THE ERISA INDUSTRY COMMITTEE

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Advocating the Benefit and Compensation Interests of America's Major Employers

ERIC Analysis of
Aetna Health Inc. v. Davila, *542 U.S.* _____ (2004)

Facts

Respondents Davila (*Davila v. Aetna*) and Calad (Calad v. CIGNA), whose claims were consolidated by the Fifth Circuit Court of Appeals, were a participant and a beneficiary in their respective employers' health care plans. Aetna and CIGNA were the third party administrators for the plans. Both Davila and Calad claimed to have suffered injuries arising from Aetna and CIGNA's decisions not to provide certain treatments under the plan. Davila and Calad argued that Aetna and CIGNA's refusal to cover the requested services violated their "duty to exercise ordinary care when making health care treatment decisions" and proximately caused respondents' injuries.

Respondent Davila claimed that because Aetna refused to pay for physican-prescribed Vioxx to remedy his arthritis pain, he began taking Naprosyn. As a result, he suffered a severe reaction the required extensive treatment and hospitalization. Respondent Calad claimed that CIGNA denied coverage for an extended post-operative stay recommended by her physician. Calad subsequently experienced postsurgery complications forcing her to return to the hospital. She alleged that the complications would not have occurred had CIGNA approved coverage for a longer hospital stay.

Lower Court Proceedings

Davila and Calad initially brought their claims in Texas state court under the Texas Health Care Liability Act (THCLA) but Aetna and CIGNA removed the cases to federal district court, arguing that the respondents' causes of action were completely preempted by ERISA §502(a). The district court agreed, and refused to remand the cases to state court. Because Davila and Calad refused to amend their complaints to bring explicit ERISA claims, the district court eventually dismissed the complaints with prejudice. Davila and Calad appealed the refusals to remand the cases. The Fifth Circuit Court of Appeals concluded that because the decisions for which Aetna and CIGNA were being sued were "mixed eligibility and treatment decisions", under the Supreme Court's ruling in *Pegram v. Herdrich,* 530 U.S. 211 (2000), they were not fiduciary in nature, and therefore were not within the scope of ERISA §502(a). Furthermore, the circuit court found that Davila and Calad's claims did not fall within the scope of ERISA §502(a)(1)(B), because they asserted tort claims while §502(a)(1)(B) "creates a cause of action for breach of contract". Based on the Supreme Court's holding in *Rush Prudential HMO, Inc. v. Moran* 536 U.S. 355 (2002), the court of appeals found that complete state pre-emption is limited to situations in which "States…duplicate the causes of action listed in ERISA §502(a)." Because THCLA did not provide an action for collecting benefits, the Fifth Circuit held that the claims fell outside of the scope of ERISA preemption.

Court's Decision

In reviewing the Fifth Circuit's holding the Supreme Court looked to the complaint alleging denials of coverage promised under the terms of two ERISA-regulated employee benefit plans. Although Davila and Calad claimed that Aetna and CIGNA's actions violated legal duties that arose independently of ERISA (specifically, duties that arose under THCLA) the Court pointed to the fact that Aetna and CIGNA's potential liability under the state law derived entirely from their administration of ERISA-regulated benefit plans. Davila and Calad therefore could have brought §502(a)(1)(B) claims to recover the allegedly wrongfully denied benefits. As such, the Court found that Davila and Calad's claims were not independent of ERISA, but were brought to rectify a wrongful denial of benefits promised under an ERISA plan. The claims therefore fell within the scope of ERISA §502(a)(1)(B), and were completely preempted by ERISA §502.

Finally, the Supreme Court found the respondents' "savings clause" argument, claiming that THCLA was a law regulating insurance, "unavailing". Citing *Pilot Life Ins. Co. v. Dedeaux,* 481 US. 41 (1987), the Court held that allowing Davila and Calad to proceed with their state-law suits because the THCLA can arguably be characterized as a law regulating insurance would "pose an obstacle to the purposes and objectives of Congress" by providing a separate vehicle to assert a claim for benefits outside of ERISA's remedial scheme. As such, the Court held that the causes of action were completely preempted and reversed the decision of the Fifth Circuit Court of Appeals.

Justice Thomas delivered the opinion for a unanimous Court.

Ginsberg/Breyer Concurrence

The language in the concurring opinion offered by Justice Ginsberg, and joined by Justice Breyer, may ultimately be as significant for major employers as the Court decision. The concurring opinion states:

"The Court today holds that the claims respondents asserted under Texas law are totally preempted by §502(a) of the Employee Retirement Income Security Act of 1974 (ERISA or Act),29 U.S.C.§ 1132(a). That decision is consistent with our governing case law on ERISA's preemptive scope. I therefore join the Court's opinion. But, with greater enthusiasm...I also join 'the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime.'"

Justice Ginsberg's concurrence goes on to suggest that the Court's broad interpretation of ERISA's preemptive force coupled with its "cramped construction" of the equitable relief allowable under §502(a)(3) creates a regulatory vacuum, given that the vast majority of state law remedies will be preempted, but few federal substitutes will be provided. Ginsberg cites a series of decisions by the Court in which, as she terms it, "persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.", including *Massachusetts Mut. Live Ins. Co. v. Russell*, 473 U.S. 134 (1985), *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993), and *Great-West Life &b Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The concurrence goes on to point to a host of lower court decisions lamenting the absence of remedies under ERISA, and

urging Congress or the courts to take action to allow for appropriate equitable relief. According to the concurrence, the dicta in these decisions make it clear that "fresh consideration of the availability of consequential damages under §502(a)(3) is plainly in order".

Finally, the concurrence turns to the Brief for United States as *Amicus Curiae* in this case, in which the Government notes that ERISA as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench". (emphasis added in the concurrence). The concurrence suggests that pursuit of fiduciary claims under §502(a) of ERISA may be "an effective remedy others similarly situated might fruitfully pursue".

Although the decision is a major preemption victory for health plans, Justices Ginsberg and Breyer's concurrence is fueling efforts in Congress to amend ERISA and either reverse the decision as it affects preemption or provide for a damages remedy in ERISA. In response to the decision, Congressman John Dingell, Ranking Member of the Committee on Energy and Commerce, has reintroduced the Patients' Bill of Rights to allow patients to sue health care plans under state law. It seems unlikely that employer plans, including self funded plans, will escape this latest effort to subject them to new remedies and litigation.