

***Cicio v. Vytra Healthcare* : Another Blow to the Defense of ERISA Preemption
in Utilization Review Decisions**

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On February 11, 2003, in Cicio v. Vytra Healthcare, the Second Circuit Court of Appeals ruled that an enrollee under a health insurance plan governed by the Employee Retirement Income Security Act (“ERISA”) may state a medical malpractice cause of action under state law against a health plan and its medical director based upon their utilization review determinations if those determinations are alleged to involve medical decisions or ‘mixed eligibility and treatment’ decisions. The Second Circuit’s decision continues the cascade of “cold water” the United States Supreme Court threw on ERISA preemption in its decision in Pegram v. Herdrich in 2000. The Cicio decision potentially drowns ERISA preemption defenses as applied to state law medical malpractice claims based on *certain* utilization review decisions.

The Facts

The decedent, Mr. Carmine Cicio, received his health insurance coverage through his employer. He was diagnosed with multiple myeloma (i.e. blood cancer) in March 1997. On January 28, 1998, Mr. Cicio’s treating oncologist requested his health plan administrator, Vytra Healthcare, to authorize benefits for high dose chemotherapy with a double stem cell transplant. *Approximately three weeks later*, Vytra’s Medical Director, Dr. Brent Spears, denied the request on the grounds that it was not a covered procedure since it was considered ‘experimental/investigational’ for Mr. Cicio’s condition.

On March 4, 1998, Mr. Cicio’s oncologist appealed Dr. Spears’ decision. In the appeal, the oncologist listed medical literature and studies supporting his contention that the double stem cell transplant was a generally accepted treatment method that provided superior results to standard therapies. In addition, Mr. Cicio’s oncologist commented that, while single stem cell transplants are also considered to be more effective than standard therapies, double stem cell transplants provide superior results to single stem cell transplants. *Approximately three weeks later*, on March 25, 1998, Dr. Spears affirmed Vytra’s original denial of benefits for the double stem cell transplant, *but approved benefits for a single stem cell transplant even though no request for such benefits had been made*. Unfortunately, by that time, Mr. Cicio’s health had further deteriorated and he was no longer a candidate for any type of stem cell transplant therapy. He died on May 11, 1998.

Mrs. Cicio’s Claims and the District Court’s Finding That ERISA Preempted Them

Carmine Cicio’s widow sued Vytra Healthcare and Dr. Spears in New York state court alleging a variety of tort law theories, including medical malpractice, negligent delays in handling the claim and misrepresentations regarding benefits. Mrs. Cicio also alleged breach of the health insurance contract and bad faith. The Defendants removed the case to federal district court, and moved to dismiss based on ERISA’s preemption of Mrs. Cicio’s state law claims.¹ The District Court

¹ ERISA is a federal statute passed in 1974 to promote the uniform administration of “employee benefit plans” across the nation. ERISA contains a broad preemption clause which preempts or supersedes state laws and state law causes of action which seek recovery of employee benefits or which “relate to” an employee benefit plan. ERISA preemption is significant because ERISA affords limited, exclusive remedies for violations of its provisions.

granted the Defendants' motion, finding that all of Mrs. Cicio's claims involved adverse benefits determinations which are preempted by ERISA (as opposed to the quality of Mr. Cicio's healthcare which claims are reserved for state regulation). Mrs. Cicio then appealed the District Court's order of dismissal to the Second Court of Appeals which *partially* overruled the District Court's decision.

The Second Circuit's Ruling

While the Second Circuit upheld the District Court's dismissal on ERISA preemption grounds of Mrs. Cicio's claims concerning the timeliness of the Defendants' benefits decisions and their alleged misrepresentations regarding the scope of Mr. Cicio's health insurance coverage, it *vacated the District Court's dismissal order with respect to plaintiff's state law medical malpractice claim and remanded that claim to the District Court for further consideration of the ERISA preemption issue consistent with the Second Circuit opinion.*

The Second Circuit held that Mrs. Cicio's medical malpractice claim *may* not be subject to ERISA preemption because it could be based upon a medical decision or a "mixed eligibility and treatment decision." More specifically, although Dr. Spears was not Mr. Cicio's treating physician, but merely an employee of his health plan administrator, the *Second Circuit determined that Mrs. Cicio had sufficiently alleged that his utilization review decision entailed the application of medical judgment to Mr. Cicio's symptoms, and, consequently, constituted a "mixed eligibility and treatment decision" not preempted by ERISA.* The Second Circuit noted that Dr. Spears was provided with a thorough description of Mr. Cicio's case history, from which he *may* have made a medical determination regarding appropriate treatment: "By denying one treatment and authorizing another that had not been specifically requested, *Dr. Spears at least seems to have engaged in a patient-specific prescription of an appropriate treatment, and ultimately, a medical decision.*"

Assuming the truth of the plaintiff's allegations (as it must for purposes of a motion to dismiss), the Second Circuit concluded that Mrs. Cicio had sufficiently alleged a negligent medical determination to withstand the Defendants' motion to dismiss under ERISA. *The Second Circuit remanded the medical malpractice claim to the District Court to determine whether a medical decision or a mixed eligibility and treatment decision is in fact at issue in Cicio (in which case the claim would be remanded to state court) or whether a pure benefits eligibility determination is really at issue (in which case dismissal for failure to plead a claim under ERISA would be appropriate).* The Defendants in *Cicio* are seeking a rehearing *en banc* so that the entire panel of judges from the Second Circuit will have the opportunity to consider and debate this decision.

