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U.S. SUPREME COURT LIMITS TORT EXCEPTION TO ERISA PREEMPTION; TWO SUPREME COURT JUSTICES CALL FOR REFORM OF "UNJUST AND INCREASINGLY TANGLED ERISA REGIME"

***Aetna Health Inc. v. Davilla*, 124 S. Ct. 2488 (2004)**

In a case decided in June 2004, the U.S. Supreme Court found that two "tort" suits by health care plan participants were preempted by ERISA. In doing so, the Court disapproved of an expansive reading by courts around the country of a prior Supreme Court case, *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143, 147 L.Ed.2d 164 (2000). *Davilla* is also noteworthy in that two concurring Justices joined in "the rising judicial chorus" urging that Congress and the Court revisit what has been said to be "an unjust and increasingly tangled ERISA regime."

Davilla involved two suits originally brought in Texas state court. The first suit involved Mr. Davilla who was a participant in an ERISA-regulated employee benefit plan. The administrator of Mr. Davilla's plan, Aetna Health Inc., refused to pay for Vioxx, a medication Mr. Davilla's physician had specifically prescribed. Without challenging the refusal, Mr. Davilla took an alternative medication, Naprosyn, for which Aetna would pay. This alternative medication caused Mr. Davilla to suffer a severe reaction requiring hospitalization. The second case involved Ms. Calad, who was a beneficiary of an ERISA-regulated employee benefit plan. The administrator of Ms. Calad's plan, CIGNA, denied coverage for an extended hospital stay after Ms. Calad had undergone surgery, even though Ms. Calad's physician recommended an extended stay. Ms. Calad experienced post-surgery complications which allegedly would not have arisen had Ms. Calad been permitted to stay in the hospital as her physician had originally requested.

Both Mr. Davilla and Ms. Calad brought suit under the Texas Health Care Liability Act (THCLA). They alleged that the administrators' refusal to cover the requested services violated the administrators' "duty to exercise ordinary care when making health care decisions," and that these refusals "proximately caused" their injuries. The administrators removed the two suits to federal court on the basis of ERISA preemption, and the respective District Courts denied subsequently filed remand motions.

On appeal to the Fifth Circuit, the court determined that the two cases should have been remanded to state court. According to the Circuit Court, the plaintiffs were not seeking reimbursement for benefits denied, a cause of action that would be preempted by ERISA, but rather were suing in tort for injuries caused by the administrators' violation of "an external, statutorily imposed duty of 'ordinary care.'" The Circuit Court concluded

that these tort causes of action were not preempted by ERISA, relying in large part upon a prior Supreme Court case, *Pegram v. Herdrich,* 530 U.S. 211, 120 S. Ct. 2143, 147 L.Ed.2d 164 (2000).

In *Davilla*, the Supreme Court rejected the Fifth Circuit's reasoning, holding that the two suits were nothing more than challenges to "eligibility decisions" made by plan administrators acting in a fiduciary capacity and thus were preempted by ERISA. According to the Court, some Courts of Appeals, including the Fifth Circuit, had misapplied *Pegram* to allow challenges to eligibility decisions to masquerade as suits in tort, thereby escaping ERISA preemption. *Davilla* sends a clear signal that *Pegram* should not be read so expansively.

The Court clarified that *Pegram* applies only where an administrator is making "mixed eligibility and treatment decisions," which the Court stated were "medical necessity decisions made by the plaintiff's treating physician *qua* treating physician and *qua* benefits administrator." The critical fact is that in *Pegram*, the plaintiff's treating physician was also the person charged with administering plaintiffs' benefits; it was she who decided whether certain treatments were covered. In that instance, the plaintiff injured by the mixed eligibility decision could escape ERISA's preemptive scope. The administrators in *Davilla*, however, were not treating plaintiffs, only deciding whether particular treatments were covered by their respective plans. Thus, the Court held the lower court was incorrect to view *Pegram* as saving the two suits from ERISA preemption.

In a concurring opinion, Justices Ginsburg and Breyer acknowledged that the majority had reached the correct result under case law governing ERISA's preemptive scope. Nevertheless, the Justices quoted from a concurring opinion of Judge Becker of the Third Circuit in which Judge Becker stated:

> ERISA has evolved into a shield that insulates HMOs from liability for even the most egregious acts of dereliction committed against plan beneficiaries, a state of affairs that I view as directly contrary to the intent of Congress. Indeed, existing ERISA jurisprudence creates a monetary ***454** incentive for HMOs to mistreat those beneficiaries, who are often in the throes of medical crises and entirely unable to assert what meager rights they possess.

DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003). The Justices went on to call for Congressional and judicial reform of ERISA. This favorable reference to fairly incendiary language of a Circuit Court judge suggests that these two Justices, and perhaps others, will be looking for ways to limit ERISA preemption in the future.

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