



the sovereign and regulatory interests of Oregon."

- c. Temporary restraining order extended. On 11/20/01, Judge Jones conducted a second hearing. With respect to the plaintiffs' motion for a preliminary injunction, the court found "serious questions on the merits and that the balance of hardships tips sharply in favor of the plaintiffs." The parties then stipulated that the temporary restraining order could be extended to allow the court to proceed directly to consideration of the plaintiffs' motion for a permanent injunction. Judge Jones took the motion for class certification under advisement.
- d. Current status of Oregon Death with Dignity Act. Judge Jones also ordered:
- "The directive of Attorney General Ashcroft issued on or about November 6, 2001, shall be unenforceable and of no legal effect pending further order of this court. Physicians, pharmacists, and other health care providers in Oregon shall not be subject to criminal prosecution, professional disciplinary action or other administrative proceedings for any actions taken in compliance with the Oregon Death with Dignity Act while this temporary restraining order remains in effect."
- e. Further briefs, hearing, and final ruling. Plaintiff and plaintiff-intervenors filed their motions for summary judgment in January 2002. Defendants have until 2/21/02 to file their response and cross-motion for summary judgment. The parties have stipulated that defendants may at the same time file a motion to dismiss the complaints of plaintiff and plaintiff-intervenors for lack of subject matter jurisdiction and/or failure to state a claim upon which relief can be granted. Plaintiff and plaintiff-intervenors will then have 14 days to file any replies. Judge Jones has indicated that "[a] hearing will be set, if practicable, within 7 days of completion of briefing, and findings and conclusions will be issued within 30 days of the hearing."

Plaintiffs' arguments. The State of Oregon and the intervenors make the following arguments:

- (1) Ashcroft's directive is invalid because Congress did not, under the CSA, delegate to the Attorney General the authority to override a state's determination as to the "legitimacy" of a medical practice.
- (2) Ashcroft's directive is not an interpretive rule, but a substantive rule, and therefore is invalid for failure to follow the formal rule-making procedures required by the Administrative Procedures Act.
- (3) Congress has no constitutional authority under the Commerce Clause to regulate the medical practices of Oregon physicians and pharmacists.
- (4) Any attempt by Congress to invalidate medical practices authorized by Oregon law is unconstitutional under the Tenth Amendment as an impermissible intrusion into areas reserved to the States, and violates the federalism principles articulated in Executive

