

Michael H. Bernstein
Partner, New York, New York

Healthcare Law
 ERISA Litigation
 Managed Care Litigation
 Life, Health and Disability Benefits Disputes



MICHAEL H. BERNSTEIN

212.422.0202 tel

212.422.0925 fax

michael.bernstein@sedgwicklaw.com

Current Scope of Practice

Michael H. Bernstein practices in the areas of healthcare, ERISA and managed care litigation and related insurance coverage issues. He counsels employee benefit plan administrators and fiduciaries concerning ERISA, employee benefits and health care issues. He has successfully defended life, health and disability claims brought against plan administrators, employers and managed care organizations.

Litigation Matters

Mr. Bernstein obtained the dismissal of a putative class action against our client, a major insurer, in U.S. District Court (SDNY). Plaintiffs alleged that our client had breached its fiduciary duties under ERISA by paying life insurance benefits by issuing to beneficiaries a checkbook to access a fully funded account instead of a lump-sum settlement check. Mr. Bernstein convinced the court that payment via checkbook account was the payment methodology required by the putative class representative's respective life insurance benefit plans, so paying benefits in this manner did not violate any ERISA fiduciary duty. The court also found that the plaintiffs lacked Article III constitutional standing to seek disgorgement and restitution because neither had suffered an injury-in-fact.

Addressing an issue of first impression for the circuit, the U.S. Circuit Court of Appeals for the Second Circuit affirmed a judgment that Mr. Bernstein obtained for our client in a precedential ruling, upholding the explicit terms of a benefits plan's limitations period. Plaintiff filed an ERISA suit in the U.S. District Court (SDNY) to challenge denial of long-term disability benefits by our clients, an insurance carrier and a long-term disability plan. The district court agreed with our clients, holding that judicial deference must be given to written plan terms regarding the start dates for the commencement of policy limitations periods. The Second Circuit ruled that the Department of Labor regulations allow ample time for plan participants to challenge an adverse benefit decision and still file a timely lawsuit, even though their plan limitations period may be running while they exhaust administrative remedies..

Mr. Bernstein obtained summary judgment for our client, a major insurer, in an ERISA action where plaintiff sought to continue long-term disability (LTD) benefits under an employee welfare benefit plan administered by our client. Our client also sought to recover an overpayment of LTD benefits caused by plaintiff's simultaneous receipt of a retroactive Social Security Disability Income award. Mr. Bernstein demonstrated

that our client had properly exercised its discretion in denying her claim for continuing LTD benefits, and the court also granted summary judgment on our equitable restitution counterclaim seeking return of overpaid benefits.

Mr. Bernstein obtained a dismissal with prejudice of a putative national class action on behalf of our client, a health plan, in a claim of wrongfully denied mental healthcare benefits filed in federal court. Plaintiff, an enrollee in his employer-sponsored health insurance plan, alleged that our client systematically and wrongfully denied in-patient mental healthcare benefits to plan beneficiaries, such as plaintiff's daughter, who suffered from eating disorders. Our client denied coverage for this out-of-network treatment because it was not covered by the plan. Sedgwick successfully moved for dismissal on the grounds that the plan terms were unambiguous and that the treatment in question was not covered.

On behalf of our client, a managed care entity, Mr. Bernstein obtained summary judgment, dismissing plaintiffs' ERISA claims seeking payment of \$11 million in hospital bills. Mr. Bernstein argued that the hours-worked eligibility requirement of the health benefit plan in question applied to all similarly situated participants and thus, our client's denial of coverage did not violate the HIPAA non-discrimination rules. The court agreed and dismissed the plaintiff's claims.

Mr. Bernstein obtained summary judgment on behalf of the insurer of a bankrupt long-term disability (LTD) plan in a case which presented a novel question concerning a claim for LTD benefits against an ERISA plan that was terminated by reason of the employer's bankruptcy. Plaintiff sought recourse against our client, but the court agreed with Mr. Bernstein's argument that the insurer, who did not insure or administrate the new disability plan formed under the employer's bankruptcy reorganization plan, was not a proper party.

Mr. Bernstein successfully defeated plaintiff's motion for leave to amend her complaint to allege a class action on behalf of a putative national class of ERISA welfare benefit plan participants who allegedly had not been properly paid long-term disability (LTD) benefits by our client, the insurer. Sedgwick argued and proved that the benefit plan at issue unambiguously permitted offsets in the amount of Social Security Disability Income payments made to participants' dependent children to be deducted from plaintiff's monthly LTD benefit award, explained the need for such offsets and how the insurer fulfilled its fiduciary duty to preserve plan assets by deducting them. The District Court agreed and denied plaintiff's motion to amend as futile.

