Oral Argument Preview: *Ghee v. USAble Mutual Insurance Co.* Alabama Supreme Court

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Billy Fleming went to the emergency room on June 11, 2013, complaining of severe abdominal pain.[1] Following nonsurgical treatment, his physicians scheduled a colectomy, the removal of all or part of the colon.[2] Blue Advantage, the company in charge of Fleming's employee health-insurance coverage, determined that nonsurgical treatment was appropriate, denied coverage of the surgery, and told Fleming to go to the emergency room if his pain worsened.[3] Fleming returned to the emergency room on July 15, 2013, where he appeared in distress.[4] Fleming died on July 16, 2013, and an autopsy showed his cause of death was "septic shock" resulting from a ruptured intestine.[5]

Douglas Ghee, on behalf of Fleming's estate, sued Blue Advantage for the wrongful death of Fleming caused by medical malpractice.[6] Blue Advantage moved to dismiss the claim on the ground that the Employee Retirement Income Security Act ("ERISA") preempted the wrongful death claim.[7] ERISA is a federal law that regulates the operation of a health insurance benefit plan if an employer provides one for its employees.[8] The trial court agreed with Blue Advantage and dismissed the wrongful death claim, ruling that the claim was preempted by ERISA.[9] Ghee appealed to the Alabama Supreme Court on October 26, 2016.[10]

On appeal, Ghee first raises the issue of whether Ghee's wrongful death claim "relates to" an ERISA plan.[11] Ghee argues that the claim does not "relate to" an ERISA plan because Ghee claims Blue Advantage voluntarily interjected itself as a health care provider for Fleming, a duty

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[1] Brief of Appellant at 12, Ghee v. USAble Mutual Insurance Co., No. 1160082 (Ala. Feb. 16, 2016).

[2] Brief of Appellee at 1, Ghee v. USAble Mutual Insurance Co., No. 1160082 (Ala. Jan. 20, 2017).

[3] Brief of Appellee, *supra* note 2, at 13.

[4] Brief of Appellee, *supra* note 2, at 13.

[5] Brief of Appellant, *supra* note 1, at 11, 14.

[6] Brief of Appellant, *supra* note 1, at 2.

[7] Brief of Appellee, *supra* note 2, at 5.

[8] *See* 29 U.S.C. § 1144 (2012).

[9] Brief of Appellee, *supra* note2, at 6.

[10] Brief of Appellant, *supra* note 1, at 8.

[11] Brief of Appellant, *supra* note 1, at 24.

beyond the plan, when it determined surgery to be unnecessary.[12] Additionally, Ghee argues the claims are unrelated to whether Blue Advantage had to pay for surgery under the plan and is unrelated to the terms of the plan.[13] Thus, Ghee argues that because Blue Advantage made a medical treatment decision instead of a plan-related benefits decision, the wrongful death claim should not be preempted by ERISA.[14]

Blue Advantage argues that Ghee's claim arises out of the denial of surgery, an ERISA plan benefit, and is therefore related to an ERISA plan.[15] Additionally, Blue Advantage argues that a personal representative can only bring a wrongful death claim if the decedent could have done so himself, had he lived.[16] As Fleming could not have brought a wrongful death claim if he had lived, Blue Advantage argues the claim is therefore preempted by ERISA.[17]

The second major issue raised is how *Aetna Health Inc. v. Davila* applies to this case. Ghee argues that Blue Advantage heavily relied on *Davila* and that his claims differ from those in *Davila*.[18] Ghee asserts that the U.S. Supreme Court held in *Davila* that the plaintiff's claims were preempted because they brought suit only to "rectify a wrongful denial of benefits promised under ERISA-regulated plans, and did not attempt to remedy any violation of a legal duty independent of ERISA . . . ."[19] Thus, Ghee argues that, under *Davila*, a health insurer can still be liable when it can be deemed to be a treating physician or when it can be deemed to be a treating physician's employer.[20]

Blue Advantage argues that the ultimate holding in *Davila* forecloses Ghee's claim.[21] Blue Advantage states the *Davila* holding concludes that "[h]ere, however, petitioners are neither respondents' treating physicians nor the employers of respondents' treating physicians. Petitioners' coverage decisions, then, are pure eligibility decisions . . . ."[22] Blue Advantage thus argues that it was not Fleming's treating physician and that *Davila* forecloses Ghee's claim because Ghee does not provide any authority showing that Blue

