Fordham H.E.A.L.S.
Fordham University School of Law

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To Whom It May Concern:

My name is Domna Antoniadis and I am writing on behalf of Fordham Health, Education, Advocacy and Law Society, a student run organization at Fordham University School of Law. I am writing because we think The Wellstone Act should outline methods of enforcement and remedies available in the event of a breach by a utilization review organization.

Will ERISA be amended to include a remedy should an individual be denied coverage under the Wellstone Act? May an individual seek damages or is there only equitable relief? The rule states that "if the state law provides for more protection than the federal law, it is not preempted." Does this mean that the state law regulating the parity benefit is not preempted by ERISA? If ERISA is not amended and does in fact preempt recovery for breach of the Wellstone Act, or of state parity laws, then what incentive will be used to ensure that the parity laws are followed?

ERISA's wide preemption clause extends to any claim that "relates to" an employee benefit plan. Most mental health benefits are made available from an ERISA plan thus limiting the possible remedy to those stipulated under ERISA. Although ERISA has a "savings clause" which allows states to regulate insurance, the Supreme Court has not extended this to utilization review by insurance companies. In Aetna v. Davila, the plaintiff was denied relief under state law because the Court struck down the argument that the complained of actions arose separately from ERISA. The suit was brought under a state law implying that the plans "controlled, influenced, participated in and made decisions which affected the quality of the diagnosis, care, and treatment" in a manner than violated "the duty of ordinary care..." The Court ruled that although the decisions may have been medical in nature, the individual would not have even had the medical benefits if not for the employee benefit plan. Since the alleged breach occurred in relation to the ERISA regulated benefit plan, it was considered within the scoop of ERISA law.

ERISA preemption of insurance utilization review prevents states from enforcing insurance law. In Davila, Justice Ginsburg in her concurring opinion stated, "I also join the 'rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled regime.' Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the 'equitable relief'...a 'regulatory vacuum exists: 'Virtually all state law remedies are preempted but very few federal substitutes are provided."

We feel that MBHO's (managed behavioral healthcare organizations) should not be included in the ERISA preemption clause (ERISA was established prior to the huge MBHO movement but has not been updated accordingly). At the moment, ERISA preemption limits recovery against MBHO negligence to only denied benefits (and sometimes attorney fees). As many of you know,

especially in mental health managed care, utilization review is often done as a prior authorization, not retroactive authorization. As a result individuals often do not receive the treatment. The current ERISA standard does not address how to rectify this type of wrongful denial of treatment. If ERISA does not provide an adequate remedy for utilization review misconduct (such as inefficient adherence to parity laws) then a state must be able to enforce these laws.

Thank you for taking the time to consider our comments.

Best Regards,

Domna Antoniadis
President
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Health, Education, Advocacy & Law Society