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**February, 2004, ERISA Highlights**

Dear Fellow Attorney,

The NFL Superbowl is past, but the ERISA Superbowl may be held on March 23! See below for details.

**Something old: Pilot Life and “complete preemption.”** State law medical malpractice actions for wrongful death or personal injury against health maintenance organizations until recently had been barred based on ERISA preemption. Contrast Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1326 (5<sup>th</sup> Cir. 1992), cert. denied, 506 U.S. 1033 (1992) (holding state wrongful death claim preempted because claim was based on a benefit decision) with Cicio v. Does, 321 F.3d 83 (2<sup>d</sup> Cir. 2003) petition for cert. filed sub nom. Vytra Healthcare v. Cicio, 72 U.S.L.W. 3093 (U.S. July 11, 2003) (holding that a cause of action based on a mixed benefit eligibility and treatment decision rather than a pure benefit eligibility decision is not preempted).

**The empire strikes back.** Two HMOs, tossed out of court by the Fifth Circuit, are battling back in the Supreme Court in an attempt to use ERISA’s civil remedies provision as a Procrustean bed to cut off ERISA participants and their families from state law remedies for malpractice. The combined cases are set for oral argument on March 23. Aetna Health, Inc. v. Davila and CIGNA Healthcare of Texas, Inc. v. Calad, Case Nos. 02-1845 and 03-83. The focus, as the ATLA’s amicus brief phrases it, is on federalism. The ATLA points out in a nutshell what is at stake:

“This case, like every preemption case, is about federalism. Respondents’ causes of action arise under the Texas Health Care Liability Act, which requires health insurers, HMOs and managed care entities to use due care when they make health treatment decisions, including determinations of ‘medical necessity’ under an ERISA plan. Petitioners contend that these damage actions are preempted – not under the express preemption provisions Congress included in ERISA, but by operation of implied ‘complete preemption’ of ERISA’s civil enforcement provisions.”

The HMOs use the third rail argument. Touch it and you’re dead. According to the HMOs, unless Congress provided a remedy under ERISA, any state law cause of action that involves the administration of an ERISA plan is dead on contact. Oral argument should create quite a stir, and the opinion itself could perhaps reveal a good deal about the thinking of the Court. The Supreme Court admitted in Rush Prudential that the comment in Pilot Life that even a statute saved by ERISA’s saving clause would not actually be saved from preemption was after all dicta and that the Supreme Court has not in fact yet had the chance to rule on that question.

In their last outing the HMOs tried to overturn state law “any willing provider” statutes. It backfired on them and resulted in a more liberal test for the application of ERISA’s saving clause and defeat for the HMOs. Kentucky Ass’n. of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003). Here, the burden is even greater for the HMOs. They argue that, even if ERISA’s express preemption provision does not protect them from liability for negligently causing death or injury to plan participants, nevertheless, ERISA’s civil remedies provision (presumably its mere existence) implicitly insulates them from the reach of state laws designed to protect participants in HMOs from harm by providing them and their families with traditional state law remedies for medical malpractice. (If the current state of the law were not confusing enough, the Third Circuit in an unrelated case held not as completely preempted by ERISA a charge by a plaintiff that he was discharged from the hospital at the insistence of the HMO but yet that the HMO’s decision that a special tracheostomy tube was not medically necessary, although both a medical and also an eligibility decision, *was* completely preempted – implying that some mixed eligibility and treatment decisions may still be preempted. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442 (3<sup>rd</sup> Cir. 2003).

**Something new: “I’m baaack!” Bad faith claims.** Even though the Calad and Davila combo does not directly involve ERISA’s saving clause, the same Pilot Life argument has been made in “saving clause” cases and the new Miller test has already spawned some interesting case law for insurance “bad faith” plaintiffs. In Stone v. Disability Management Services, Inc., 288 F.Supp. 2d 684 (M.D. Pa. 2003) Judge Munley sided with Judge Clarence C. Newcomer in Rosenbaum v. UNUM Life Ins. Co. of America, 2003 WL 22078557, U.S. Dist LEXIS 15652 (E.D. Pa. Sept. 8, 2003).