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[12] Brief of Appellant, *supra* note 1, at 24–25.
[13] *See* Brief of Appellant, *supra* note 1, at 26–28 ("These duties are independent and separate from Blue Cross's duties under ERISA because they are unrelated to the issue whether Blue Cross was required to pay for a surgery under the plan. Ghee's claims do not derive from the Blue Cross plan or require investigation into the terms of the Blue Cross plan.").
[14] Brief of Appellant, *supra* note 1, at 30.
[15] Brief of Appellee, *supra* note 2, at 25.
[16] Brief of Appellee, *supra* note 2, at 48–49.
[17] Brief of Appellee, *supra* note 2, at 53.
[18] Brief of Appellant, *supra* note 1, at 37.
[19] Brief of Appellant, *supra* note 1, at 38.
[20] Brief of Appellant, *supra* note 1, at 39-40.
[21] Brief of Appellee, *supra* note 2, at 37.
[22] Brief of Appellee, *supra* note 2, at 38–39.

Advantage would be deemed a treating physician under the facts of this case.[23]

Ghee also raises the issue of whether he was entitled to conduct discovery before his claim was dismissed on the merits.[24] Ghee argues that Blue Advantage's affirmative defense of preemption could not have been raised in a Rule 12(b)(6) motion to dismiss.[25] In support, Ghee cites *Lloyd Noland v. HealthSouth* for the proposition that "[s]ince facts necessary to establish an affirmative defense generally must be shown by matters outside the complaint, the defense technically cannot be adjudicated on a motion under Rule 12."[26] Ghee thus argues that the motion should have been treated as a motion for summary judgment.[27] Ghee additionally argues the motion should have been a motion for summary judgment because Blue Advantage produced its ERISA plan and summary of benefits, exclusions, and procedures for resolving claims under the plan in support of its defense, converting its motion to dismiss into a summary judgment motion by producing documents outside the pleadings.[28]

Blue Advantage argues that an affirmative defense can be used under Rule 12(b)(6) when the "defense appears clearly on the face of the pleading."[29] Blue Advantage argues that the affirmative defense of preemption appears clearly on the face of the complaint because the allegations in Ghee's complaint, the documents, and the applicable law "establish that Ghee's wrongful death claim 'relates to' Blue Advantage's administration of the Wal-Mart ERISA Plan."[30] Blue Advantage also argues the documents were properly before the court because Ghee's complaint includes allegations about Fleming's plan coverage and benefits.[31] Thus, Blue Advantage asserts that the documents were referred to in Ghee's complaint and central to his claim and were therefore able to be considered on a motion to dismiss without converting it to summary judgment.[32]

Oral arguments in *Ghee v. USAble Mutual Insurance Co.* will be held before the Alabama Supreme Court on September 26, 2018. The event will take place at the Leslie S. Wright Center on the campus of Samford

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[23] Brief of Appellee, *supra* note 2, at 39–41.
[24] Brief of Appellant, *supra* note 1, at 49.
[25] Brief of Appellant, *supra* note 1, at 49.
[26] Brief of Appellant, *supra* note 1, at 49–50 (quoting Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 791 (Ala. 2007)).
[27] Brief of Appellant, *supra* note 1, at 52 (citing 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1366 (3d ed. 2004)).
[28] Brief of Appellant, *supra* note 1, at 53.
[29] Brief of Appellee, *supra* note 2, at 53 (quoting *HealthSouth Corp.*, 979 So. 2d at 791).
[30] Brief of Appellee, *supra* note 2, at 54–55 (citing *HealthSouth Corp.*, 979 So. 2d at 791).
[31] Brief of Appellee, *supra* note 2, at 56.
[32] Brief of Appellee, *supra* note 2, at 55–56.

University. Oral arguments will begin at 9 a.m. and will last until 12 p.m. The event, hosted by Cumberland School of Law, the Birmingham Bar Foundation, and Appellate Courts of Alabama, is free and open to the public. The *Cumberland Law Review* is privileged to publish these case summaries in anticipation of the oral arguments and will also report on the appellate courts' decisions following oral arguments.