

No. 22-157

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Estate of Kathleen Valentini, Valerio Valentini as Administrator, Valerio Valentini, and Valerio Valentini, on behalf of his minor son, Matthew, Plaintiffs-Appellants,

v.

Group Health Incorporated, Emblem Health Inc, CareCore National, LLC d/b/a eviCore, and John Does 1 and 2, Defendants-Appellees

On Appeal from the United States District Court
For the Southern District of New York

**BRIEF *AMICI CURIAE* OF THE AMERICAN MEDICAL ASSOCIATION
AND** _____
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to FRAP 26.1, *amici*, American Medical Association (“AMA”) and _____ state that they are not- for-profit corporations and no publicly held corporation owns 10% or more of the stock of either *amicus*.¹

¹ Pursuant to FRAP 26(c)(5), *amici* state that no party or party’s counsel authored this brief in whole or in part or contributed money intended to fund preparing or submitting this brief. *Amici* further state that no other person contributed money intended to fund preparing or submitting this brief.

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Identification and Interest of *Amici* and Source of Authority

The AMA is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all states and in all areas of medical specialization.

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The _____

Amici are concerned by the widespread practice of health insurance companies to require prior authorization as a condition precedent to the payment of benefits. See <https://www.ama-assn.org/system/files/prior-authorization-survey.pdf>. Although this practice may save money for insurance companies, it is deleterious to patient health and causes substantial inconvenience and frustration to patients and to health care providers, including physicians. See "Why Prior Authorization is Bad for Patients and Bad for Business" (AMA News 2/18/2022), at <https://www.ama-assn.org/practice-management/sustainability/why-prior->

[authorization-bad-patients-and-bad-](#)

[business#:~:text=What's%20the%20news%3A%20Prior%20authorization,having%20a%20healthy%2C%20productive%20workforce.](#)

As is evident from this case, the prior authorization requirement can endanger health and even lead to loss of life. This case presents an especially egregious case of prior-authorization abuse. *Amici* seek to ensure that such abuses are minimized and that, when they occur, insurance companies are properly held responsible.

The source of authority to file this brief is _____.

Summary of Argument

The website posting of CareCore National LLC d/b/a eviCore, misrepresented its regular business practice. In essence, the website promised that eviCore would assist patients in obtaining proper medical care. The website posting was made in order to gain eviCore a competitive business advantage – employers would be induced to purchase their employees’ health insurance from companies that retained eviCore to conduct their pre-authorization review. In practice, though, eviCore did exactly the opposite of what it promised on its website. Rather than assisting patients in obtaining necessary care, it restricted medical care in order to save money for its client insurance companies. The

employers who purchased health insurance were misled, and their employees paid the price.

The decedent (Kathleen Valentini) forewent crucial medical care while waiting for eviCore to authorize necessary treatment. The decedent had every reason to respect eviCore’s promise that it would render sound medical judgment as to what medical tests the decedent should undertake. But, eviCore did not render sound medical judgment, and the consequences for the decedent were gruesome and ultimately fatal. Now, eviCore asserts that, contrary to its own representations, its duty was only to the insurance company and not to the decedent.

EviCore is wrong. Under the New York law of negligence, eviCore had a duty to the decedent, and it should be held to its promises. EviCore should bear the consequences of its misrepresentations – not the decedent.²

Argument

I. The EviCore Website Was Misleading.

The First Amended Complaint includes the following allegations (at ¶¶ 53-54):

53. “[I]n a video on eviCore’s homepage, patients are told that:

² This brief does not address the potential liability of the defendants other than eviCore, and it does not address the duties eviCore may have owed to the decedent under legal theories other than common law negligence.

- a. ‘The patient comes first. We want to make sure that the patient gets the right procedure.’ (eviCore CEO).
 - b. EviCore ‘want[s] to share ... info with the patient ... so they can make an informed choice. ... Based on evidence-based medicine ... not just what they are told to do, they have been advised and counseled to make an appropriate choice,’
 - c. EviCore is there ‘really to assure that the patient gets the best care,’ noting that with EviCore ‘you have a chance to change the outcome and the path for people receiving these services.’”
54. “In other areas of eviCore’s website ... eviCore claims that:
- d. EviCore delivers ‘improved patient outcomes by ensuring health plan members receive the appropriate test or treatment necessary for their individual case presentation or condition ... EviCore’s approach is not to deny care that is needed but rather to redirect providers and patients to more appropriate testing and treatment options.
 - e. ‘The eviCore Musculoskeletal solution addresses the full spectrum of potential care and treatment, from holistic and conservative approaches to more advanced and invasive procedures. We then apply up-to-date evidence-based guidelines and advanced technologies to ensure that the right evidence-based care is delivered.’
 - f. ‘The strong evidence supporting our criteria allows us to make appropriate decisions on patients’ behalf.’”

