

ERISA Preemption: Going, Going...Almost Gone?

By Rhonda D. Orin

The U.S. Supreme Court knocked another hole in the wall of ERISA preemption on June 20 when it handed down its landmark decision in *Rush Prudential HMO, Inc. v. Moran*, 122 S.Ct. 2151 (2002).

In *Moran*, the Supreme Court determined that state laws mandating external review of certain denials were not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"). In a 5-4 decision, the Supreme Court ruled that these laws regulated insurance and therefore were saved from preemption.

Importance of Decision

This decision is important for many different reasons.

First, this decision validates laws that already exist in more than 40 states. While these laws vary widely from one state to another, they generally establish procedures for claimants to obtain neutral, third-party reviews of certain types of coverage denials. The denials that usually are subject to these laws are denials on grounds of "medical necessity" or "experimental or investigational" procedures.

All of these laws would have become unenforceable, in effect, had the Supreme Court reached the opposite determination on preemption.

Second, this decision makes clear that HMOs (and, potentially, other types of managed care organizations as well) are to be treated as insurance companies, and therefore are subject to many of the same laws and regulations that apply to insurance companies. The decision overtly rejected Rush Prudential's claims that it is a "a contractor that provides only administrative services" and "a sort of medical matchmaker, bringing together ERISA plans and medical care providers" – but *not* an insurance company. *Id.* at 2162. The Supreme Court held that "HMOs have taken over much business formerly performed by traditional indemnity insurers" and they must be viewed as such for purposes of laws and regulations.

Writing on behalf of the majority, Justice Souter explained — somewhat dryly: "[E]ven a matchmaking HMO would fall within the insurance industry." *Id.* at 2164.

Third, this decision is important because it marks yet another occasion in which the Supreme Court has narrowed the scope of ERISA preemption. The Supreme Court has been doing so for years now. Nevertheless, each new decision seems to echo louder than the one before.

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The following is a brief summary of what even insurance industry representatives are forced to acknowledge as a trend:

- *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985): ruling that state mandated-benefit laws are not preempted by ERISA;
- *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999): ruling that state laws regarding late notice are not preempted by ERISA;
- *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999): ruling that federal and state RICO ("Racketeering Influenced and Corrupt Organizations") laws are not preempted by ERISA;
- *Pegram v. Herdrich*, 530 U.S. 211 (1999): establishing that state malpractice laws are not preempted by ERISA; and now
- *Rush Prudential HMO, Inc. v. Moran*, 122 S.Ct. 2151 (2002): ruling that state external-review laws are not preempted by ERISA.

The Trend

This trend has enormous ramifications because preemption has long been viewed as a tremendous advantage for insurance companies and managed care organizations. Preemption, at least until now, has protected insurance companies and managed care organizations from being held accountable for their wrongful actions like ordinary businesses: through the tort system. This is so because, among other things: (a) ERISA does not permit the award of damages; (b) the only remedies allowed are for payment of the benefits that were wrongfully denied, equitable relief, and attorneys fees; (c) there is exclusive federal court jurisdiction; and (d) there is no right to a jury trial.

Conclusion

In light of the Supreme Court's recent attacks on preemption, and the overall importance of the *Moran* decision, changes are likely to occur in the healthcare industry. It is difficult to predict what form the changes will take. But, for those who watch and wait, the answers should emerge fairly soon. ■

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