



Aetna Health, Inc. v. Davila

ERISA PREEMPTS THE THCLA

By Kim Rankin*

I. Introduction:

Texas' attempt to hold managed health care organizations ("MCOs") liable for negligent decisions regarding treatment of patients covered under employee benefit plans, and allow recovery of compensatory or punitive damages, was finally thwarted by the Supreme Court in *Aetna Health, Inc. v. Davila*, holding that the Texas Health Care Liability Act, sections 88.001-.003 (THCLA), is preempted by ERISA § 502(a).¹ Patients who suffer damages resulting from denial of payment for medical procedures are now limited to ERISA remedies and have little recourse against their "MCO."

II. History of "MCOs" and the THCLA:

In response to major increases in health care costs during the 1970's and 1980's, "MCOs" emerged with the goal of providing affordable healthcare at a profit for the "MCO."² "MCOs" contain costs by acting both (1) as an insurance carrier, by performing utilization review of which services should be provided in exchange for premiums paid and (2) as a provider, by creating the network system through which doctors render treatment to patients covered under the plan.³ Although "MCOs" do not make treatment decisions, they affect the doctor's decisions by deeming recommended treatments medically unnecessary and refusing to pay for services.⁴ The patient technically is not denied treatment because he still has the option of paying for any treatment himself.⁵ However, this option is often not feasible because patients may be unable to pay for expensive medical services.

The cost reduction decisions of "MCOs" resulted in a general decline of quality care for patients with few checks by state and federal law.⁶ Texas reacted to this decline in healthcare quality by passing the Texas Health Care Liability Act in September 1997, holding "MCOs" statutorily liable for failing

to exercise a duty of care when making treatment decisions.⁷ The THCLA provided in pertinent part:

(a) A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is

liable for damages for harm to an insured or enrollee proximately caused by its failure to exercise such ordinary care.

(b) A health insurance carrier, health maintenance organization, or other managed care entity for a health care plan is also liable for damages for harm to an insured or enrollee proximately caused by the health care treatment decisions made by its:

- (1) employees;
- (2) agents;
- (3) ostensible agents; or
- (4) representatives who are acting on its behalf

and over whom it has the right to exercise influence or control or has actually exercised influence or control which result in the failure to exercise ordinary care.

(c) It shall be a defense to any action asserted against a health insurance carrier, health maintenance organization, or other managed care entity for a health care plan that:

(1) neither the health insurance carrier, health maintenance organization, or other managed care entity, nor any employee, agent, ostensible agent, or representative for whose conduct such health insurance carrier, health maintenance organization, or other managed care entity is liable under Subsection (b), controlled, influenced, or participated in the health care treatment decision.⁸

III. Davila and Calad's Claims:

Juan Davila was a participant in an ERISA-regulated employee benefit plan administered by Aetna Health, Inc.⁹ In administering Davila's plan, Aetna reviewed requests for coverage of medical treatment and paid medical providers for covered expenses.¹⁰ Similarly, Ruby Calad was a beneficiary in an ERISA-regulated plan which was administered by CIGNA Healthcare of Texas, Inc. Both Davila and Calad filed suit for injuries that they alleged arose from Aetna's and CIGNA's denial of coverage for treatments recommended by their physicians.¹¹ Davila's doctor prescribed Vioxx for arthritis pain, and Aetna declined to cover the drug expense.¹² Instead of purchasing the Vioxx on his own and seeking reimbursement, Davila took Naprosyn and had a severe reaction requiring "extensive treatment and hospitalization."¹³ Ruby Calad underwent surgery and although her doctor recommended an extended hospital stay, CIGNA denied coverage for the extended stay based on an opinion of a CIGNA nurse who determined that Calad did not meet CIGNA's criteria for such a stay.¹⁴ As a result, Calad was discharged home where she suffered post-surgery complications which forced her to return to the hospital.¹⁵ Calad alleged that she would not have suffered the complications had CIGNA approved the extended stay.¹⁶

IV. Complete preemption:

The Supreme Court reviewed Davila and Calad's complaints to determine whether their cases fell "within the scope" of ERISA § 502(a)(1)(B), which provides:

"A civil action may be brought— (1) by a participant or beneficiary... (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."¹⁷

The Supreme Court held that THCLA sections 88.001-.003 were duplicative and attempted to supplement enforcement remedies of ERISA.¹⁸ The sections were therefore completely preempted by ERISA, leaving patients only the limited remedies provided through ERISA.¹⁹

