PAUL M. SULLIVAN, JR.,
ATTORNEY AT LAW, P.A.

580 Village Boulevard, Suite 280
West Palm Beach, FL 33409
Telephone: (561) 689-7222

Facsimile (561) 689-5001
Email: psulliv@bellsouth.net
erisaclaims.lawoffice.com

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July 1, 2004, ERISA Highlights

Dear Fellow Attorney,

A midsummer night's dream– or nightmare? On June 21 the Supreme Court rehashed where we have come since 1987, when Pilot Life eliminated insureds' rights to sue for insured benefits under state insurance law. Apparently, full circle. The court decided unanimously that a Texas statute giving insureds the right to sue their HMO's ran afoul of ERISA's remedial scheme. Got to love those ERISA remedies! The opinion in the consolidated cases of Aetna Health Inc. v. Davila and Cigna Healthcare of Texas, Inc. v. Calad, – S.Ct.–, 2004 WL 13773230 (2004) will be scrutinized by attorneys and courts to see exactly what it does hold. However, it apparently holds at least that, if a plaintiff complains of a denial of coverage for medical care, where the plaintiff is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty independent of ERISA or the plan terms is violated, then complete preemption applies making the case removable to federal court. Here the claims by a participant and a beneficiary respectively that the administrators' denials of coverage violated Texas law were *not* entirely independent of federally regulated plans. Therefore, removal was proper. (The holding is squarely and narrowly only that such claims are properly removable to federal court under the doctrine of complete preemption. The court analogizes – rhapsodically – to Pilot Life's discussion of ordinary preemption under ERISA's preemption provision, 29 U.S.C. Sect. 1144(a), but only to state that: "The pre-emptive force of ERISA Sect. 502(a) is still stronger.") Because the Texas statute does not impose liability for the failure to exercise ordinary care where there the treatment is not covered, interpretation of the ERISA-regulated benefit plans forms an essential part of the Texas cause of action. Liability under the state law derives entirely from the benefit plans. The Court holds that the state law causes of action fall within the scope of ERISA's Sect. 502(a)(1)(B) and are completely preempted therefore by Sect. 502 and removable.

All the rest, as they say, is dicta; but, to coin another phrase, the devil is in the dicta.

The saving clause aspect. The claims also did not fall within ERISA's saving clause. However, even a state law that can arguably be characterized as "regulating insurance" will be preempted if it provides a separate vehicle to assert a claim for benefits outside of or in addition to ERISA's remedial scheme. (This, like the same observation in Pilot Life is dicta, although Davila uses the word "held" in reference to Pilot Life's observation. Nevertheless, Pilot Life's dicta has held sway since April, 1987 and promises to continue to exert a powerful effect on future "saving clause" cases.)

"Mixed eligibility and treatment" decisions under Pegram v. Herdrich, 530 U.S. 211 (2000), which described such decisions as not fiduciary in nature and potentially subjecting HMO physicians to state tort law liability for malpractice, as Davila explains, only make sense where the underlying negligence is by a party who can be deemed to be a treating physician or such a treating physician's employer(citing the dissent by Judge Calabresi in Cicio v. Does, 321 F.3d 83, 100-104 (2d Cir. 2003). The Court comments that the Second Circuit in Cicio and the Eleventh Circuit in Land v. CIGNA Healthcare, 339 F. 3d 1286, 1292-1294) made too much out of the Pegram "mixed" decision discussion.

Comments: What Davila does not squarely confront is the once-famous footnote 7 in 1999's UNUM v. Ward saving clause case, where Justice Ginsburg noted that the Department of Labor had retreated from its earlier enthusiasm for its 1987 position in Pilot Life that the Labor Management Act was analogous to ERISA (noting in 1999 that the LMRA –whoops, my bad – does not have a "saving clause," a small oversight that after 12 years the DOL wished to correct). In Davila in 2004, however, the Department of Labor *sided with the HMO's*. By odds then, if there is a next time, the DOL may reverse course again and readopt its "footnote 7" position. Secondly, Davila explains *and revises* Pegram – HMO's act as insurers and therefore not as fiduciaries when deciding whether to pay benefits out of their own assets. The Court claims Pegram was misunderstood by some lower courts. In contrast, Judge Calabresi and Professor Langbein, who appear committed equally with the Court to sweeping everything under the rug of ERISA's remedial provision, are cited with approval. Davila is a closed circle both logically and historically.

Corollaries. Cases against treating physicians employed by HMO's and against the HMO's that employ them remain not completely preempted and not removable to federal court under ERISA's remedial provision. Causes of action based on a "legal duty (state or federal) independent of ERISA of the plan terms" are not removable to federal court. Intentional torts committed in the course of claims administration, such as violation of California's invasion of privacy law, presumably remain free from preemption. Similarly, cases by former employees against their former employers for drops in the the value of their ESOP shares may also continue to escape preemption. Davila's holding is narrow. Davila's dicta are broader but still dicta. When the composition of the Court changes, Davila's dicta are presumably as open to reinterpretation as the dicta in UNUM v. Ward and in Pegram were by the Court today in Davila itself.

Reimbursement cases. The administrator of a multiple-employer long term disability plan did not have a federal common law right to sue a plan participant for reimbursement based on unjust enrichment or restitution. Cooperative Benefit Administrators, Inc. v. Ogden, 367 F.3d 323 (5th Cir. 2004). Similarly, the federal district court did not have subject matter jurisdiction over a suit under ERISA by a plan administrator against a plan participant seeking reimbursement of money the participant had received in a settlement with a third-party tortfeasor. The suit was a legal action, not one for "other appropriate equitable relief" (over which the district court would have had jurisdiction) notwithstanding the administrator's prayer for imposition of a constructive trust or an equitable lien. Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004).

A word to the wise: do not fool with a special needs trust! It was bad news at the district court level for the parents of a brain-damaged child who did. See B.P. Amoco Corp. v. Connell, 2004 WL 1293882 (M.D. Ga. 2004). Although it presumably will be overturned on appeal, how sad that it had to happen at all!

Appropriate relief, the other side of the coin. What relief *plan participants* may obtain as "appropriate equitable relief" is in question. E.g., Millsap v. McDonnell Douglas Corp., 368 F.3d 1246 (10th Cir. 1246), holds that backpay was not "appropriate equitable relief" in that ERISA Sect. 510 interference-with-benefits claim.