

MAYER, BROWN, ROWE & MAW LLP'S
SUPREME COURT DOCKET REPORT
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Today the Supreme Court granted certiorari in three cases of potential interest to the business community, two of which were consolidated. Amicus briefs in support of the petitioners are due on Thursday, December 18, 2003, and amicus briefs in support of the respondents are due on Thursday, January 22, 2004. Any questions about these cases should be directed to Miriam Nemetz (202-263-3253) or Richard Katskee (202-263-3227) in our Washington office.

1. *ERISA — Preemption — State-Law Negligence/Medical Malpractice Claims Based On Denial of Treatment Coverage.* The Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 *et seq.*, which regulates employee benefit plans, including HMO and managed care plans, completely preempts certain state-law claims. The Supreme Court granted certiorari in and consolidated two cases, *Aetna Health Inc. v. Davila*, No. 02-1845, and *Cigna HealthCare of Texas, Inc. v. Calad*, No. 03-83, to decide whether Section 502(a) of ERISA, 29 U.S.C. § 1132(a), completely preempts state-law claims against insurers for damages based upon allegedly negligent decisions by HMOs to deny coverage for medical treatment recommended by the claimants’ physicians.

Respondents Juan Davila and Ruby Calad filed separate state-court lawsuits seeking compensatory and punitive damages under the Texas Health Care Liability Act, contending that their respective insurers, Aetna Health Inc. (“Aetna”) and Cigna HealthCare of Texas, Inc. (“Cigna”), acted negligently in making medical necessity determinations. Aetna and Cigna removed the cases to federal district court, asserting that the plaintiffs’ state-law claims were completely preempted by ERISA. Plaintiffs’ motions to remand their cases were denied, and the complaints were dismissed.

The Fifth Circuit consolidated the appeals and reversed. *Roark v. Humana, Inc.*, 307 F.3d 298 (2002). According to the Fifth Circuit, a state-law claim is preempted only if it “duplicates or falls within the scope of” a claim that could have been filed under ERISA § 502(a). *Id.* at 305. The court observed that plan participants or beneficiaries can raise claims under only two provisions of ERISA: Section 502(a)(1)(B), which authorizes claims to recover plan benefits, and Section 502(a)(2), which authorizes claims for breaches of fiduciary duty. Reasoning that claims to recover benefits under Section 502(a)(1)(B) are analogous to claims for breach of contract, and that Section 502(a)(2) does not encompass claims arising from “mixed eligibility and treatment decisions” (307 F.2d at 309) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 228 (2000)), the court of appeals concluded that these provisions do not displace state-law tort claims involving “medical malpractice claims against an HMO.” *Id.*

The circuits are divided regarding whether state-law claims against HMOs for negligence or medical malpractice are preempted by ERISA. The Second and Eleventh Circuits, like the Fifth Circuit, have held that ERISA does not preempt state-law medical malpractice claims against HMOs. See *Cicio v. Doe*, 321 F.3d 83 (2d Cir. 2003), petition for cert. filed, 72 U.S.L.W. 3093 (U.S. Jul. 11, 2003) (No. 03-69); *Land v. CIGNA Healthcare of Fla.*, 339 F.3d 1286, 1293 (11th Cir. 2003). In contrast, the First, Third, Fourth, Seventh, and Eighth Circuits have concluded that ERISA does preempt such claims. See, e.g., *Hotz v. Blue Cross & Blue Shield of Massachusetts*, 292 F.3d 57 (1st Cir. 2002); *Difelice v. Aetna U.S. Healthcare*, --- F.3d ---, 2003 WL 22346402 (3d Cir. Oct 15, 2003); *Marks v. Watters*, 322 F.3d 316 (4th Cir. 2003); *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996); *Hull v. Fallon*, 188 F.3d 939 (8th Cir. 1999).

This case is important to all HMOs and managed care plans, as well as to all businesses that seek to provide health care benefits to their employees at manageable cost.

2. Administrative Procedure Act — Federal Court Authority to Compel Agency Action — Public Lands. Section 706(1) of the Administrative Procedure Act (“APA”) authorizes judicial review “to compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). The Supreme Court granted certiorari in *Norton v. Southern Utah Wilderness Alliance*, No. 03-101, to determine whether this provision allows courts to review the adequacy of an agency’s day-to-day management of public lands under statutory standards and the agency’s own land use plans.

The plaintiffs, a group of environmental organizations, sued the Bureau of Land Management under Section 706(1), alleging that the Bureau had violated the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, and the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, by failing properly to regulate the use of off-road vehicles in “Wilderness Study Areas.” Under the FLPMA, the Bureau may classify public lands as Wilderness Study Areas, which Congress later may designate for wilderness preservation; until Congress affirmatively declares or rejects a Study Area as protected wilderness, the Bureau must manage the area “so as not to impair [its] suitability * * * for preservation.” 43 U.S.C. § 1782(c). The environmental groups sought an injunction compelling the Bureau to implement provisions of its land use plans relating to the use of off-road vehicles in Wilderness Study Areas and to take a “hard look” under the NEPA at whether the agency should prepare supplemental environmental impact statements for areas affected by increased use of such vehicles.

The district court granted the Bureau’s motion to dismiss for lack of subject matter jurisdiction, reasoning that, as long as an agency is taking some steps toward fulfilling its mandatory, nondiscretionary duties, its actions are not subject to judicial review under Section 706(1). *Southern Utah Wilderness Alliance v. Babbitt*, No. 99-CV-852, 2000 WL 33914094 (D. Utah Dec. 22, 2000). The court also held that Section 706(1) does not provide a basis for challenging the Bureau’s alleged failure to implement provisions of its land use plans, and that the Bureau does not have a clear duty under the NEPA to consider whether to supplement its prior environmental impact statements.

A divided panel of the Tenth Circuit reversed and remanded the case for consideration on the merits, holding that the environmental groups could challenge the Bureau’s management of the Wilderness Study Areas under Section 706(1). *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002). In the court’s view, the Bureau has a mandatory, nondiscretionary duty under the FLPMA not to impair the suitability of those regions for designation as protected wilderness — a duty that is therefore enforceable under Section 706(1). *Id.* at 1229, 1233. The Tenth Circuit also concluded that the district court had subject matter jurisdiction to consider claims that the Bureau had violated its own land-use plans (*id.* at 1235) and that the district court had erred in holding that the environmental groups had failed to state a valid claim under the NEPA (*id.* at 1236-40). Judge McKay dissented in part, opining that Section 706(1) should not become a jurisdictional vehicle for programmatic attacks on day-to-day agency operations. *Id.* at 1242-43. In the dissent’s view, that section authorizes challenges to true administrative inaction, but does not allow judicial review of agency efforts that allegedly do not satisfy completely the agency’s statutory obligations. *Id.* at 1243.

This case most concretely affects businesses having interests relating to the government’s management of public lands. Because the Supreme Court may clarify the circumstances under which any agency may be judicially compelled to comply with statutory obligations in the conduct of its day-to-day operations, however, this case also may affect many other businesses subject to ongoing regulatory oversight.

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