The Legal Intelligencer
Vol. 220, No. 101
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May 26, 1999

WHEN QUALITY, NOT QUANTITY OF CARE IS AT ISSUE, ERISA DOESN'T APPLY

MED MAL SUIT SENT BACK TO STATE COURT

Shannon P. Duffy
U.S. Courthouse Correspondent

An HMO cannot remove a medical malpractice lawsuit to federal court on ERISA preemption grounds merely because the plaintiff alleges that the insurer established "disincentives" to providing proper care since such a claim focuses on the quality -- not the quantity -- of care, a federal judge has ruled.

In his 12-page opinion in DeLucia v. St. Luke's Hospital et al., U.S. District Judge Robert S. Gawthrop HI found that Aetna U.S. Healthcare had not proven that the plaintiffs' claims were completely preempted by ERISA and therefore remanded the case to the Court of Common Pleas of Northampton County.

"Rather than alleging that the disincentive policy 'had the effect of denying benefits,' plaintiffs' complaint alleges that Aetna's disincentive policy had the effect of discouraging doctors from 'provid[ing] complete and proper care under the circumstances of this case.' This allegation, rather than addressing the denial of a plan benefit, is more properly read as challenging the quality of medical care provided," Gawthrop wrote.

According to the suit, on May 31, 1997, Jacqueline DeLucia gave birth to Keith Carl DeLucia Jr. at St. Luke's Hospital after a complicated pregnancy. Mrs. DeLucia had a history of spontaneous pregnancy losses, as well as intrauterine growth restrictions and the premature rupture of membranes.

Premature by about two months, Keith Jr. was jaundiced at birth and diagnosed with respiratory distress. In his first three weeks of life, the infant suffered numerous episodes of apnea and bradycardia and was noted to have an excessively rapid heart-beat.

On June 23, 1997, Keith Jr. was discharged from St. Luke's Hospital, and doctors advised his mother that his condition did not meet Aetna's criteria for discharging a newborn on a breathing monitor.

Mrs. DeLucia was then referred to defendant ABW Pediatrics for her son's further pediatric care. She informed ABW Pediatrics that the child experienced blue spells, on a daily basis, often accompanied by a cessation in breathing. ABW Pediatrics treated him from June 27, 1997. until Nov. 14, 1997, when he died of causes consistent with Sudden Infant Death Syndrome.

Represented by Lisa Schwartz of Anapol Schwartz Weiss Cohan Felman & Smalley, the DeLucias filed a 64-page, 250-paragraph complaint against 21 defendants alleging negligence and medical malpractice. The suit includes five counts against Aetna, which primarily allege that because the physicians

who treated Keith Jr. were Aetna's agents, it is liable for their medical malpractice.

Aetna's lawyer, Patricia C. Collins of Elliott Reihner Seidzikowski & Egan, removed the case to U.S. District Court arguing that the claims against Aetna "relate to a union benefit plan within the meaning of Section 514 of ERISA, 29 U.S.C. Section 1144, and, as a substantive matter, are preempted by ERISA."

Both the plaintiffs and defendant St. Luke's Hospital filed motions to remand the case, arguing that because the allegations relate not to coverage or the quantity of benefits, but rather to negligence or the quality of benefits, the plaintiffs had not stated a claim under Section 502 (a)(1)(B) of ERISA, and thus, removal was improper.

Gawthrop found that ERISA "supercedes any and all state laws insofar as they may now or hereinafter relate to an employee benefit plan."

But he also found that "not all state law claims that are preempted by Section 1144 are removable."

Instead, he said, "only those ERISA claims that qualify under the complete preemption doctrine are removable."

To determine whether the state law claims fall within the scope of Section 502 (a)(1)(B), Gawthrop said, a court must determine "whether those claims, properly construed, are 'to recover benefits due...under the terms of the plan, to enforce...rights under the terms of the plan, or to clarify...rights to future benefits under the terms of the plan.' However, a claim about the quality of a benefit received is not a claim under Section 502(a)(1)(B) to 'recover benefits due...under the terms of the plan."'

The 3rd U.S. Circuit Court of Appeals established the test for deciding such an issue in Dukes v. U.S. Healthcare, Gawthrop found.

