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Heart and Soul Practitioners

Justice Kline defends his dissent

Erwin Chemerinsky on the next U.S. Supreme Court term

Edward Lazarus justifies *Closed Chambers*

Lawyers Behind Bars

What's it like to be an attorney in prison?

California, ESQ.

Unnatural Deselection

Fired health plan doctors are seeking due process.

Doctors who practice medicine as part of managed health care plans are awaiting a California Supreme Court ruling that will likely have a dramatic effect on their livelihoods. In a major controversy involving due process rights, the court will decide whether a managed care group can legally terminate a physician without an explanation or hearing.

The case, *Potvin v Metropolitan Life Insurance Co.,* S061945, "goes to the basic question of whether doctors can be dismissed for capricious or arbitrary reasons and, more fundamentally, whether the patient-physician relationship will be protected," says Catherine Hanson, general counsel for the California Medical Association. "The health care system will go in different directions depending on how this debate is resolved."

The case dates back to 1992, when Dr. Louis E. Potvin, an Orange County physician who had once headed his hospital's ob-gyn department, was dropped—or "deselected"—by two major health plans overseen by Met Life. After nearly a year of repeated requests for information, Potvin learned that he had been dismissed because of earlier medical malpractice claims against him, three of which had been dropped, with a remaining case settled without an admission of guilt. Still, Met Life officially maintained he was terminated without cause and that the insurer had no contractual obligation to explain its decision.

Potvin sued the company in 1994, claiming his deselection had devastated his practice. A Los Angeles County Superior Court judge held in favor of Met Life in a summary judgment ruling. However, the Second District Court of Appeal concluded in April 1997 that managed care plans could not drop doctors from provider panels without affording them a state common law right to due process. 54 CA4th 936. The court based its decision on the premise that health plans control a physician's economic well-being by acting as gatekeepers between doctors and their patients. In what is apparently the only other deselection case to reach a state high court, in 1996 the New Hampshire Supreme Court held in *Harper v Healthsource New Hampshire,* 674 A2d 962, that doctors are entitled to a review of no-cause terminations done in bad faith or found contrary to public policy. But the California court attached no such restrictions to a doctor's right to due process.

"A lot of doctors would've just given up."

Fenton: Robert Levins

Health care companies argue that maintaining the right to remove doctors from provider panels without layers of administrative hearings and appeals is crucial to keeping costs down. "There's a lot more at stake than an individual physician's economic well-being," says Lowell C. Brown, a Los Angeles attorney who submitted an amicus brief in *Potvin* on behalf of the California Association of Health Plans. "If the goal is the highest possible care at the lowest possible price, [that goal] is in conflict with what amounts to granting physicians tenure."

With more than two-thirds of working Americans receiving health care through managed care plans, doctors are under increasing pressure to join provider panels for their economic survival. But they also contend that health care groups are using the threat of no-cause terminations to coerce them into unsound medical practices. According to the American Medical Association, physicians

A Fine Legal Bouquet

Sonoma County's Kendall-Jackson Winery Ltd. seems to like a good lawsuit about as much as it does a perky chardonnay. A recent trademark infringement suit claims that a competitor, Golden State Vintners, unlawfully used the name "Vintner's Reserve"—which Kendall-Jackson claims as its own—on some bottles. Although that dispute remains pending, the winery in July lost a Ninth Circuit appeal in a similar label-design lawsuit against industry giant E. & J. Gallo.

Litigating labels

Perhaps the background of several Kendall-Jackson officials and suppliers helps to explain the wine-drenched litigation. Jess Stonestreet Jackson, the winery's proprietor, is a Boalt Hall graduate and former property rights attorney at San Francisco's Jackson, Jacobsen & Banke. His wife, Barbara Banke, who presides over a separate winery that supplies Kendall-Jackson with grapes, is an ex-partner at the same law firm. Jackson's daughter, a lawyer, works at Kendall-Jackson, and her husband, also an attorney, is affiliated with other grape-supplying wineries. In addition, Kendall-Jackson employs two in-house attorneys.

But Paul M. Ginsburg, K-J's executive vice president and a former lawyer, says all those wine-loving barristers don't make the winery more litigious than others. "We always bring suits reluctantly," he says, while emphasizing the need for all wineries to

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keep a close watch on infringement matters. "If they don't, they should hire new lawyers."

High School Confidential

What do Monica Lewinsky, O. J. Simpson, and Huey Newton have in common? All three had lawyers who were classmates together at Hamilton High School in Los Angeles.