Mr. Bernstein secured summary judgment in a long-term disability benefits suit seeking over \$2 million for allegedly wrongful denial of benefits claims. In granting Sedgwick's summary judgment motion, dismissing plaintiff's claims and denying plaintiff's cross-motion, the court agreed that our client's denial of benefits was not arbitrary or capricious and that there was substantial evidence to support such denial.

In a university medical center case alleging that our client violated a PPO agreement, Mr. Bernstein secured summary judgment by citing ERISA preemption and lack of contract privity between the parties. In granting our motion, the court specifically rejected plaintiff's attempt to confuse "complete" ERISA preemption with ERISA "conflict" preemption. The court also noted that plaintiff's attempts to create the appearance of contract privity failed.

On behalf a group health plan insurer, Mr. Bernstein obtained summary judgment dismissal of an \$11 million action brought by a prominent university hospital for charges associated with heart transplant surgery. Plaintiff filed a state law breach of contract claim for failure to pay for services rendered pursuant to a PPO agreement. The court granted Mr. Bernstein's summary judgment motion, holding that ERISA preempted all

of plaintiff's claims.

Mr. Bernstein obtained summary judgment in an ERISA case seeking over \$1 million in disability benefits. The federal district court agreed that our client's denial of benefits was not arbitrary or capricious because the claimant's disability began after he was no longer employed by the plan sponsor, thus rendering him ineligible for benefits.

Mr. Bernstein obtained an order granting summary judgment dismissing plaintiff's case and denying plaintiff's cross-motion for summary judgment in a case in which plaintiff disputed termination of disability benefits after expiration of a time limit on benefits related to psychological causes. The court rejected plaintiff's efforts to expand the administrative record to include materials not previously reviewed by our client's claim administrators. The court also held that attempts by a claimant to reclassify his disability as physical in order to avoid a mental/nervous policy limitation should be "closely scrutinized" by the reviewing court.

In *Cicio v. Vytra Healthcare*, Mr. Bernstein persuaded the U.S. Court of Appeals (2nd Cir.), on remand from the U.S. Supreme Court, to affirm the U.S. District Court's (EDNY) judgment dismissing a plaintiff's medical malpractice action on grounds that ERISA completely preempted her claims. The Second Circuit had previously reversed the district court's judgment dismissing plaintiff's medical malpractice claims, but that decision was then reversed by the Supreme Court and remanded for further consideration in light of the Court's recent decision in *Aetna Health Inc. v. Davila*. On remand, the circuit court affirmed the original judgment dismissing plaintiff's complaint.

He successfully moved for dismissal of a United States District Court ERISA case where a widow sued her deceased husband's HMO claiming medical malpractice, breach of fiduciary duty, fraudulent misrepresentation and other claims when he died following the HMO's denial of medical benefits for an experimental procedure recommended by his treating oncologist.

Affiliations, Activities and Accomplishments

Mr. Bernstein is a Fellow of the American Bar Foundation, a preeminent supporter of scholarly sociolegal research. Membership in the Fellows recognizes an attorney's outstanding professional accomplishments and adherence to the legal profession's highest principles. This honor is limited to one third of one percent of lawyers licensed to practice in any given jurisdiction. Members are nominated by Fellows in their jurisdiction and elected by the Board of the American Bar Foundation.

He is a member of the State Bars of New York, Connecticut and Pennsylvania and is admitted to appear before the U.S. District Court for the Northern, Southern, Eastern and Western Districts of New York; the U.S. District Court for the Eastern District of Pennsylvania; the U.S. District Court for the District of Connecticut; the U.S. Court of Appeals for the Second and Third Circuits; and the U.S. Supreme Court. He is also a member of the American Bar Association (including the Health Law Section); the New York State Bar Association (including the Torts, Insurance, and Compensation Law Section); the Defense Research Institute (including serving as Healthcare Programming Chair of the Life, Health and Disability Committee, also member of Medical Liability and Health Care Law Committee); the Association for Health Care Risk Management of New York; the American Health Lawyers Association; and the New York State Medical Defense Bar Association.

