Courts Curtail ERISA Protection For HMOs

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Posted By: Timothy C. McDonald

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Courts have been divided on the issue of whether the Employee Retirement Income Security Act of 1974, which regulates retirement and health plans, pre-empts state law medical malpractice claims brought against employer-sponsored HMO arrangements.

Two federal appeals court cases, however, have dealt the case for ERISA pre-emption a fairly significant blow. The courts concluded that federal law does not prevent an employee from bringing a medical malpractice action under state law against an HMO.

These recent decisions could have significant ramifications for HMOs. Also affected are employers who contract with physician groups to provide health services directly to employees and their dependents.

ERISA Pre-emption

In order to provide uniform regulation of retirement and health plans across state lines, ERISA generally pre-empts any state laws that "relate to" an employee benefit program. In addition to pre-empting state law claims, the act pre-empts state law remedies.

If a court determines that an employee claim is governed by ERISA, the remedy is generally limited to recovering benefits due under the plan or enforcing the terms of the plan. Generally, an employee cannot obtain monetary or punitive damages under ERISA. In cases involving alleged medical malpractice, the applicability of ERISA would prevent the employee from obtaining potentially significant monetary relief under state tort law.

To determine whether ERISA pre-emption applies, the courts must delineate the parameters of a plan and determine whether the malpractice claim "relates to" the plan. Given the ever-changing nature of health-care delivery systems, this is a difficult task.

Two Cases

• In *Dukes v. U.S. Health Care, Inc.,* the widow of an employee covered under an employer-sponsored HMO filed a malpractice suit against the HMO, alleging that the HMO failed to exercise reasonable care in selecting and monitoring the personnel who treated her husband. The district court concluded that the plaintiff's claims "related to" an employee benefit plan and, therefore, were preempted by ERISA.

On appeal, the plaintiff and the Department of Labor (as *amicus curie* claimed that the medical malpractice claims were not pre empted by ERISA because the sole benefit that an employee received from the health plan was the employee's membership in the HMO. The HMO, in turn, asserted that the benefit an employee receives is the medical care provided by the HMO.

Although, for purposes of its decision, the Third Circuit Court of Appeals assumed the HMO's analysis of the benefit provided was correct, the court concluded that the plaintiff's malpractice claims were not pre-empted by ERISA because they were claims attacking the quality of benefits provided, not claims for benefits due under the plan or to enforce rights under the terms of the plan. Therefore, the appeals court concluded that the medical malpractice claims against the HMO did not relate to the employee benefit plan.

• In *Pacificare of Oklahoma, Inc. v. Barrage*, the Tenth Circuit Court of Appeals concluded that ERISA does not pre-empt a claim of vicarious liability for medical malpractice brought against an employer-sponsored HMO. The court stated that resolution of the malpractice issue involves evidence of what transpired between the patient and the physician and an assessment of whether the physician possessed and utilized the requisite knowledge, skill, and care.

As for whether the physician was an agent of the HMO, the circuit court affirmed the district court's conclusion that any reference to the plan to resolve the issue of agency does not implicate the concerns of ERISA pre-emption. The court concluded that a medical malpractice claim does not involve the administration of benefits or the level or quality of benefits promised by the plan.

According to the Barrage decision, ERISA does not preempt a malpractice claim against a doctor and, therefore, should not pre-empt a vicarious liability claim against an HMO.

Implications

The implications of the *Dukes* and *Barrage* decisions are not completely clear. The cases demonstrate that HMOs may not be able to rely upon ERISA pre-emption to avoid liability for the medical malpractice of an HMO physician. Drawing the line between medical malpractice and plan operation, however, may be difficult.

For example, according to another circuit court decision, the denial of treatment pursuant to a pre-certification or utilization review procedure apparently is protected by ERISA pre-emption. In certain cases, it may be difficult to determine if the denial of treatment is a medical judgment or a plan interpretation.

The *Dukes* and *Barrage* decisions also may have ramifications foremployer's self-funded plans. The more an employer is involved in controlling how a physician provides medical services, the more the employer risks a medical malpractice suit.

For example, some employers are contracting directly with physicians to provide medical service at employer-maintained clinics. Applying the analysis of these cases, such employers may not be able to rely upon ERISA pre-emption to avoid medical malpractice claims involving the "quality" of care provided.