Under ERISA, a plan participant or beneficiary may only recover equitable relief (e.g. a declaration that plan benefits are owing) and an award of plan benefits. Attorneys' fees may also be awarded in the court's discretion. ERISA does not afford aggrieved plan participants any extra-contractual damages (e.g. compensatory damages for bodily injury or emotional distress, or punitive damages). Nor does ERISA provide a right to a jury trial. Because of the restrictive remedies available under ERISA, ERISA plan participants and beneficiaries strive wherever possible to circumvent ERISA and pursue their claims in state court where the full array of tort liability theories and extra-contractual damages are typically available for benefit denials or other negligence in plan administration.

The concept of mixed eligibility and treatment decisions was first announced by the United States Supreme Court in *dicta* in its opinion in Pegram v. Herdrich, 530 U.S. 211 (2000). Prior to the Pegram decision, courts had long agreed in principle that ERISA preempts state law claims if the challenged conduct amounts to an administrative benefits determination (but not if it constitutes a medical treatment decision), but disagreed over the application of ERISA preemption to managed care activities, such as utilization review decisions. In Pegram, the United States Supreme Court noted that modern managed care activities routinely involve “mixed eligibility and treatment” decisions.² The Second Circuit relied on Pegram’s dicta relating to blended managed care decision-making to conclude that Mrs. Cicio’s medical malpractice claim may not be preempted by ERISA. The Second Circuit suggested that previous court decisions finding ERISA preempts utilization review determinations if they have a *benefits component*, as well as a medical judgment component, are now moot in the wake of Pegram.

Central to the Second Circuit’s conclusion that state law remedies are potentially available in cases challenging utilization review under ERISA governed plans, was (1) the concern expressed by the Supreme Court in Pegram that, if an HMO could be sued for breach of its ERISA duty when it makes a pure treatment, or a mixed eligibility and treatment decision, available state medical malpractice claims would merely be replicated; and (2) its belief that prospective utilization review decisions are far more likely than retrospective benefit determinations to influence an enrollee’s choice of treatment options and, consequently, have “possibly dispositive consequences” on medical treatment. Consequently, *the Cicio court inferred from Pegram that state law malpractice actions may be based on a health insurer’s utilization review activities.*

Likely Impact of the Cicio Decision

The Cicio decision potentially has far reaching effects for the continued viability of ERISA preemption of state law claims involving utilization review decisions made under ERISA governed plans. If the Second Circuit’s decision is affirmed, or a rehearing is denied, the Cicio decision will theoretically increase the state law liability exposure of medical directors and managed care organizations operating within the Second Circuit (i.e. in New York, Connecticut and Vermont). The Cicio decision might also result in an increase in liability exposure in other jurisdictions as the Second Circuit is considered a highly influential and well-respected court.

Additionally, this decision may increase the managed care industry’s exposure to separate state and federal court litigation over the same conduct: for example, in Cicio, the Second Circuit recognized that the plaintiff’s claim concerning the timeliness of Defendant’s utilization review decision was preempted by ERISA and, consequently, must be pursued in federal court, while holding that the plaintiff’s claim that the same utilization review decision adversely impacted Mr. Cicio’s care could possibly be pursued in state court.

However, we note that, due to the relatively specific holding in Cicio, it is possible that this case may have a more limited effect on future cases than some commentators believe. Cicio may be distinguished from other utilization review cases in which the medical director strictly responds

² Pegram did not directly involve ERISA preemption. Rather the issue before the Supreme Court was whether it was a breach of fiduciary duty under ERISA for an HMO to use financial incentives to ration care.

to the benefit request before him/her and does not authorize benefits for alternative treatment. The Second Circuit's opinion demonstrates the dangers inherent in such an approach, supporting the maxim "no good deed goes unpunished." Because it was precluded from addressing the merits of the case at the motion to dismiss stage, the Second Circuit's opinion nowhere indicates that Dr. Spears' benefits decision was erroneous. It simply indicates that, if a medical director or managed care organization oversteps the bounds of a utilization review decision, and gratuitously authorizes alternative benefits, he/she/it runs the risk of being sued in state court for medical malpractice. Thus, at least for now, in the Second Circuit, if a managed care organization or its medical director is presented with a patient's "constellation of symptoms," and makes a determination regarding an appropriate medical response, it may be required to defend itself against state tort law claims.