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*Holding Decision Makers Liable: Assessing Liability
Under a Managed Health Care System*

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Abstract by Carrie Mitchell

Traditional approaches to medical care were prominent in the U.S. until the 1960s and involve health care centered on the doctor patient relationship. More recently, use of managed care principles in health care center around goals of cost containment and managed competition. Various theories of liability explain how tort principles are applied to correct a wrong under managed care. The Employee Retirement Income Security Act (ERISA) affects the law and the desirability of Congressional action in this area. Congress needs to close the ERISA loophole that denies patients injured by negligent decisions of ERISA- regulated managed care programs to hold the plans responsible. The theories of liability for managed care organizations (MCOs) include direct liability and vicarious liability. Direct liability appears to take many forms including negligence, breach of contract, negligent selection or supervision of physicians, breach of warranty, misrepresentation, bad faith, and breach of fiduciary duty. ERISA preemption presents a harsh reality. Under theories of vicarious liability, MCOs are liable when one of their providers delivers negligent care. The provider is seen as the agent of the MCO.

The tort system provides proper tools to encourage HMOs, insurers and others to consider the health care impact on a patient prior to making economic decisions for him. Courts are more able to apply tort principles where harm to a patient occurs. Liability should be imposed on HMOs to encourage them to provide good care. The public policy debate requires a balance between providing good care on one hand and keeping costs down. Modifying ERISA to expand patients' rights against HMOs provides a good start.