## LEGISLATION

1. California. In October 2001, California Governor Gray Davis signed into law a new bill, AB 487, requiring physicians to take classes in pain management and end-of-life care as part of obtaining their licenses or as a continuing education requirement in order to renew their licenses. The law also directs the state Division of Medical Quality to develop standards concerning pain management, including definitions for under-treatment, under-medication, and over-medication of a patient's pain, by 6/1/02. The Division is required to report annually to the legislature on actions taken by the Division or the state medical board regarding unprofessional conduct by medical personnel in prescribing drugs, including under-treatment or under-medication of pain.
2. Michigan. Michigan Governor John Engler has signed 15 bills reflecting the recommendations of the Michigan Commission on End of Life Care. The bills are intended to provide patients with information needed to make health care decisions, raise awareness and knowledge about pain management and treatment options, remove barriers to prescribing pain medication, establish a new electronic system to track prescription drugs, make health care professionals aware of patients' wishes, and make nursing home residents more aware of the availability of hospice care.
3. Oregon.
  - a. U.S. Department of Justice legal opinion. On 6/27/01, Sheldon Bradshaw, a deputy assistant attorney general with the U.S. Department of Justice, sent a 24-page memorandum to Attorney General John Ashcroft concluding that physician-assisted suicide is not a "legitimate medical purpose" under the Controlled Substances Act.
  - b. Senator Wyden's letter. On 10/30/01, Oregon Senator Ron Wyden wrote a letter to President Bush charging that the administration was "actively considering" whether to declare that physicians who prescribe drugs under the Oregon Death with Dignity Act were in violation of the Controlled Substances Act. Wyden called on President Bush to refrain from doing so, saying that such an action would lead to a court challenge and could have a chilling effect on pain relief nationwide.
  - c. Directive issued by U.S. Attorney General John Ashcroft. On 11/6/01, Attorney General John Ashcroft sent a letter to the Drug Enforcement Administration (DEA) determining that assisting suicide is not a "legitimate medical purpose" under the Controlled Substances Act and that a physician's license to prescribe is subject to suspension or revocation if the physician prescribes lethal medication for assisting suicide. The determination was to become effective as an interpretive rule on 11/9/01, when it was published in the Federal Register. 66 Fed. Reg. 56,607 (Nov. 9, 2001). The Attorney General directed the DEA to enforce and apply this determination notwithstanding the 6/5/98 letter from former Attorney General Janet Reno overruling an earlier determination by the DEA Administrator that assisting suicide was not a legitimate medical purpose. Ashcroft's directive stated that the reinstated determination "makes no change in the current standards and practices of the DEA in any State other than Oregon" and claimed that the Department of Justice has the authority to obtain copies of confidential documents filed with Oregon Health Services (formerly the Oregon Health Division) when an assisted suicide occurs.
  - d. Enforcement against Oregon physicians. U.S. Department of Justice officials have said that they do not plan to pursue criminal prosecutions in Oregon and would not enforce Ashcroft's directive retroactively. On 11/7/01, Dr. Hugh Stelson, president of the Oregon Medical Association, received a letter from Attorney General Ashcroft indicating that his directive would not be applied retroactively and will not be used to target aggressive treatment of pain for dying patients. Ashcroft sent letters to about a dozen national medical organizations, indicating that physicians could continue aggressively treating pain without fear of DEA action.
  - e. Oregon pharmacists. After Ashcroft's directive was issued, the Oregon Board of Pharmacists sent a letter to Oregon pharmacies telling them not to fill prescriptions for lethal medication. When Ashcroft's directive was issued, two dozen terminally ill patients were seeking to complete the process of obtaining lethal medication, which takes a minimum of 15 days. Pharmacists resumed filling prescriptions after the temporary restraining order was issued in *Oregon v. Ashcroft*.
  - f. Position of Oregon Congressional delegation. Six of Oregon's seven Senators and Representatives have announced their opposition to Ashcroft's ruling. Senator Gordon Smith, who is a devout Mormon, has said that he supports Ashcroft's ruling as a matter of conscience. Oregon Secretary of State Bill Bradbury, a



- a. Criminal conviction affirmed. On 3/26/99, Dr. Jack Kevorkian was convicted by a jury of second-degree murder and illegal delivery of a controlled substance in connection with the death of Thomas Youk by lethal injection. Kevorkian will not be eligible for parole until May 2007. On 11/12/99, Kevorkian filed an appeal with the Michigan Court of Appeals to reverse his conviction and dismiss the case or order a new trial. A hearing on the appeal was held on 9/11/01 in Detroit before Judges Joel P. Hoekstra, Henry William Saad, and William C. Whitbeck of the Michigan Court of Appeals. On 11/20/01, the 3-judge panel unanimously affirmed Kevorkian's conviction, rejecting his claims that euthanasia is legal, that a prosecutor improperly referred to Kevorkian's failure to testify, that he received ineffective assistance of counsel, and that prosecutors failed to prove that Youk died as a result of the lethal injection. *People v. Kevorkian*, 2001 WL 1474986 (Mich. App. Nov. 20, 2001). Kevorkian's attorney, Mayer Morganroth, has indicated that the case will be appealed to the Michigan Supreme Court and, if necessary, to federal courts.

Request for release pending appeal. On 12/27/00, Jack Kevorkian's attorney Mayer Morganroth filed a petition for writ of habeas corpus in U.S. District Court contending that Kevorkian should be released from prison while his murder conviction is appealed, because he is at risk of a stroke, he poses no threat to the public, and the issues on appeal have strong merit. On 6/22/01, U.S. District Judge Paul Borman denied Kevorkian's request, finding that delay in hearing the appeal did not of itself require the federal courts to intervene. *Kevorkian v. Ludwick*



2. Medicare payment for nutrition therapy and pain management Beginning 1/1/02, Medicare will recognize and pay for two new services, nutrition therapy and pain management. The nutrition benefits will be available initially to patients with diabetes or kidney disease. Based on the experiences of this group, the Secretary of Health and Human Services is supposed to advise Congress whether nutrition benefits should be made available to other Medicare beneficiaries. Medicare has established a new reimbursement code allowing physicians to identify themselves as specialists in pain management.

