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ERISA PREEMPTION

by Ted Babbitt

The Federal ERISA law as embodied in U.S.C. §502(a)(1)(B) states that only Federal Courts can consider actions brought under certain portions of the Federal Employee Retirement Income Security Act (ERISA). Since many HMOs provide coverage to employees through this act, that preemption section is extremely important. A medical malpractice action, which alleges vicarious responsibility of an HMO for the actions of its doctors if restricted to an ERISA claim, would provide only damages for the cost of the treatment and nothing else. Thus, any plaintiff injured as a result of an HMO physician's negligence who seeks to hold the HMO responsible wants, at all costs, to avoid Federal preemption.

The Florida Supreme Court has recently held in Villazon v Prudential Health Care Plan, Inc., 28 F.L.W. S267 (Fla. March 27, 2003) that Federal preemption does not apply to an action brought against an ERISA HMO when the cause of action is based on vicarious liability. That decision resolved the conflict between Villazon v Prudential Health Care Plan, Inc., 794 So.2d 625 (Fla. 3rd DCA 2001) and In Re: Estate of Frappier, 678 So.2d 884 (Fla. 4th DCA 1996). The issue in those two cases boiled down to whether an action bottomed on vicarious liability of an HMO physician sufficiently "relates to" the administration of an ERISA plan to require preemption.

The ERISA law was designed to prevent State Court actions when an HMO consumer complained of the HMO's refusal to provide benefits. Broad preemption language was contained within the law so that only Federal Courts could determine those claims and to prevent consumer actions for damages beyond the value of the benefits. Numerous Federal appellate decisions have turned on the question of whether a vicarious liability action brought against an HMO for one of its physicians was sufficiently connected to a claim for benefits to invoke the preemption language. The Frappier Court, in reviewing those Federal cases, concluded that there was a distinction between lawsuits based upon an HMO having withheld benefits from the consumer and an action based upon the quality of the HMO benefits provided. It concluded that a

malpractice action falls in the latter category and, as such, would not relate to the administration of the plan and would, thus, avoid preemption.

The Villazon Court drew the opposite conclusion. The Supreme Court sided with the Frappier Court.

However, Villazon directly conflicts with Frappier in its determination of whether a state law wrongful death claim by a deceased patient member's estate against a health maintenance organization (HMO) based upon vicarious liability for asserted medical malpractice of its member physicians 'relates to' administration of the ERISA plan and is therefore preempted. In Villazon, the district court below incorrectly concluded that it did. See Villazon, 794 So.2d at 627 (determining that Villazon's claims 'directly relate to the health plan as they arise from the denial of medical care and treatment benefits'). In Frappier, in contrast, the district court correctly determined that ERISA does not preempt such vicarious liability claims. (emphasis by the Court).

The key case analyzed by virtually every jurisdiction on this issue is Dukes v US Healthcare, Inc., 57 F.3d 350 (3d Cir. 1995). The analysis of the Frappier Court stated it as follows:

Accordingly, Dukes considered and rejected the line of cases cited and relied upon by the lower court in determining that ERISA preempts the instant vicarious liability claim. We agree with the factual dichotomy expressed in Dukes that is critical for this analysis:

[T]here is no allegation here that the HMOs denied anyone any benefits that were due under the plan. Instead the plaintiffs here are attempting to hold the HMOs liable for their role as the arrangers of their decedents' medical treatment.

Id. at 361.

Thus where, as here, an ERISA is implicated by a complaint for failing to provide, arrange for, or

supervise qualified doctors to provide the actual medical treatment for plan participants, federal preemption is inappropriate. (Citing numerous cases.) Therefore, even if Health Options is an ERISA subject to federal preemption, we must conclude that the trial court erred in dismissing the vicarious liability count of the instant complaint. Frappier, 678 So.2d at 887.

The Supreme Court in Villazon cites with approval the above section of the Frappier opinion and concludes that it is the correct interpretation of the law as it applies to actions brought in State Court against HMOs based upon allegations of either direct or vicarious liability for negligence of a physician who provides services to an HMO consumer.

In Villazon, the plaintiff had also alleged that the HMO had assumed a nondelegable duty to render medical care when it agreed to provide health care to the plaintiff's decedent. That allegation was bottomed on Fla. Stat. 641.17-641.3923, the "Health Maintenance Organization Act." The Supreme Court rejected that allegation and concluded that the statute did not provide for a cause of action for that theory of liability, however, the Court did not preclude an allegation of that theory based upon common law and left that question for a later determination.

The Villazon case is also important on the issue of what proof is required to go to the jury on the question of actual agency. The Third District found as a matter of law that the physician in question was an independent contractor and not an actual agent of the HMO because there was no evidence of control by the HMO over the physician. The Supreme Court reversed, pointing out that it is not actual control that is important but rather the right of control which is determinative. See Nazworth v Swire Fla., Inc., 486 So.2d 637, 648 (Fla. 1st DCA 1986). The language utilized by the Court seems to create a new view as to the relationship between an HMO and a physician.

While physicians of the past in the traditional pattern of American life may have constituted distinct independent entities and independent centers of occupation and profession, that model has been dramatically altered through the HMO concept in a significant manner which a legal system cannot simply ignore.

The thought of visiting a private and independent office of a totally independent physician may now be one more of history and cultural conditioning than current reality. The economic structures alone may so impact the relationships that the prism through which we consider and evaluate issues of control must be honed for this current reality.

The Supreme Court then goes on to express the view that this new way of looking at the relationship between an HMO and a physician creates a jury question as to actual agency.

These contractual provisions, along with the contractual provisions between the HMO and the physicians, and the totality of the circumstances operating within the current reality of the interaction within the decision-making process, create genuine issues of material fact sufficient to withstand a motion for summary judgment with respect to the question of whether PruCare can be held vicariously liable for the alleged medical negligence of its member physicians when providing service pursuant to the PruCare health plan under theories of actual agency. PruCare has not conclusively demonstrated the absence of genuine issues of material fact.

It appears that in any case involving an HMO, this opinion provides the key to creating a cause of action against the HMO and this landmark case may well revolutionize the ability to sue HMOs for the acts of its physicians.