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April 22, 2003

Dear Fellow Attorney,

I was privileged to speak on ERISA preemption at the American Conference Institute's Sixth National Advanced Forum on Litigating Disability Insurance Claims held in Boston on March 24-25. After that note, here is a spring-cleaning roundup of recent ERISA decisions.

Preemption cases:

In a case where I represent a former IBM employee suing for breach of IBM's Sickness and Accident Income Plan, the Eleventh Circuit reversed a lower court order denying plaintiff's motion to remand to state court. Stern v. Int'l. Bus. Machines Corp., 2003 WL 1870321 (11th Cir. April 14, 2003). The Dept. of Labor appeared as amicus on Stern's behalf. At issue was the "*payroll practices*" regulation exempting from preemption payment of ordinary compensation to employees during disability.

Again on the threshold issue whether there was an ERISA plan, a former employee's action against the administrator of a *stock option plan* was dismissed, because the stock option plan was not an ERISA plan. Oatway v. American Int'l. Group, Inc., 2003 WL 1870907 (3rd Cir. April 14, 2003).

Where the minor daughter of the deceased employee sued the latter's former wife in state court claiming to be the rightful beneficiary of *life insurance proceeds* pursuant to a divorce decree, ERISA preempted Illinois law with respect to determining the rightful beneficiary. Melton v. Melton, 2003 WL 1870321 (7th Cir. April 8, 2003).

The Second Circuit issued a *landmark decision* case in the area of state law claims against HMO's based on *utilization review*. Cicio v. Does 1-8, 321 F.3d 1111 (2nd Cir. 2003). Picking up on the "mixed" benefit entitlement and treatment category of HMO decisions, the Second Circuit for the first time held such decisions free from ERISA preemption and potentially subject to state law malpractice actions.

In another *utilization review* case, however, the Fourth Circuit held the claim of the estate of a mental health patient who murdered his wife and daughter and then committed suicide to be subject to complete preemption. Marks v. Watters, 322 F.3d 316 (4th Cir. 2003). This case underscores the significance of the decision in Cicio.

Saving clause cases:

The U.S. Supreme Court held Kentucky's any willing provider laws saved from ERISA preemption. Kentucky Ass'n. of Health Plans, Inc. v. Miller, (2003) Perhaps the most significant aspect about the opinion is that the Supreme Court abandoned its prior analysis of ERISA's saving clause. The Court will now look at the effect of the state law on the risk pooling arrangement.

The court stated that, to determine whether Kentucky's AWP statutes were saved from preemption, it had to ascertain whether they were laws which regulate insurance under 29 U.S.C. §1144(b)(2)(A).

A state law must be specifically directed toward the insurance industry in order to fall under ERISA's savings clause; laws of general application that have some bearing on insurers do not qualify. At the same time, not all state laws "specifically directed toward" the insurance industry will be covered by §1144(b)(2)(A), which saves laws that regulate *insurance*, not insurers. Conditions on the right to engage in the business of insurance *must also substantially affect the risk pooling arrangement* between the insurer and the insured, in order to be covered by ERISA's saving clause. It suffices that they substantially affect the risk pooling arrangement between the insurer and the insured. By expanding the number of providers from whom the insured may receive health services, any willing provider laws alter the scope of permissible bargains between insurers and insureds. No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium. The AWP prohibition substantially affects the type of risk pooling arrangements that insurers may offer.

Reimbursement/subrogation claims:

In a "man bites dog" case, one which the assignee of an employer's right of reimbursement could only wish had been an April Fools' Day joke, the assignee first sued in state court to recover the entire amount of medical benefits paid to an employee injured in an automobile accident – not just the two thirds remitted by the injured employee's attorney –. Then the employee *counterclaimed on behalf of the class of other employees whose lawyers had not been allowed to deduct fees from third party recoveries*. Next, after the assignee attempted to dispose of the counterclaim by releasing its claim against the employee and moving to dismiss its state court suit as moot, the employee refused to accept the release. Then the assignee countered by filing a federal action, basing jurisdiction on ERISA and seeking a declaration that the ERISA plan overrode the "common fund" doctrine under which the employee's lawyer claimed a fee. The Seventh Circuit, however, in an opinion by Judge Posner held that the claim by the assignee as an ERISA fiduciary was not one for equitable relief within the meaning of ERISA's civil enforcement provision. Moreover, the dispute about the applicability of the common fund doctrine did not arise under ERISA. Finally, the assignee lacked standing to sue in light of its release of its claim against the employee. Primax Recoveries, Inc. v. Sevilla, 2003 WL 1702497 (7th Cir. April 1, 2003). (One wonders if the assignee felt like Dewey, who, after awaking to learn he had lost the election to Truman, thought to himself, "If I'm dreaming, why do I have to go to the bathroom?")