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**Aetna Health Inc. v. Davila**

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**Introduction**

In the consolidated cases of *Aetna Health Inc. v. Davila* and *CIGNA Corporation v. Calad* (hereinafter, "*Davila*"), 542 U.S. \_\_\_\_, 2004 WL 1373230 (June 21, 2004), a unanimous Supreme Court ruled that ERISA's remedies completely preempt state law claims against HMOs for injuries allegedly suffered due to preauthorization request denials, even where the claims decisions involved an element of medical judgment. In so holding, the Court resolved a split in circuits following its decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000), which some courts had interpreted to mean that plan participants could bring state law medical malpractice or similar tort suits against plans where claims decisions involve medical judgment.

*Davila* is obviously a positive development for health care plans. Following *Davila*, a plan should not be subject to a state tort (or other) claims for a benefit denial, unless the plan actually employs the treating physician. Thus, plaintiffs' ability to recover damages will be limited to those provided under ERISA section 502(a)(1)(B) – the cost of the benefit, and, possibly, attorneys' fees. By confirming that the state law remedies are completely preempted, *Davila* routinely will allow for the removal of benefit litigation to federal court.

We note, however, that a concurring opinion in *Davila* suggests that some form of "make whole" relief (*e.g.*, damages) might be "appropriate equitable relief" under ERISA section 502(a)(3). This discussion was prompted by a U.S. Department of Labor amicus brief and likely will prompt the next wave of litigation as plaintiffs continue to seek damages in excess of the limited relief available under ERISA section 502(a)(1)(B).

**Background**

In the landmark case *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987), the Supreme Court ruled that state law claims against ERISA plans generally were preempted because Congress intended the remedies provided by ERISA section 502 to be exclusive. On the same day, the Supreme Court found in *Metropolitan Life*

*Insurance Company v. Taylor*, 481 U.S. 58, that section 502's complete preemption of state law remedies created a right of automatic removal of state law claims. Ordinarily, federal preemption merely is a defense that can be raised against state law claims in state court, and does not create federal court jurisdiction. However, under *Taylor*, ERISA's complete preemption of state law claims results in a state law claim being recharacterized as a federal law claim, allowing automatic removal since the claim then raises a federal question.

Following *Pilot Life* and *Taylor*, the lower courts generally found that ERISA section 502 completely preempted tort claims providing alternative remedies in connection with injuries arising out of denied health benefits, even when the decisions involved medical necessity and preauthorization determinations, unless the plaintiff's HMO directly was involved in providing medical treatment (e.g., the treating physician was an employee, not an independent contractor, of the HMO). E.g., *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999); *Danca v. Private Health Care Sys.*, 185 F.3d 1 (1st Cir. 1999); *Jass v. Prudential Health Care Plans, Inc.*, 88 F.3d 1482 (7th Cir. 1996); *Cannon v. Group Health Servs. of Okla.*, 77 F.3d 1270 (10th Cir. 1996); *Tolton v. American Biodyne*, 48 F.3d 937 (6th Cir. 1995); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

While most practitioners believed the law was settled with respect to preemption of medical necessity and preauthorization claims, the Supreme Court's decision in *Pegram v. Herdrich*, 530 U.S. 211 (2000), led a number of appellate courts to revisit the issue. *Pegram's* actual holding was that an HMO's treating physician does not act as an ERISA fiduciary when making a medical treatment decision, and, consequently, ERISA's remedies for breaches of fiduciary duties do not apply. *Pegram* also included dicta that describes the treating physician's decision in *Pegram* as a "mixed eligibility decision" – a decision with both eligibility and treatment components – which may be redressible under state medical malpractice law. Significantly, some courts interpreted this dicta to mean that HMOs could be liable under state malpractice law whenever a claims decision involves some form of medical judgment. E.g., *Land v. CIGNA Healthcare of Fla.*, 339 F.3d 1286 (11th Cir. 2003); *Cicio v. Does*, 321 F.3d 83 (2d Cir. 2003); *Roark v. Humana, Inc.*, 307 F.3d 298 (5th Cir. 2002) (*Davila* had been consolidated with *Roark* at the Fifth Circuit). These courts reached this conclusion even though *Pegram* expressly stated that it did not modify prior Supreme Court decisions on preemption.

In *Davila*, the plaintiffs brought claims for consequential and punitive damages under the Texas Health Care Liability Act ("THCLA") after their preauthorization requests were denied. The THCLA requires that HMOs "exercise ordinary care when making health care treatment decisions" and makes HMOs liable for damages for harm "proximately caused" to participants by their failure to exercise such care. Tex. Civ.