The Court supported its decision with well established preemption principles. Generally, a cause of action arises under federal law when a plaintiff's well-pleaded complaint contains federal law issues.²⁰ The well-pleaded complaint rule holds that if a plaintiff does not make a federal claim in his petition, then a case may not be removed to federal court.²¹ However, the doctrine of "complete preemption" will serve to circumvent the well-pleaded complaint rule when Congress enacts a federal statute that displaces a state law claim.²² An attempt to sue on a state claim will simply be "recharacterized" as a claim arising under federal law.²³

In this case, the Supreme Court held that the doctrine of complete preemption applied because (1) ERISA is a federal statute that displaces duplicative state law (the THCLA) and (2) claims pled by plaintiffs under the THCLA are the same kinds of claims addressed by ERISA.²⁴ Therefore, ERISA preempts the THCLA.²⁵ The Court supported this holding by stating that "the purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions ... intended to ensure that



Texas reacted to this decline in healthcare quality by passing the Texas Health Care Liability Act

pre-empted."²⁹

The Court buttressed this holding by citing its decision in *Metropolitan Life Ins. Co. v. Taylor*, which held that: (1) ERISA § 502(a)(1)(B) mirror's LMRA § 301; and (2) since LMRA § 301 converts state causes of action into federal causes of action, ERISA has the same effect.³⁰

The Court further held that because of ERISA's preemption power and express remedies, ERISA § 502(a)(1)(B) completely preempts an individual's state cause of action "where there is no other independent legal duty implicated by a defendant's actions."³¹ The Supreme Court's ruling affirmed the district court's dismissal of Davila and Calad's THCLA claims based on preemption.³² Although the two had the opportunity to amend their complaints to allege claims under ERISA § 502(a), neither did.³³ Thus, Davila and Calad were left with no causes of action.³⁴

A. Davila and Calad's Injuries Were Due to the Terms of Their Plans, Not the "MCOs" Application of the Plan Provisions:

Davila and Calad filed suits in Texas state court under THCLA section 88.002 stating that the insurance companies "controlled, influenced, participated in and made decisions which affect the quality of the diagnosis, care and treatment provided" and that refusal to cover the treatments recommended by their doctors was a violation of the insurance companies' "duty to exercise ordinary care when making health care treatment decisions."³⁵ They asserted that this duty of ordinary care was an independent duty which saved their suits from preemption by ERISA and allowed a THCLA claim under Texas state law.³⁶ However, the Court noted that the THCLA does not require managed care entities to exercise ordinary care when making health care treatment decisions.³⁷ The Court stated that the proximate cause of injuries due to refusal to cover a treatment would be the "terms of the plan itself, not the managed care entity that applied those terms."³⁸ Thus, Davila and Calad's claims were brought only to recover from wrongful denial of benefits promised under ERISA regulated plans and therefore fell "within the scope" of ERISA.³⁹

B. Davila and Calad's claims were not based on a mixed eligibility and treatment decision:

The Court noted that the only connection Davila and Calad had with Aetna and CIGNA, respectively, was the fact that Aetna and CIGNA were the administrators of the plans and noted that Davila and Calad "complain only about denials of coverage."⁴⁰ The Court noted that Davila and Calad could have paid for the treatments themselves and then sought reimbursement through an ERISA § 502(a)(1)(B) action or sought a preliminary injunction.⁴¹

Aetna and CIGNA performed only administration of the benefits plans and made no actual medical decisions.⁴² Davila and Calad argued that the plans made medical decisions in deciding to deny coverage and thus the “eligibility decision and the treatment decision [was] inextricably mixed” as in *Pegram v. Herdrich*.⁴³ The Court distinguished *Pegram* because the plaintiff’s treating physician in *Pegram* was also the person charged with administering benefits under the plaintiff’s plan and therefore a separate duty of care existed which saved the claim from ERISA preemption.⁴⁴ Here, Aetna and CIGNA were not the treating doctors or even the doctor’s employers.⁴⁵ Therefore, stated the Davila court, the coverage decisions were purely eligibility decisions, and *Pegram* was not implicated.⁴⁶

C. The Insurance Savings Clause of ERISA does not save THCLA from Preemption:

Davila and Calad attempted to circumvent ERISA by asserting that the THCLA was a law that regulated insurance and was therefore outside the scope of ERISA because of ERISA’s savings clause which states “nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.”⁴⁷ The Court rejected this attempt, citing *Pilot Life’s* holding that ERISA § 514(b)(2)(A) “must be interpreted in the light of the congressional intent to create an exclusive federal remedy in ERISA § 502(a)” and even a state law regulating insurance is “preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to ERISA’s remedial scheme.”⁴⁸