But despite their common backgrounds, William Ginsburg, Robert Shapiro, and Paul Harris—the three graduated in 1960—had their differences back then. Ginsburg, for example, listed his goals and interests in his senior yearbook as "law, public relations, and golf," while Harris said his objectives at the time were "world peace and brotherhood." The space next to Shapiro's photo was accidentally left blank, perhaps because he had been confused with another student who shared his name. In any event, Shapiro says he no longer recalls what he wanted the yearbook to say about him.

Robert Shapiro

William Ginsburg

The Klausner Report

Los Angeles attorney Manuel S. Klausner seems well situated to defend Internet gossip journalist Matt Drudge in a pending $30 million libel suit brought by White House aide Sidney Blumenthal. A writer himself, Klausner was a founding editor of *Reason,* a libertarian magazine established 30 years ago. And like Drudge, Klausner is unrestrained when it comes to his preferred subject matters. The sole practitioner, who had a hand in

reportedly are being deselected for referring too many patients to specialists or ordering excessive medical tests, at least in the opinion of health plan administrators. "Physicians are in a bind," says Dr. Ronald Cooper, a San Ramon surgeon who was deselected in 1996 by an independent practice association (a group of doctors that contracts with a managed care plan). "They have to choose between personal financial liability and their patients' health."

Doctors also argue that deselection policies effectively deny continued treatment to patients, particularly those with serious medical conditions, who are unable to afford their physicians once the doctors are dropped from medical plans and go into private practice.

Whatever the California Supreme Court decides, meanwhile, will have no effect on Potvin, who died last year from pancreatic cancer. "He was totally dedicated to his patients and supremely honest and straightforward," says Henry R. Fenton, a Los Angeles lawyer who represents Potvin's estate in the litigation. "A lot of doctors would've just given up with the expense and difficulty of the case. He wouldn't." —*Loren Stein*

Wanted—a Few Good Republicans

Trial lawyers are trying to win over GOP supporters.

California trial lawyers are looking for political friends in the unlikeliest of places: the Republican Party's ranks within the Legislature. Although Consumer Attorneys of California (CAOC), the plaintiff bar's lobby, hasn't yet lured any GOP lawmakers into its camp, the group has found some who are at least willing to question traditional Republican support for limits on tort suits.

Earlier this year a new GOP offshoot of the Democratic-flavored CAOC formed Conservative Attorneys for Civil Justice, a political action committee that funneled about $250,000 into the primary campaigns of potentially sympathetic Republicans. "We believe in the preservation of the constitutional jury system," says Wayne Johnson, a political consultant who directs the conservative trial lawyers' PAC. "We shouldn't scrap the jury system just because juries sometimes make mistakes."

The courtship also received a boost earlier this year when Assemblyman Tom McClintock, R-Granada Hills, suggested in a hearing that a free-market economy can't function properly without a vibrant tort system. Although McClintock has attacked punitive damages in tort cases, he also has questioned the fairness of a long-standing $250,000 cap on noneconomic damages in medical malpractice cases.

> "We believe in the preservation of the jury system."
> —Wayne Johnson

Rolling back the medical malpractice law happens to be one of CAOC's highest legislative priorities. But several bills that would have raised existing caps on damages, restored the right of third parties to sue insurers for bad faith, and lifted other limitations on tort suits fell by the wayside even after the Democrats regained control of the Legislature after the 1996 elections.

Rick Simons, CAOC's president, denies that the group began courting Republicans in retaliation over the Democrats' failure to advance CAOC's political agenda. "It's not related to disillusionment with the Democrats," he says. Instead he attributes the move to straightforward math calculations. "You're better off trying to find 41 votes out of 80 [total members of the Assembly] than you are trying to find 41 out of 43 [Democrats]."

McClintock's political position notwithstanding, plaintiffs lawyers so far can point to only one Republican's vote as evidence that their efforts might pay off. Earlier this summer, Assemblyman Peter Frusetta from Hollister joined all 43 Democrats in voting for a bill that would ease some of the protections from tort suits enjoyed by health maintenance organizations.

Simons, meanwhile, says tort reformers could find themselves on the defensive regardless of who wins November's gubernatorial contest between Gray Davis and Dan Lungren. Not surprisingly, Davis has informed CAOC that he supports an "adjustment" of the medical malpractice caps. Lungren, whose campaign has been silent on the issue, might be expected as a conservative Republican to resist such changes in the tort system.

"But I don't know if it's safe to make that assumption about him," says Simons, who