Prac. & Rem. Code Ann. §§ 88.001-88.003. Both of the district courts ruled that the plaintiffs' claims were preempted by ERISA section 502(a). *Davila v. Aetna*, 2001 WL 34354948 (N.D. Tex. June 29, 2001); *Calad v. CIGNA*, 2001 WL 705776 (N.D. Tex. June 21, 2001).

On appeal, the Fifth Circuit held that ERISA section 502 did not preempt the plaintiffs' claims under the THCLA. The Fifth Circuit narrowly construed the *Taylor* complete preemption doctrine, finding that ERISA section 502 preemption applies only when a state law cause of action "duplicates" one of ERISA's specific remedies. The Fifth Circuit found that ERISA section 502 provides a contract remedy (§ 502(a)(1)(B)), a remedy for fiduciary violations (§ 502(a)(2)), and an equitable remedy (§ 502(a)(3)), but that the THCLA provides a tort remedy. As such, the THCLA did not duplicate a remedy available under ERISA section 502 and the plaintiffs' THCLA claims were not completely preempted. The Fifth Circuit also relied on *Pegram's* mixed eligibility dicta for further support that ERISA section 502 did not preempt state law tort claims arising out of benefit decisions involving medical judgment.

### **Discussion**

On review, the Supreme Court reversed the Fifth Circuit's decision in *Davila*, holding that any state cause of action that "duplicates, supplements, or supplants" the exclusive remedies provided by ERISA section 502 is preempted. The Court explained that if a plan participant could have sought relief under ERISA, and no independent legal duty was implicated, ERISA completely preempts the plaintiff's non-ERISA claim. In this case, the Court explained that THCLA liability only could exist because of the HMOs' duties to interpret and determine coverage under the plaintiffs' ERISA plans. Furthermore, clarifying its dicta in *Pegram*, the Court stated that utilization review decisions made by non-treating parties are pure eligibility decisions, not mixed eligibility-treatment decisions. As such, these decisions are not subject to state law remedies, even though some medical judgment may have been exercised in making the decisions.

*Davila* will substantially protect health plans from state law suits seeking to circumvent ERISA's exclusive remedial scheme. *Davila* also puts to rest any confusion over the Court's "mixed eligibility" dicta from *Pegram*. However, *Davila* makes clear that HMOs may be subject to suit under state law theories of vicarious liability where a plan employs (or controls the treatment decisions of) the treating physician. While this is most likely the case where there is a staff model HMO, plaintiffs' lawyers may try to expand such claims to cover decisions made by physicians under contract with a network model HMO. Notwithstanding this uncertainty, we expect the courts generally to recognize the essential distinction the Supreme Court has drawn – ERISA remedies apply

to coverage and payment decisions made by plans, and state law malpractice remedies apply to medical treatment decisions.

Significantly, the Court reinforced the *Taylor* decision by affirming that ERISA section 502 completely preempts state law claims. This should facilitate plans' removal of state law claims involving benefit decisions to federal court.

Finally, the Court rejected the notion that ERISA section 502(a) completely preempts a state remedy only if the state law cause of action also was preempted under the express preemption provision of ERISA section 514. In the past, the Department of Labor had argued in other cases that both section 502 and section 514 preemption were needed to find state law claims completely preempted. Because state insurance laws are saved from preemption under section 514, the Department of Labor claimed that remedies specifically directed at insurers would not be subject to complete preemption. Following *Davila*, this argument no longer is tenable. This ensures that ERISA section 502(a)'s complete preemption of state law remedies will apply with equal force to claims brought against both insured and self-funded plans.

As noted, a concurring opinion by Justice Ginsburg, joined by Justice Breyer, draws attention to perceived inadequacy of relief available under ERISA section 502(a)(1)(B), and raises the possibility that ERISA section 502(a)(3) may be available to provide plaintiffs with "make whole" relief. This issue had been addressed in the Department of Labor's amicus brief and was the subject of some questioning at oral argument. ERISA section 502(a)(3), the so-called "catch-all" remedy, enables plan participants to seek "other appropriate equitable relief" to enforce plan provisions or the requirements of Title I of ERISA. In other cases, the Supreme Court severely has limited the relief that can be obtained from *non-fiduciaries* under section 502(a)(3). *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993). In its amicus brief, the Department of Labor argued that, with respect to *fiduciaries*, some form of make-whole relief should be available to plaintiffs, as was the case under the common law of trusts. Thus, fiduciaries making benefit claim decisions potentially could face liability not only for the cost of the denied benefit, but also for whatever damages are needed to restore the plaintiff to the position he would have been in but for the wrongful benefit denial.