James E. Stone was part owner and manager of an office furniture store. He became disabled due to multiple sclerosis. UNUM paid Stone benefits beginning April, 2000 but then on April 13, 2001 changed its method of calculating benefits and reduced Stone’s benefits in proportion to the losses the business was facing. Stone sued based in part on Pennsylvania’s Unfair Trade Practices and Consumer Protection Law, under which in an action arising under an insurance policy, upon a finding by the court that the insurer acted in bad faith, the court may award punitive damages. 42 Pa. Cons. Stat. Ann. Sect. 8371. The Pennsylvania statute is directed toward the insurance industry. Therefore it satisfies the *first prong* of the Miller test. It also satisfies the *second prong*, because:

“Section 8371 . . . clearly affects the allocation of risk between an insurer and an insured. Section 8371 provides for the possibility of punitive damages. . . . This increased risk faced by an insurer significantly affects the risk pooling arrangement between an insurer and an insured.” Stone, supra, 694.

The Pennsylvania law also affects that arrangement by reducing the insured’s risk that the insurer will deny a claim in bad faith. It limits the ability of insurers to deflect risk in insurance policies by in effect nullifying risk deflection provisions used by insurers to limit claims and damages. It thus also alters the provisions in insurance policies. Id., 694.

Taking the Pilot Life tack, UNUM argued, as do the HMOs in Calad and Davila, that the Pennsylvania statute was preempted, because ERISA's civil remedies provision provides the only remedies permitted by Congress. The court in Stone confronted this argument head on. Apart from the requirement that a law needs to regulate insurance, Congress did not impose any other requirement for a law to be saved from preemption. Congress's intent was unambiguous. The fundamental purpose behind ERISA's saving clause is to respect state sovereignty in insurance regulation. Id., 695-696.

Just as after the Supreme Court's 1999 UNUM v. Ward decision, other cases rely on the dicta in Pilot Life. The April, 1987 Pilot Life decision is once again the focus of attention, and again not because of its holding but because of its dicta. The Rosenbaum and Stone district court decisions find nothing ambiguous about ERISA's saving clause, and whether there really is any preemptive effect to be ascribed to ERISA's civil remedies provision we will likely know soon. Whether such preemptive effect, if any, trumps a statute otherwise saved from preemption under ERISA's saving clause is still not a question before the Supreme Court. Meanwhile, the lower courts reach conflicting outcomes in applying the Miller test depending whether they apply the dicta from Pilot Life or else traditional canons of statutory construction to the preemption provision, including the saving clause.

**Reimbursement/Subrogation:** An attorney retained by an ERISA beneficiary to represent the beneficiary in a personal injury action has no duty enforceable under ERISA to account to an ERISA plan for settlement proceeds received. Mid Atlantic Med. Services, Inc. v. Do, 294 F. Supp. 2d 695 (D.Md. 2003). The attorney for the injured party is not a proper party in an ERISA reimbursement action. Admin. Committee of the Wal-Mart Stores, etc. v. Cossey, 287 F.Supp. 2d 975,979 (E.D. Ark. 2003). In Cossey the court turned down Wal-Mart's bid to have a constructive trust imposed, where Wal-Mart had not even yet paid the claims. ERISA likewise provides no remedy against the insurer of the injured victim. Lapham-Hickey Steel Corp.v. A.G. Edwards Trust Co. F.S.B., 2003 WL 22324877 (N.D. Ill. Oct. 8, 2003). Subject matter jurisdiction was lacking in an ERISA reimbursement action. Community Health Plan of Ohio v. Mosser, 347 F. 3d 619 (6<sup>th</sup> Cir. 2003).

**The Chicago School:** Following its own holding in Admin. Committee of the Wal-Mart Stores, etc. v. Varco, 338 F.3d 680 (7<sup>th</sup> Cir. 2003), the Seventh Circuit continues to be the only federal circuit actually to have held an attempt to impose a constructive trust to constitute equitable relief under ERISA's catchall relief provision, 29 U.S.C. Sect. 1132(a)(3). Admin. Committee of the Wal-Mart Stores, etc. v. Hummell, 77 Fed. Appx. 891, 2003 WL 22345464 (7<sup>th</sup> Cir. Oct. 7, 2003). Also in Chicago, where a health insurer refused to apply the Illinois common fund doctrine to credit the injured *federal* employee for attorney's fees and costs of the latter's auto negligence case, a claim for reimbursement under the Federal Employees Health Benefits Act, 5 U.S.C. Sect. 8901-8914, was dismissed. Blue Cross and Blue Shield of Ill. v. Cruz, 2003 WL 22715815 (N.D. Ill. Nov. 17, 2003).