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## HEALTH LAW

### ERISA's Effect on Claims of Injury due to Denial of Coverage

Ilene C. Albala, MBe, JD

*But whatever the HMO, there must be rationing and inducement to ration [1].*

Rationing has become a dirty word, though many argue that rationing is necessary if we wish to improve the American health care system [2]. Supporters of the new health care act, the Patient Protection and Affordable Care Act (ACA), are resolute in their stance that the act does not promote rationing [3]. Yet the Supreme Court already recognizes that rationing plays a crucial part in the health care system [4]. In the famous United States Supreme Court case *Pegram v. Herdrich*, Justice David Souter wrote about the pivotal role of rationing in managed care organizations, contending that “no HMO organization could survive without some incentive connecting physician reward with treatment rationing” [5].

While it has described the critical role of rationing in managed care organizations, the Supreme Court remains unwilling to condemn or condone the practice. In the past 11 years, the Court has heard three cases related to health care rationing—*Pegram v. Herdrich*; *Rush Prudential HMO, Inc. v. Moran*; and *Aetna Health Inc. v. Davila* [5-7]. These three cases focus on the liability of managed care organizations for refusal to cover or reimburse certain medical procedures. In each case plaintiffs sought redress for injuries allegedly caused by HMOs' delay or denial of medical services. While these cases are seemingly straightforward claims of negligence due to HMOs rationing coverage, they have been anything but.

Complicating these claims of liability for managed care organizations that deny reimbursement or coverage of medical services is the ever-perplexing ERISA legislation. The Employee Retirement Income and Security Act (ERISA), enacted to protect employee pension plans and retirement benefits, also encompasses employee “welfare benefit plans,” their medical and disability benefits [8, 9]. Because ERISA is a federal regulation, including “welfare benefit plans” meant that the legislation could preempt certain aspects of state laws that govern medical insurance. With little guidance from legislators as to which areas of state insurance laws ERISA can supersede, courts have been left with the task of interpreting ERISA preemption.

In *Pegram v. Herdrich*, the plaintiff sued her HMO for medical malpractice after she suffered from peritonitis allegedly caused by her physician's delay in ordering an ultrasound to determine the cause of her stomach pain. Ms. Herdrich alleged that the physician's delay was due to the HMO's practice of reducing costs by creating incentives for physicians to limit medical treatment—in other words, rationing.

While the issue for the plaintiff was one of negligence due to rationing, the question of law before the Supreme Court was *not* whether the delay in medical services was negligent, but rather whether an HMO, acting through its physician employees, qualifies as a fiduciary under ERISA [10].

The unanimous Court, though, did not ignore the issue of rationing completely. Justice Souter commented on rationing, describing it as a necessity:

Since inducement to ration care goes to the very point of any HMO scheme, and rationing necessarily raises some risks while reducing others (ruptured appendixes are more likely; unnecessary appendectomies are less so), any legal principle purporting to draw a line between good and bad HMOs would embody, in effect, a judgment about socially acceptable medical risk [11].

However, he went on to say that this was not a judgment that the Court was willing to make. Instead, Justice Souter wrote that the judiciary should avoid deciding issues of acceptable levels of rationing in the health care context. The Court instead stated that, if anyone should determine this threshold, it should be the legislative branch, with its “preferable forum for comprehensive investigations and judgments of social value” [12].

Two years following *Pegram*, the Court decided *Rush Prudential HMO, Inc. v. Moran*, in which Justice Souter again delivered the majority opinion (this time 5-4). Here again, the Court deferred to the physician’s judgment, once again confounded by ERISA preemption law.

The Supreme Court addressed the issue for a third time in 2004, when the nine Justices unanimously decided *Aetna Health Inc. v. Davila*. The Court held that a patient-employee, who was allegedly injured after a denial of coverage for medical services, had no claim for damages because the claim was preempted by ERISA. There were two companion cases in *Davila* brought by respondents Juan Davila and Ruby Calad. Both respondents allegedly suffered from injuries arising from their HMOs’ decisions not to cover their medical treatments, contradicting their physician’s recommendations.

Juan Davila suffered from arthritis, and, when his physician prescribed Vioxx, Davila’s HMO refused to cover the expense, offering instead to pay for a cheaper drug. Davila subsequently had a severe reaction to the drug and sued the HMO, Aetna, under a Texas statute that held HMOs to an “ordinary” standard of care. Once again, the question became not whether rationing of medical services that allegedly created injuries was lawful, but rather whether or not ERISA preempted state law. The holding indicated that future patients who bring legal actions against their managed care organizations will be limited to a recovery in the amount of the reimbursement of the unjustly denied payment [13].

## Conclusion

While ERISA was designed to protect employee retirement and pension plans, the effect on patients has been anything but protective. Applied in the health care context, ERISA has created a loophole through which managed care organizations can escape liability for full compensatory damages solely because the patient is insured by his or her employer. Yet hope is not lost. Justices Ruth Ginsburg and Stephen Breyer recognized this “regulatory vacuum” in their concurrence in *Davila* as they joined the “rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime” [14].

The day that the Supreme Court announced its decision in *Davila*, Congress reacted. Representative John Dingell (D-MI) reintroduced a patients’ bill of rights that would attempt to fix this gap in patient protection [15]. Since then however, little progress has been made and the loophole remains.

Physicians are seemingly left out. A real consequence of ERISA is that physicians could be exposed to malpractice claims, since the act shields MCOs while leaving physicians to bear responsibility for these negligence claims.

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Ilene C. Albala, MBe, JD, is pursuing a doctoral degree in public health at Columbia University's Mailman School in New York. She is also a legal fellow at the New York Legal Assistance Group, where she conducts research for the LegalHealth division.

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