



ERISA Litigation Update

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Second Circuit Erodes ERISA Preemption

In a forty page opinion issued on February 11, 2003, the Second Circuit held that ERISA does not preempt state-law medical malpractice claims against managed care organizations arising from the prospective utilization review process. The following summarizes the facts of the case and the legal basis of the Second Circuit's most recent decision in the area of ERISA preemption.

BACKGROUND

In March 1997, Carmine Cicio was diagnosed with a blood-based form of cancer. Over the next ten months, Mr. Cicio underwent chemotherapy treatment that was authorized and paid for by his health plan, Vytra Healthcare. In January 1998, Mr. Cicio's treating oncologist wrote a detailed letter to Vytra requesting preauthorization for high doses of chemotherapy coupled with a tandem double transplant of blood stem cells. A Vytra medical director denied the request as not being a covered benefit under Mr. Cicio's plan, which excluded coverage for experimental and investigational procedures.

The treating oncologist requested that Vytra reconsider the denial in light of medical literature supporting the effectiveness of the requested procedure. The same Vytra medical director who denied the Mr. Cicio's first request responded by approving a single stem cell transplant. The original request

for a tandem stem cell transplant remained denied.

By the time the single stem cell transplant was approved, Mr. Cicio was no longer a candidate for the procedure. He died less than two months later.

THE COMPLAINT

Mr. Cicio's wife sued Vytra in New York state court alleging that its denial of preauthorization of the tandem stem cell transplant constituted medical malpractice. Vytra successfully removed the complaint to federal district court in the Eastern District of New York on the grounds that plaintiff's claims were completely preempted by ERISA. Vytra then moved to dismiss plaintiff's claims on the same grounds.

The district court granted the motion to dismiss. The court noted that many decisions made by managed care organizations ("MCOs") involve some medical judgment, and that Congress did not intend claims challenging quasi-medical/administrative decisions to survive ERISA preemption. The court further found that, even if pure medical malpractice claims were not preempted, plaintiff had not challenged the quality of care rendered to her husband, but rather the validity of an administrative decision made under the plan. Accordingly, the district court found plaintiff's claims were completely preempted under ERISA.

THE APPEAL

On appeal, the Second Circuit framed the issue as "whether a state law medical malpractice claim brought with respect to a medical decision made in the course of prospective utilization review by a MCO or health insurer is preempted [by ERISA]." In a majority opinion written by Circuit Judge Sack, the court held that ERISA does not preempt such a state law claim.

The court held that that the Supreme Court's decision in *Pegram v. Herdrich* eroded the distinction between "quality of care" and "benefit administration" decisions for purposes of ERISA preemption. 530 U.S. 211, 229 (2000). The Second Circuit held that, by finding "the eligibility decision and treatment decision [to be] inextricably mixed" for purposes of making prospective utilization decisions, the Supreme Court had abandoned the practice of categorically preempting claims challenging benefit determinations while allowing claims challenging the quality of care to proceed.

Applying this analysis, the Second Circuit held that ERISA does not preempt a state law cause of action challenging an allegedly flawed medical judgment as applied to a particular member. If the MCO considers the member's "constellation of symptoms" in making a utilization review decision, the MCO can be held liable for medical malpractice. In this case, the court concluded that the record on appeal was



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insufficient to determine whether Vytra's decision to deny the requested benefit was based on a medical decision, an eligibility decision, or a mixed medical and eligibility decision. The court noted that if, on remand to state court, the defendant could demonstrate as a matter of fact that the benefit determination was made solely on the basis of a plan exclusion, then the plaintiff's claim would be preempted. Otherwise, if the decision to deny was based even in part upon a medical decision, plaintiff's state law negligence claims could proceed.

THE EFFECT

The impact of the Second Circuit's decision in Cicio remains to be seen. If the decision stands, it will dramatically

increase the risk of exposure that ERISA plan administrators face in making benefit determinations. Even in cases that are defensible on the merits, Cicio will lead to greater litigation expenses because the applicability of preemption has now become a question of fact. An evidentiary determination may now be required in virtually every case before the court can resolve the preemption issue.

It is unknown whether Vytra will seek certification of this case before the United States Supreme Court. Given the current disparity among circuits in applying ERISA preemption in this context, Cicio may provide the Supreme Court with an opportunity to add some certainty to this remarkably vague area of the law.

For further information, please contact Ted Tucci (ttucci@rc.com), Brad Babbitt (bbabbitt@rc.com) or, call (800) 826-3579.

If you do not wish to receive these updates, simply let us know. Contact James Kelly at 860-541-2717 or e-mail him at jkelly@rc.com and reference TAAS Update.



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