosed and untreated, developing into meningitis. But, after numerous calls, the HMO doctor did not advise the Baumans to go back to the hospital. The next day, the couple called U.S. Healthcare for a home-care pediatric nurse, which their contract covered. No nurse came. The infant died—after a brief 48 hours of life. The case now goes back to New Jersey Superior Court for trial.

### The Crisis

While the U.S. Supreme Court appears to endorse state court medical malpractice suits as the remedy against medically negligent ERISA HMOs, this offers little protection for most people. Without Federal legislation to eliminate the 1973 HMO law, or to rein in abuses of the ERISA law, decent malpractice decisions in state courts depend on the vagaries of state law, the interpretation of ERISA by judges, and the skills of the attorneys involved. For decades, state and Federal courts have erroneously dismissed such suits. In fact, a June 20 ruling by the U.S. Fifth Circuit Court of Appeals in *Corporate Health Insurance (Aetna) v. The Texas Department of Insurance* upholds the state's law to protect the health of its citizenry and the patient's right to sue medically negligent HMOs, yet, it leaves open several areas for grievous denial of justice under HMO rule. In some states, suits are allowed only *after* a so-called independent review (usually controlled by HMO industry flacks) of the HMO's medical decision takes place. In other states, a patient's life may hang on how the term "medically necessary care" is defined—and, by whom. And, all states are overwhelmed with complaints about HMO denials. The Supreme Court, in *Pegram v. Herdrich*, called on Congress to deal with the managed-care debacle, but, the Conservative Revolution contingent in Congress intends to block—at all costs—even the limited Federal protections provided in the Bipartisan Patients' Bill of Rights, which they again recently shot down in the Senate. Now, with fewer than 30 legislative days left in this Congress, a growing number of Congressional members will attempt, on a bipartisan basis, to again bring this bill up for a vote in both Houses. But, it's time that the citizenry take up where the courts and Congress fail; it's time to reverse the HMOs' ravaging of our most vulnerable citizens, and to demand that legislators take up the LaRouche movement's "The Right to High-Quality Health Care" bill (see the LaRouche campaign's Committee for a New Bretton Woods's pamphlet "Ban the HMOs NOW!").

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## Interview: Lawrence C. Marshall

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# Stop the Conviction of Innocent People

*Lawrence C. Marshall is a professor of law, and legal director of the Center on Wrongful Convictions at Northwestern University School of Law in Chicago. He teaches civil procedure, constitutional criminal procedure, legal ethics, and appellate practice, and, through the Center on Wrongful Convictions and the Northwestern Legal Clinic, he represents criminal defendants.*

*Professor Marshall held a press conference in Houston, Texas on June 12, at which a group of innocent persons, wrongfully convicted of serious crimes because of erroneous eyewitness identifications, called on Gov. George W. Bush and the Texas Board of Pardons and Paroles to block the June 22 execution of Gary Graham (also known as Shaka Sankofa). Graham, who was executed, was convicted solely on the basis of a single eyewitness account. At the press conference, the former prisoners, most of whom were exonerated by DNA evidence or confessions of others, each stepped up to a podium at Texas Southern University's Thurgood Marshall School and declared, "I am living proof that eyewitnesses can and do make mistakes."*

*In an unprecedented move, the government of France, speaking on behalf of the European Union, issued an official declaration of protest against the execution of Graham, which read, "We are dismayed by the news of the execution of Gary Graham in Texas. We especially regret that the authorities knowingly took the risk of putting an innocent man to death. . . . France is firmly opposed to capital punishment, and is committed, as are its European partners, to its abolition."*

*Among Professor Marshall's more well-known clients are wrongfully convicted former death-row prisoners Rolando Cruz and Ronald Jones, Ford Heights Four defendant Willie Raigne, and Gary Gauger, an innocent man sentenced to death in 1994 for the murder of his parents—a crime for which others are now under indictment.*

*It was the Center's cases, among others, which led Illinois Gov. George Ryan to announce, on Jan. 31, 2000, that he would impose an indefinite moratorium on executions, which has subsequently led to a growing movement for a nationwide moratorium in the United States.*

*Professor Marshall was interviewed by Marianna Wertz on June 29.*

**EIR:** Prior to Gary Graham's execution on June 22 in Hous-