

ERISA Ruling Signals Change In 5th Circ. Preemption Analysis

By **Thomas Hardy and Martin Bishop**

In *Dialysis Newco Inc. v. Community Health Systems Inc. Group Health Plan et al.*,^[1] the U.S. Court of Appeals for the Fifth Circuit held that the Employee Retirement Income Security Act expressly preempts a Tennessee statute that barred anti-assignment clauses in insurance policies, as applied to the self-funded benefit plan at issue. Importantly, the court distinguished a previous decision that many viewed as establishing that such statutes are not preempted.



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This likely signals a change in the Fifth Circuit's ERISA preemption analysis to bring it in line with the U.S. Supreme Court's 2016 ruling in *Gobeille v. Liberty Mutual Insurance Co.*^[2]. The change also brings the Fifth Circuit in line with the Eighth and Tenth Circuits, which have both held that ERISA preempts statutes that prohibit assignment of benefit plan rights, and effectively overrules a prior Fifth Circuit case that held a similar Louisiana statute was not preempted. The case thus ends a circuit split and acknowledges that *Gobeille* represents a shift in favor of a broader application of ERISA's preemption provision.



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In *Gobeille*, the Supreme Court recognized that it had previously applied a presumption against preemption and in favor of state insurance law, but held that "[any] presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation." The Fifth Circuit viewed this as a change in course on ERISA preemption and ran with it.

Dialysis Newco involved a dispute among an out-of-network dialysis provider, an ERISA health care benefit plan, and a third-party administrator, with the provider alleging that the plan and administrator had underpaid its benefit claims. The provider relied on an assignment of the patient's rights under the plan to assert a benefit claim under ERISA.

The defendants argued that the provider lacked standing to sue, because the plan contained an anti-assignment clause. After first finding that the anti-assignment clause was ambiguous and therefore should be construed against the plan, the U.S. District Court for the Southern District of Texas held that a Tennessee statute barred the plan from enforcing the anti-assignment clause and rejected the defendants' argument that ERISA preempts the Tennessee statute.

The defendants appealed, and the Fifth Circuit overturned the district court on both grounds. The court first examined the plan's anti-assignment clause, which authorized the administrator to directly pay the provider but prohibited the member from assigning rights under the plan to providers.

The district court had held that these two provisions were in conflict, creating an ambiguity that should be construed against the plan to make the clause unenforceable. The Fifth Circuit disagreed, finding that the direct payment authorization and anti-assignment clauses dealt with entirely distinct issues, and that a direct payment authorization did not create any rights in the provider beyond the right to receive benefit payments. As a corollary, the court held that a right to direct payment does not include the right to sue to recover those

payments.

The court then took up the district court's no-preemption holding regarding the Tennessee statute. The Fifth Circuit had previously addressed the issue in an earlier decision, *Louisiana Health Service & Indemnity Co. v. Rapides Healthcare System*,^[3] in which it held that a Louisiana statute that barred anti-assignment provisions was not preempted by ERISA.

Notably, in *Rapides*, the Fifth Circuit found that the Louisiana statute had at most a minimal impact on nationwide uniform plan administration that did not justify preemption. The *Rapides* court also took what it viewed as a conservative approach to preemption, in light of the U.S. Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,^[4] which underscored that ERISA does not override the primacy of state law in regulating insurance.

The *Rapides* case has since been widely understood to mean that statutes prohibiting anti-assignment clauses are not subject to ERISA preemption, which has led many insurers to either not include such clauses in insured ERISA plans or to not rely on them when they do include them.

The court determined that *Rapides* is limited to its facts, and that the Tennessee statute does have an impermissible relation to an ERISA plan due to its impact on nationwide uniform plan administration. To get there, the court reframed *Rapides* as dealing with a "Louisiana statute which required insurance companies to honor direct-payment authorizations," and not a statute that required plans to honor assignments of rights under the plan. The court relied heavily on its earlier holding that direct payment authorization and assignment of benefits are distinct concepts.

Ultimately, the court's perception of a shift in Supreme Court jurisprudence regarding ERISA preemption tilted the balance. The court determined that, in *Gobeille*, the Supreme Court threw out the then-prevailing presumption against preemption in favor of state regulation of insurance that earlier cases like *Travelers* embodied.

The Fifth Circuit therefore held that the Tennessee statute impermissibly "purports to eliminate the choice of one method of structuring benefits, by forcing plan administrators to interact with — and potentially be sued by — providers who are not in their networks nor otherwise in contractual privity with them." Since "[mandating] that plan administrators must assume liability to be sued by third-party providers who are not in privity of contract with them impacts a central matter of plan administration," and because states have varying statutory requirements concerning assignments, the Tennessee statute has an impermissible impact on nationwide uniform plan administration — and therefore is preempted.

As a result, the Fifth Circuit "[declined] to extend *Rapides*'s reasoning to the facts of this case." However, it made clear in a footnote that *Rapides* and *Travelers* both remain good law.

The Fifth Circuit's decision is important on multiple levels. At the highest level, it signals that the court views *Gobeille* as marking a shift in favor of a broader scope for ERISA preemption — an approach that likely will broaden the court's application of ERISA preemption in future cases. None of the other circuit courts appear to have wrestled with *Gobeille*'s impact on the presumption against preemption, but a few district courts have cited *Gobeille* as affirming the presumption. Litigants in all jurisdictions will no doubt cite *Dialysis Newco* to argue against a presumption, so it will be interesting to see whether other

circuits agree with the Fifth Circuit's approach.

At another level, one cannot help but read the opinion and feel that the court would decide Rapides differently today. For instance, a Texas statute bars insurers from issuing policies that prohibit participants from "making a written assignment of benefits," but Dialysis Newco strongly suggests that this statute is preempted as applied to ERISA plans.[5] Insurers in Texas and states with similar statutes may feel emboldened to enforce such clauses when they appear in ERISA plans, given that the Fifth Circuit's rationale seemingly should apply to preempt all such statutes.

At yet another level, Dialysis Newco may put to an end to the persistent argument from providers that direct payment of benefits by an administrator to a provider prevents the plan from relying on an otherwise valid anti-assignment provision, given the Fifth Circuit's clear demarcation between the right to direct payment and the right to sue under the plan. While not perhaps the court's most important holding, it brings the Fifth Circuit in line with other courts that have made the same distinction and should make it more difficult for out-of-network providers to assert claims by assignment in the face of an anti-assignment provision.

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[1] Dialysis Newco, Inc. v. Community Health Systems Group Health Plan et al., No. 18-40863 (5th Cir. Sept. 11, 2019).

[2] Gobeille v. Liberty Mutual Ins. Co., 136 S. Ct. 936 (2016).

[3] Louisiana Health Serv. & Indem. Co. v. Rapides Healthcare Sys., 461 F.3d 529 (5th Cir. 2006).

[4] New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

[5] Tex. Ins. Code § 1204.053.