V. ERISA Remedies Are Limited:

In reality, and what the Court fails to mention, is that ERISA provides no immediate remedy to plan participants or beneficiaries who find coverage of recommended treatments denied by managed healthcare plans. The Supreme Court noted that participants or beneficiaries who believe that benefits were wrongly denied can bring suit seeking provision of those benefits.⁴⁹ Still, patients like Ms. Calad have no choice but to pay for medical treatments up front and then file suit against the “MCO” in hopes of reimbursement at some unknown point in the distant future. In many cases, however, paying up front is simply not possible, and the treatment is foregone. Furthermore, the remedy for participants and beneficiaries who suffer injuries such as loss of life or major hospitalization as a result of a denial of coverage and effective denial of treatment may only recover the cost of the treatment had they received it. Justice Ginsberg, with whom Justice Breyer joined, wrote that she concurred with the majority opinion as consistent with current law, but that “a series of the Court’s decisions has yielded a host of situations in which persons adversely affected by ERISA-prescribed wrongdoing cannot gain make-whole relief.”⁵⁰

Conclusion:

For now, participants and beneficiaries of ERISA-regulated managed healthcare plans are relegated to the ERISA regime, which favors MCOs. Participants and beneficiaries must bear unjust and unbalanced costs, which may take the form of minor inconvenience, major hospitalization, loss of limb or even death. “MCOs,” on the other hand, bear few costs in denying treatment and pay no penalty if they are wrong. This lack of balance and injustice cannot be what Congress intended in its creation of ERISA. It is apparent from the Supreme Court’s opinion that it is unwilling to place a check on Congress and

ERISA legislation. ERISA healthcare plan patient’s only hope is that Congress will check itself.

* Kim Rankin is a law student at the University of Houston Law Center and is the Student Editor-in-Chief of the *Journal of Texas Consumer Law*.

1. *Aetna Health, Inc. v. Davila*, 124 S.Ct. 2488 (2004).
2. See Jose L. Gonzalez, *A Managed Care Organization’s Medical Malpractice Liability for Denial of Care: The Lost World*, 35 HOUS. L. REV. 715, 716-19, 728-29 (1998).
3. Sharon J. Arkin, *A Litigator’s Perspective on HMO Liability: The View from the Plaintiff’s Side*, 22 AM. J. TRIAL ADVOC. 131, 133-34; Gonzalez supra note 1.
4. Gonzalez, supra note 1.
5. Davila, 124 S.Ct. at 2497.
6. Scott Thornton, *The Texas Health Care Liability Act: Managed Care Organizations Can Say Goodbye to Their Extensive Immunity from Lawsuits – Or At Least That Was How It Was Supposed to Work*, 30 TEX. TECH. L. REV. 1227 (1999).
7. Shannon Turner, *ERISA Preemption of Direct Liability Claims: Texas Throws Down the Gauntlet*, 78 TEX. L. REV. 211 (1999).
8. Codified at TEX. CIV. PRAC. & REM. CODE ANN §§ 88.001-.003 (Vernon Supp. 2004).
9. Davila, 124 S.Ct. at 2493.
10. Id. at 2493.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. 29 USC § 1132(a)(1)(B).
18. Davila, 124 S.Ct. at 2494.
19. Id.
20. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).
21. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1 (1983).
22. *Metropolitan Life*, 481 U.S. at 63.
23. Id.
24. Davila, 124 S.Ct. at 2496.
25. Id.
26. Id. at 2495 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981)).
27. Id. (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)).
28. Id. at 2495.
29. Id.
30. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).
31. Davila, 124 S.Ct. at 2496.
32. Davila, 124 S.Ct. at n.7.
33. Id.
34. Id.
35. Id. at 2497.
36. Id.
37. Id.
38. Id. at n.3.
39. Id. at 2498.
40. Id.
41. Id.
42. Id. at 2500.
43. 530 U.S. 211 (2000); Id. at 2501.
44. Id. at 2502.
45. Id. at 2501.
46. Id.
47. ERISA § 514(b)(2)(A) (codified at 29 U.S.C. § 1144(b)(2)(A)).
48. Davila, 124 S.Ct. at 2500 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)).
49. Davila, 124 S.Ct. at n.7.
50. Davila, 124 S.Ct. at 2503. (Ginsberg, R., concurring).