

INVESTIGATOR AWARDS IN  
**Health Policy  
 Research**

## Law and Order in Managed Care: Resolving Conflicts Between Patients and Health Plans

*Peter D. Jacobson*

**F**ew worlds seem farther apart than those of the courtroom and the medical examining room. Yet an important key to solving the country's managed care crisis may lie in the link between the judicial bench and the doctor's office.

An innovative design crafted by Peter D. Jacobson, associate professor at the University of Michigan's School of Public Health, would use the courts to inject greater clarity and fairness into health plans' decisions to delay or deny care.

The judicial system plays a significant role in deciding whether and how millions of Americans receive and experience health care. Legislators make laws and managed care administrators formulate policy, but the courts wield a different type of power by converting sometimes fuzzy policies and regulations into clear legal guideposts.

Jacobson's fresh approach to reform weaves the judicial system and the concept of fiduciary duty into a promising model for working out differences among payers, providers, and patients. He will soon publish his blueprint for reform in his new book, *Strangers in the Night: Law and Medicine in the Managed Care Era*, with support from a Robert Wood Johnson Foundation Investigator Award in Health Policy Research.

Jacobson's prescription for health policy reform would:

- Rely on health care fiduciaries with the legal duty to follow carefully established guidelines and objectively balance the needs of individual patients with the need to preserve scarce resources for their fellow health plan members; and
- Use the courts to ensure that fiduciaries' decisions meet strict standards for fairness.

### *Medical and Legal Conflicts Deepen*

The health system and the legal system had a complicated history long before managed care's debut. The fee-for-service era found patients and lawyers tangling with insurers in contractual battles over payment, while physicians fended off liability lawsuits targeting their treatment decisions.

Although managed care has supplanted fee-for-service, it hasn't ended these disputes. Instead, medicine and law are entangled even more tightly in a health system marked by increasing complexity, confusion, and conflict.

Managed care has sown many of the seeds of conflict. By uniting financial and care delivery duties within a single entity, Jacobson says, managed care blurs the relatively distinct lines of responsibility for payment and treatment decisions established under fee-for-service. Unlike the old days, denied payment under managed care often means denied access to care as well. According to Jacobson, the new power that payers hold over clinical decisionmaking erodes physician autonomy and clouds accountability. Who should be called to task for bad clinical decisions? Doctors? Physician groups? Utilization review firms? Health plans?

A National Program of  
 The Robert Wood Johnson Foundation

National Program Office:  
 Rutgers, The State University  
 of New Jersey  
 Institute for Health, Health Care Policy,  
 and Aging Research  
 317 George Street, Suite 400  
 New Brunswick, NJ 08901-2008

phone: 732.932.3817 ext.256  
 fax: 732.932.3819  
 email: depdir@ihhpar.rutgers.edu  
 www.ihhpar.rutgers.edu/rwjf

Thanks to this growing confusion and frustration, Jacobson warns, the managed care system is hemorrhaging a valuable commodity: trust. In many minds, managed care's commitment to the individual patient's treatment needs consistently takes a backseat to managed care's goal of cost containment.

When Americans lose hope in finding fairness inside the health care system, they turn to a time-tested American remedy: They look outside the system — and head to court.

---

### ***The Courts and Managed Care: Imperfect Solutions***

As a result, the courts frequently find themselves the favored arbiters in the clash between managed care's mission to control costs and individual patients' quests to ensure the best possible clinical treatment for themselves.

Patients unhappy about medical care delayed or denied by a health plan have sued their managed care organization for medical negligence. Alternately, patients have mounted attacks alleging that managed care organizations and physicians have behaved negligently because of financial incentives designed to limit care.

Managed care's fusion of financial and clinical decisionmaking might seem a prime weak spot for contractual and tort law attacks against delayed or denied care. As outlets for patient grievances, however, contract and tort law have delivered little relief.

Today's judicial approach to managed care mirrors earlier courts' handling of emerging industries such as railroads, Jacobson explains. Judges are leaving the job of building and repairing managed care to the invisible hand of the market and to the more visible hands of elected legislators. In contractual battles over managed care plans' benefit limits, Jacobson explains, courts have tended to uphold contracts rather than compel health plans to pay for treatment. Campaigns to pin medical liability on managed care plans have proved equally unsuccessful. Most managed care organizations' cost-containment strategies have survived liability lawsuits, thanks to court decisions that continue to paint health plans as financiers, not clinicians.