Dukes involved two consolidated medical malpractice suits in which the plaintiffs sued for injuries arising from the medical malpractice of several hospitals and health care professionals.

In one case, following surgery, a doctor prescribed a blood test for a patient, which the hospital refused to perform. Although a blood test was later performed, the patient's condition deteriorated and he died. In the other case, plaintiffs sued based on a doctor's failure to diagnose preeclampsia, which they alleged led to a stillbirth.

In both cases, the plaintiffs sued both the physicians and the HMOs that provided the medical treatment.

The HMOs removed plaintiffs' claims to federal court, arguing that the court had jurisdiction under the complete preemption doctrine. The 3rd Circuit disagreed and remanded the cases to state court.

The court wrote: "Nothing in the complaints indicates that the plaintiffs are complaining about their ERISA welfare plans' failure to provide benefits due under the plan.... Instead of claiming that the welfare plans in any way withheld some quantum of plan benefits due, the plaintiffs in both cases complain about the low quality of the medical treatment that they actually

received and argue that the...HMO should be held liable under agency and negligence principles."

The Dukes court concluded that "there was no allegation that the HMOs denied anyone any benefits that they were due under the plan," but "instead, the plaintiffs were attempting to hold the HMOs liable for their role as arrangers of their decedents' medical treatment."

Gawthrop found that since Dukes, the case law has distilled the inquiry down to the question of whether the conduct complained of occurred as part of the HMO's "utilization review" role -- the process by which an HMO determines whether to pay for the medical care of an individual -- or its "arranging for medical treatment" role -- the process by which an HMO delivers medical care.

The complete preemption doctrine, he said, "applies only when a complaint challenges an entity's conduct in its utilization-review role."

Schwartz argued that her complaint set forth medical malpractice claims under Pennsylvania state law and that since the suit challenged the quality of benefits received from defendant Aetna/U.S. Healthcare, the claims were not completely preempted.

Aetna, however, insisted that the suit specifically alleged that Aetna formulated and implemented criteria for discharging a newborn on a breathing monitor and that DeLucia's son was not discharged from the hospital on a breathing monitor because he did not meet those criteria.

As a result, it argued, the suit alleged a denial of benefits -- a breathing monitor -- and the claims therefore fell within the scope of Section 502(a)(1)(B) of ERISA.

But Gawthrop looked to the language of the complaint and found that the claims were not preempted.

Instead, he said, the complaint alleged that "Aetna/U.S. Healthcare, either individually or acting through its agents servants, and employees, was negligent and careless in...failing to order decedent a breathing and/or heart monitor...(and) adopting and/or enforcing rules, regulations and procedures which established disincentives to doctors to provide complete and proper medical care under the circumstances of this case."

Gawthrop found that such claims must be remanded under Dukes.

"I do not find that plaintiffs' complaint, either in these allegations or elsewhere, states a claim for a denial of a benefit due. When a plaintiff fails to allege that the denied or omitted medical treatment or service was due under the plan, complete preemption does not apply," he wrote.

Gawthrop noted that the suit "nowhere alleges that Aetna denied a request for a breathing monitor."

The plaintiffs also made no allegation that a breathing monitor was due and should have been provided.

"The complaint thus cannot be read to allege that Aetna made an administrative decision to deny a benefit due under the plan," Gawthrop wrote. "Thus, plaintiffs' claim is not completely preempted by ERISA."

The same was true for the alleged disincentive policy, Gawthrop said, in which the plaintiffs allege that Aetna "adopted and/or enforced rules, regulations and procedures which established disincentives to doctors," but never alleged that the policy denied them any benefit due under the terms of the plan.

In conclusion, Gawthrop wrote, "plaintiffs have thus not brought a claim for benefits, but rather seek a remedy for damage caused by Aetna's negligence in the way that it structured its plan -- a structure that allegedly led participating physicians to render inadequate medical care to plan beneficiaries. As such, it is not a claim to which complete preemption applies."

(Copies of the 12-page opinion in DeLucia v. St. Luke's Hospital et al., PICS NO. 99-1015, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases not available until 1 p.m.)