August 2005

CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
Suite 420
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037-1175
202.861.0900

ebglaw.com

## The United States Court of Appeals for the Eighth Circuit Rules Arkansas Any-Willing-Provider Law Cannot Not Apply to Self-Funded ERISA Benefit Plans

On June 29, 2005, the United States Court of Appeals for the Eighth Circuit, in *Prudential Ins. Co. of Am. v. National Park Med. Ctr.*, No. 04-1464, (*"Prudential II")* held that Arkansas' any-willing-provider statute should continue to be permanently enjoined as to self-funded employee health benefit plans subject to ERISA. The Court affirmed its earlier holding that Arkansas' so-called Patient Protection Act of 1995 ("PPA") is preempted by ERISA as applied to self-insured plans, and that the PPA, when so applied, does not fall within ERISA's savings clause that exempts state insurance laws from ERISA preemption. The *Prudential II* decision affirms that ***all*** state laws that have the effect of regulating, directly ***or indirectly***, uninsured – *i.e.* self-funded – benefit plans are preempted by ERISA.

### Background

The PPA requires health care insurers to allow into their limited provider networks all health care providers who are willing to accept the insurer's terms and conditions of participation. Upon the passage of the PPA, Daly D.E. Temchine of Epstein Becker & Green, P.C. ("EBG") was retained by Prudential Insurance Company of America, its Arkansas HMO affiliate, two labor unions and Tyson Foods, Inc., a large multi-state employer who sponsors a self-funded health plan which covers eligible employees and their dependents in many states, to prevent the enforcement of the PPA.

EBG filed a federal lawsuit on its clients' behalf asserting that the PPA was preempted under ERISA because it was a state law that interfered with the design and administration of health benefit plans subject to ERISA. Just about all private employer sponsored benefit plans are subject to ERISA.

The United States District Court in Little Rock, Arkansas, agreed with EBG's argument that the PPA was preempted by ERISA. An appeal from that ruling was taken by the State and the health care providers who had sought passage of the PPA. In 1998, the United States Court of Appeals for the Eighth Circuit held that the PPA was preempted in its

entirety, and directed the District Court to enter a permanent injunction prohibiting the enforcement of the PPA (*"Prudential I"*).

Following the United States Supreme Court's decision in *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003) (*"Miller"*), in which a Kentucky state law similar to the PPA was found not to be preempted by ERISA, the defendants in *Prudential I* and the State of Arkansas sought to have the injunction entered in *Prudential I* terminated. They argued that the *Miller* decision had overruled the Eighth Circuit's reasoning in *Prudential I*. The Supreme Court in its *Miller* decision characterized access to an expanded universe of providers as a form of benefit to insureds subject to the states' authority to regulate insurance. The District Court granted the motion to dissolve the injunction on the basis of the *Miller* decision. Tyson then retained EBG to pursue an appeal with the goal of preserving the capacity of its self-funded benefit plan to operate free of state law interference. The decision resulting from this appeal (*"Prudential II"*) is the subject of this Alert.

**The Decision in *Prudential II***

EBG's primary argument to the Eighth Circuit on behalf of Tyson was that the Supreme Court's decision in *Miller* could only apply to insured plans, and not to self-funded plans like the Tyson Plan. This, it argued, was the only permissible reading of both the *Miller* decision and of the ERISA statute itself because of the effect of an ERISA provision known as the "Deemer Clause." The Deemer Clause prohibits the states from treating – "deeming" – self-funded ERISA plans as if they were insured benefit plans. The critical consequence of this prohibition is that, although the states can indirectly regulate insured ERISA benefit plans by reason of their ability to regulate the insurance such plans purchase, they have no ability to achieve even such indirect regulation of self-insured plans because the states cannot treat them as if they were an insurance product.

EBG further argued that, even if a self-funded ERISA plan utilizes the administrative services of insurance companies, including the purchase of access to limited components of the insurer's provider network, it cannot be subjected to any state laws, including those that purport to regulate insurance. The thrust of EBG's argument was that, as long as no coverage obligation – i.e., insurance – was purchased from insurers by self-funded plans, the states were proscribed from even indirectly regulating the conduct of their affairs by those plans. Thus, the PPA, as applied to self-funded plans, was not saved from ERISA preemption.

The Eighth Circuit agreed with EBG's position on behalf of Tyson. It ruled that the injunction against the PPA was to be lifted to the extent the PPA applied to ***insured*** plans. It went on to hold in *Prudential II*, however, that ERISA completely preempts: (1) the ability of the states to directly or indirectly regulate self-funded benefit plans; and (2) the PPA's civil penalty provisions as applied to suits that could have been brought under ERISA section 502 (the section containing ERISA's remedial provisions for benefit denial and breach of fiduciary duty).

**Analysis and Implications of the Decision in *Prudential II***

The *Prudential II* decision confirms that multi-state employers who desire to provide employee benefit plans with uniform benefits for all of their employees, wherever they are located, and to have their plans administered on a consistent basis in all of the states in which their plans' participants and beneficiaries are found, can achieve those goals through a self-funded benefit plan. The holding of *Prudential II* makes clear, for example, that employers who sponsor self-funded plans cannot be required to cover benefits mandated by state insurance laws, even if they utilize the services of a carrier for administrative purposes such as claims processing

or utilization management. Employers thus can sponsor less costly benefit structures, rather than have as their only alternative to very costly benefit plans, not offering any benefits at all. As the cost of health care benefits continues to rise at double digit inflationary rates, this concern is becoming a major issue for more and more employers.

In light of the flexibility and potential for cost savings that self-funded plans can provide to employers under the protection of the Deemer Clause of ERISA, the creation of such benefit plans warrants serious consideration by employers. The category of "self-funded benefit plan" does not imply that employers cannot limit the risk that they bear in connection with their support of the benefits such plans may cover. There are a variety of methods through which employers can create self-funded benefit plans, each of which is both compliant with ERISA, immune to state regulation, and which provides for sensible and adequate benefits to employees for a fixed and determinable cost to employers.

* * *

Should you have any questions, or would like to discuss the utility and flexibility of self-funded ERISA health benefit plans, please call or contact **Daly D.E. Temchine** in our Washington, D.C. office at 202/861-1837, **dtemchine@ebglaw.com**, or via facsimile at 202/296-2882.