It's not that every court has a soft spot for managed care plans and unrestrained market forces. Some judges, in fact, have pointedly featured compelling evidence of health plans' medical negligence in their opinions. But looming over many judicial decisions is the 800-pound gorilla of health benefit law: the Employee Retirement Income Security Act (ERISA) of 1974.

ERISA shields employer-sponsored benefit plans from state laws that "relate to" benefit plans. That puts the 65 percent of insured Americans covered by ERISA health plans beyond the reach of state laws that would tame badly crafted cost controls or open managed care plans to liability lawsuits. Instead, angry individuals in ERISA plans can only chase a weak set of federal court remedies.

With contract law and tort law solutions unable to effectively limit managed care's use of cost-containment methods, the health care system continues to sink under the weight of patients' and providers' exasperation, acrimony, and intensifying legal attacks.

---

*When Americans lose hope in finding fairness inside the health care system, they turn to a time-tested American remedy: They look outside the system — and head to court.*

---

### ***Fiduciary Duty: A Promising Alternative?***

According to Jacobson, courts and managed care decision-makers might do well to dust off an overlooked legal principle: fiduciary duty.

A fiduciary has a duty to act for the benefit of another person. In the real world, this concept is familiar to physicians and attorneys, for example, who have fiduciary duties to their patients and clients, respectively.

Applied to the world of managed care, Jacobson's fiduciary framework would introduce procedures that mandate impartial care decisions by health plans based on the best available medical and scientific evidence. The framework would require a health care fiduciary to objectively balance the merits of an individual health plan member's care with the financial effects of that care on the entire health plan.

The fiduciary duty approach provides a way for health plans to implement cost containment objectives without compromising an individual patient's health care needs. This is important for patients because it directly addresses their concerns that a managed care organization may arbitrarily deny or delay needed health care without adequate explanation.

Jacobson's framework rests on three legs: selecting fiduciaries, creating rules for decisionmaking, and giving the court system a robust oversight role.

■ **Choosing fiduciaries:** Any person acting as a health plan fiduciary must earn the trust of both the managed care organization and its enrollees. That requires health plans to limit the field of possible candidates to those capable of acting impartially despite potentially conflicting loyalties. Although they would likely be health plan employees, fiduciaries would have to be able to recognize conflicting interests and still act independently. Fiduciaries should also disclose the financial incentives that might affect their decisions.

■ **Setting the rules:** The fiduciary system's second component, decision rules, would spell out general administrative guidelines on topics such as benefit caps. The rules would also clearly establish care standards for individual treatment decisions. Fiduciaries would have to back up treatment denials by demonstrating medical reasons (supported by evidence-based guidelines, for example) and administrative reasons (showing that the benefit to the overall health plan population outweighed the harm to the individual member).

■ **Reviewing the standards:** The fiduciary model's third piece would be strong judicial oversight of managed care conflicts. The courts would measure fiduciaries' actions against the two yardsticks of prudence and loyalty. The sharper the potential conflict between the medical and administrative aspects of a fiduciary's decision, the sharper the scrutiny exercised by the courts.

Although Jacobson's approach to conflict resolution includes elements familiar to arbitration and mediation models, a fiduciary duty system offers a more promising tack.

As in arbitration, a fiduciary model features a third-party decisionmaker who hears evidence presented by both sides. A fiduciary duty system would share some goals with arbitration, such as reduced litigation costs and a less adversarial process. Unlike arbitration, however, a fiduciary model would build a foundation of precedents for future treatment recommendations and reviews. A fiduciary framework would also ensure a more active monitoring role for the judicial system, which often plays no role in arbitration systems.

---

*Applied to the world of managed care, Jacobson's fiduciary framework would introduce procedures that mandate impartial care decisions by health plans based on the best available medical and scientific evidence.*

---

## About the Investigator

Peter D. Jacobson is an associate professor in the Department of Health Management and Policy at the University of Michigan School of Public Health.