#### Recent articles

Charles D. Douglas et al., *The Intention to Hasten Death: A Survey of Attitudes and Practices of Surgeons in Australia*, 175 Med. J. Australia 511 (2001) [survey of 683 general surgeons during 1999 revealed that 36.2% of respondents had given drugs in doses that they perceived to be greater than required to relieve symptoms with the intention of hastening death, with more than half of these (20.4% of all respondents) reporting that they had not received an unambiguous request for a lethal dose of medication; only 5.3% indicated that they had given a lethal injection or assisted a suicide in response to

defendants and adding an alternative charge of aiding a suicide. On 10/23/01, however, after deliberating for only 10 minutes, a jury acquitted the defendants of the murder charges, which were supported only by circumstantial evidence. The judge previously had ruled that there was no evidence to support a charge of assisting a suicide.

- b. South Australia. On 1/26/02, Sandra Kanck, deputy leader of the South Australian Democrats, pledged to introduce voluntary euthanasia legislation at the first sitting of the South Australian parliament following the February 9 election.
- c. Nancy Crick website. Nancy Crick, a 70-year-old resident of Burleigh Waters, Queensland has established a website ([www.protection.net.au/nancycrick/](http://www.protection.net.au/nancycrick/)) to chronicle the rest of her life by diary entries and photographs. Crick, who has bowel cancer, already has access to lethal medication but is objecting to the fact that her family might be subject to criminal prosecution if they were present at her death.

## 2. Belgium

- a. Senate approves euthanasia bill. On 10/25/01, the Belgian Senate approved by a vote of 44-23, with two abstentions, a bill that would legalize euthanasia for competent adults with an incurable illness causing unbearable and constant suffering, as well as for patients in a persistent vegetative state who had made a request within the prior five years before two witnesses to have their life ended in such circumstances. A national evaluation committee of physicians and lawyers would be set up to ensure that the law is followed. The opinion of a second physician would be required for a terminally ill patient. In the case of a patient who is not terminally ill, the opinion of a third physician (either a psychiatrist or a specialist in the patient's illness) would be required, and at least one month would have to elapse between the patient's request and the act of euthanasia. The legislation came to a vote after 18 months of committee discussion and three days of Senate debate. The House of Representatives is expected to approve the bill.
  - b. Insurance industry reaction. The Belgian insurance industry association Beroepsvereniging der Verzekeringsondernemingen (BVVO) has announced plans to restrict payment of life insurance benefits where the policy was purchased less than one year prior to the death of a euthanasia patient who was not terminally ill. BVVO plans to lobby the lower house of Parliament to amend the pending legislation. In the absence of an amendment, BVVO says that it will introduce its own guidelines restricting payment of life insurance benefits.
3. Canada. Supporters of Robert Latimer continue to protest his life sentence, without possibility of parole for 10 years, for the mercy killing of his disabled 12-year-old daughter. On 12/13/01, the Canadian Civil Liberties Association presented to the office of Solicitor General Lawrence MacAulay a petition seeking clemency for Latimer that was signed by more than 60,000 people.

## Great Britain

- a. Diane Pretty. In June 2001, Brian Pretty wrote a letter to Prime Minister Tony Blair asking that a physician be allowed to help his 42-year-old wife Diane die because of her motor neurone disease. When Blair declined to help and Mrs. Pretty's condition deteriorated further, she appealed to Director of Public Prosecutions David Calvert-Smith to guarantee that her husband would not be prosecuted if he assisted her to take her own life. In August 2001, after Calvert-Smith refused to give any guarantee, Mrs. Pretty appealed to the High Court in London arguing that his refusal violated her rights under the European Convention on Human Rights. After a hearing, the High Court ruled on 10/18/01 that the law did not allow a family member to help a loved one to die. On 11/29/01, the five law lords of the House of Lords affirmed the High Court's decision. On 1/18/02, Mrs. Pretty registered her case with the European Court of Human Rights, which said that it would rule as soon as possible after giving priority to the case.

Editorial. In the 11/10/01 issue of the British Medical Journal, two British medical professors argued that

India. On 12/13/01, the Kerala High Court dismissed a petition filed by a 74-year-old man, B.K. Pillai, who sought a direction to the state government to facilitate the painless termination of his life. Pillai suffers from filariasis, a



\* Some information obtained from media reports has not been independently verified.