The only reasonable reading of the eviCore website (or, at least, a plausible reading of the eviCore website) is that eviCore would act on the patient’s behalf, in order to make sure the patient would receive proper medical care. In effect, eviCore promised to render a second medical opinion in order to make sure that the

most appropriate medical care would be provided to the patient – appropriate, that is, from the patient’s medical viewpoint. EviCore, thus, would protect the patient.

The truth was greatly different. As articulated in its motion to dismiss and supporting memorandum, eviCore was *not* working for patients; it was working for the insurance companies that had contracted for its services. *See eviCore Memorandum* at 3,13-14. EviCore was hired to make sure that a patient would only receive the medical care that was within the coverage of the patient’s insurance policy. EviCore obligations to the insurance company largely contradicted the promises made on its website. If medical care was needed that could extend beyond the obligations under the insurance policy, well, then, that was just too bad. If medical care had to be delayed while eviCore evaluated the scope of the insurance policy, that was also too bad. This is a far cry from the website, which promised a fair evaluation of the patient’s medical needs based on the patient’s physical condition, rather than on the metes and bounds of the insurance policy.

Complaints are to be construed in the light most favorable to the plaintiff. On a motion to dismiss, well-pleaded allegations must be taken as true, and all reasonable inferences should be drawn in the plaintiff’s favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Stajic v. City of New York*, 214 F. Supp. 3d 230, 233

(S.D.N.Y. 2016). Furthermore, eviCore is bound by the statements made in its judicial pleadings. *Conrad v. Perales*, 92 F. Supp. 2d 175, 187 (W.D.N.Y. 2000).

The reasonable inferences that can be drawn from the complaint include the following:

- The eviCore website posting was made so that others would rely upon it. Those others would include employers who were purchasing insurance to benefit their employees.
- The website posting was made to gain eviCore a competitive advantage. Specifically, employers would purchase insurance from eviCore's contractors so that eviCore could secure additional revenue as a result of the mistaken belief that eviCore would conduct its prior authorization review in such a way as to ensure that "the patient comes first" and "to assure that the patient gets the best care."
- By purchasing insurance from eviCore's contractors, employers forewent the opportunity of purchasing insurance from companies that conducted their prior authorizations using methodologies more favorable to patients.
- By hook or by crook, eviCore elevated its financial welfare above the patients' health and safety – sometimes with the tragic consequences exemplified in this lawsuit.

II. EviCore Owed the Decedent a Duty To Help Her Receive Optimal Medical Care.

The threshold question in a negligence case is whether the alleged tortfeasor owed a duty of care to the injured party. *Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 177 (2d Cir. 2013); *Farnham v. Mic Wholesale Ltd*, 176 A.D.3d 1605, 1606 (2019). The duty eviCore owed the decedent was to help her obtain the optimal medical care she needed, not to set up roadblocks by scouring her insurance policy for loopholes under which the insurer could deny benefits. Its duty included the obligation -- first, to do no harm.

There is no simple formula or algorithm for a court to determine the existence of a duty under New York law. A duty depends on concepts of morality, logic, and the social consequences of imposing the duty. *Davis v. S. Nassau Communities Hosp.*, 26 N.Y.3d 563, 572 (2015). A duty is found in favor of those who have a distinctive and direct interest in proper performance. *Signature Health Ctr., LLC v. State*, 28 Misc. 3d 543, 551–52 (Ct. Cl. 2010), *aff'd*, 92 A.D.3d 11 (2011). These considerations all point toward a finding that eviCore owed a duty to the decedent.

McKinney's General Business Law §349(a) declares: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are ... unlawful." Not only were eviCore's false website

postings illegal, but they contributed to a chain of events that caused the decedent great suffering, including dismemberment and ultimately death.

EviCore made its false website posting as a calculated business decision. It misled (or at least tried to mislead) employers into purchasing insurance policies that, after consideration of the prior authorization procedure, would provide lesser benefits for employees than the employers had been promised on the website.

Because eviCore failed to meet the standards it had openly set for itself, the decedent's cancer went undetected, she endured unspeakable pain, her leg, hip, and pelvis were amputated, and she eventually died. According to the doctors at Memorial Sloan Kettering Hospital, eviCore's delay foreclosed a less radical and possibly more successful option with chemotherapy. First Amended Complaint, ¶¶ 11, 64, 66. No one can ever know how the decedent's fate would have been different if eviCore had not made its deceptive website posting. But eviCore should bear the burden of that uncertainty. It would be immoral if it were to escape with impunity.

Conclusion

EviCore posted a misleading website to induce employers to purchase health insurance from companies that contracted with eviCore. It promised a standard of care that employers would want to provide for their employees, but which eviCore

had no intention of fulfilling. The likely consequences for employees could be – and in this case were -- devastating.

Accordingly, this Court should find that eviCore had a duty to the decedent to help her obtain the medical care she needed, not to obstruct her efforts to secure that care. The first element of the first cause of action in the amended complaint – common law negligence – should be deemed properly pleaded.

Respectfully Submitted

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Date: _____, 2022

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