Jacobson's quest to bring clarity to the often contentious relationship between the worlds of medicine and the law has generated a wealth of groundbreaking research. Weaving his background as an attorney with his scholarly work on major public health policy issues, Jacobson has been published in the *Journal of the American Medical Association*; *Journal of Health Politics, Policy and Law*; *Journal of Law, Medicine and Ethics*; and many others. As a recognized authority in the field and an accomplished speaker, Jacobson regularly addresses key health policy and legal decisionmakers.

Interactions — and, increasingly, conflicts — among doctors, attorneys, and courts generate plenty of media and scholarly commentary. Yet the seemingly less sensational legal trends behind those individual events rarely generate headlines.

With managed care organizations gaining unprecedented power over financial and care delivery decisions, however, “we need to look beyond individual encounters between health and law and take a much more systematic approach to understanding the role of the legal system in shaping health care delivery,” Jacobson cautions.

Jacobson has used his 1995 RWJF Investigator Award in Health Policy Research to explore how judicial decisions shape the nation's health policy. He is also crafting principles to help the courts create consistent judicial doctrine that balances an individual's treatment needs with limited health care resources.

“I want to raise the level of the debate between health care and the law from one of mutual antagonism to one of mutual understanding,” Jacobson explains. “That will give us a better opportunity to understand how the law and medicine connection shapes our lives, and to address the difficult health policy choices we face.”

A comprehensive synthesis of Jacobson's work will appear in 2002 with the Oxford University Press release of his newest book, *Strangers in the Night: Law and Medicine in the Managed Care Era*.

Both mediators and fiduciaries may be effective at bringing two sides closer to reaching an agreement. Unlike mediation, where the mediator only has the authority to make suggestions, a fiduciary model gives a relatively impartial fiduciary the final decisionmaking authority if the parties can't agree.

A fiduciary duty approach won't deliver a simple, speedy solution, Jacobson cautions. But over time, a trail of stable principles would take shape to guide health care fiduciaries. Health plans could better ensure that cost-containment objectives don't compromise individual medical decisions, while patients may feel that they have better protection against managed care plans' arbitrary care denials.

By combining the concept of fiduciary duty with a strengthened oversight role for the courts, Jacobson's model could inject new fairness and clarity into managed care decisions and begin to restore Americans' trust in their health care system.

### Publications

Mr. Jacobson will soon publish his blueprint for using the concept of fiduciary duty as a model for working out differences among payers, providers, and patients. His book, *Strangers in the Night: Law and Medicine in the Managed Care Era*, will be published by Oxford University Press in 2002. To order a copy, call 1.800.451.7556, or email [medical@oup-usa.org](mailto:medical@oup-usa.org).

Related publications by Mr. Jacobson include:

- Jacobson PD, Selvin E, and Pomfret SD. The role of the courts in shaping health policy: an empirical analysis. *Journal of Law, Medicine, and Ethics*, 2001; 29:278-89.
- Jacobson PD, Kanna ML. Cost-effectiveness analysis in the courts: recent trends and future prospects. *Journal of Health Politics, Policy and Law*, 2001; 26(2):291-326.
- Jacobson PD, Patil NM. Managed care litigation: legal doctrine at the boundary of tort and contract. *Medical Care Research Review*, 2000; 57(4):440-63.
- Jacobson PD, Cahill MT. Applying fiduciary responsibilities in the managed care context. *American Journal of Law and Medicine*, 2000; 26(2-3):155-73.
- Jacobson PD and Pomfret SD. ERISA litigation and physician autonomy. *Journal of the American Medical Association*, 2000; 283:921-6.
- Jacobson PD. Legal challenges to managed care cost containment programs: an initial assessment. *Health Affairs*, 1999; 18(4):69-85.

Mr. Jacobson may be reached by phone at 734.936.0928, or by email at [pdj@umich.edu](mailto:pdj@umich.edu).

To order additional copies of *Law and Order in Managed Care: Resolving Conflicts Between Patients and Health Plans*, contact the National Program Office of the RWJF Investigator Awards in Health Policy Research at 732.932.3817, ext. 256, or [depdir@ihh-par.rutgers.edu](mailto:depdir@ihh-par.rutgers.edu).