Publications and Presentations

Mr. Bernstein's publications include:

- “Second Circuit,” Chapter 2 in ABA’s *2012 Edition: ERISA Survey of Federal Circuits* (December 2011).
- “State Law Challenges in Managed Care” Chapter 4 of *Managed Care Litigation*, published by the Bureau of National Affairs, Inc. (May 2011) coauthored with members of Sedgwick’s Healthcare Practice Group).
- “Health Care Reform, One Year Later” paper prepared for presentation at DRI’s 2011 Life, Health, Disability & ERISA Claims seminar, (Boston, MA, April 28, 2011).
- “Comparative Preemption in Health Care—Is Any Area Left Unoccupied?” paper prepared for presentation at DRI’s 2010 Life, Health, Disability & ERISA Claims seminar (April 28, 2010) (coauthored with Sedgwick attorney Elizabeth R. Chesler).
- “Supreme Court Rules that Litigant Need Not Be Prevailing Party to Recover Attorney’s Fees Under ERISA,” Sedgwick *Healthcare Law Alert* (May 2010) (coauthored with Sedgwick attorney John T. Seybert).
- “Full-Blown Discovery and Trial Ordered in Seventh Circuit on *De Novo* Review,” Sedgwick’s *Healthcare Law Newsletter* (Winter 2009/2010) (coauthored with Sedgwick attorney John T. Seybert).
- “Hobson v. MetLife,” DRI’s *Life, Health & Disability E-News Flash* (August 2009).
- “Second Circuit”, a chapter in *Misrepresentation in the Life, Health and Disability Insurance Application Process: A National Survey*, published by ABA’s Tort Trial & Insurance Practice Section (June 2009) (coauthored with Sedgwick attorney John T. Seybert).
- “State Law Challenges in Managed Care,” Chapter 4 of *Managed Care Litigation*, published by the Bureau of National Affairs, Inc. (May 2009) (coauthored with members of Sedgwick’s Healthcare Practice Group).
- “New Law Requires Equal Coverage For Mental Health Care in Group Health Plans,” Sedgwick’s *Healthcare Law Newsletter* (Winter 2009).
- “ERISA Discretionary Review in the Wake of *MetLife v. Glenn*,” AHLA’s *Payors Plans & Managed Care* (January 2009) (coauthored with Sedgwick attorney John T. Seybert).
- “Everyone Pays The Price When Healthcare Providers Waive Patients’ Co-Insurance Obligations,” ABA’s *The Health Lawyer* (December 2008) (coauthored with Sedgwick attorney John T. Seybert).
- “Two Circuit Courts Pause to ‘Determine’ Language Sufficient to Confer Discretion for Arbitrary and Capricious Review,” Sedgwick’s *Healthcare Law Newsletter* (Summer 2008) (coauthored with Sedgwick attorney John T. Seybert).
- “Supreme Court Denies Certiorari on Scope of Damages Available Under ERISA §502(a)(3) for Welfare Benefit Plans,” Sedgwick’s *Healthcare Law Alert* (June 2008) (coauthored with Sedgwick attorney John T. Seybert).

- “Supreme Court Decision: *Metropolitan Life Ins. Co. v. Glenn*, __ S.Ct. __, 2008 WL 2444796 (June 19, 2008) (U.S. Supreme Court Docket No. 06-923),” DRI’s *The Voice* (June 2008) (coauthored with Sedgwick partner Dennis G. Rolstad).
- “Is There Any Uniformity? ERISA’s Standard of Review for Structurally Conflicted Administrators,” DRI’s *In-House Defense Quarterly* (Spring 2008) (coauthored with Sedgwick attorney John T. Seybert).
- “State and Local Employer Healthcare Mandates: Preempted by ERISA?” *Life Health and Disability News*, published by the Defense Research Institute (DRI) (Winter 2008) (coauthored with Sedgwick attorney John T. Seybert).
- “Ninth Circuit Telegraphs Potential Circuit Split on Whether ERISA Preempts Employer Health Benefits Funding Mandates,” Sedgwick’s *Healthcare Law Alert* (January 2008) (coauthored with Sedgwick attorney John T. Seybert).
- “Recent Trends in ERISA Preemption Affecting the Managed Care Industry,” *Insights* (October 2007) (coauthor).
- “RICO and Insurers,” *New Jersey Law Journal* (October 2007) (coauthored with Sedgwick attorney Jeffrey M. Winn).
- “Eighth Circuit Decision Reversing Plan’s Retroactive Rescission Provides a ‘Trifecta’ of ERISA Rulings,” *The Voice* (July 2007), published by the Defense Research Institute (DRI).
- “Court Holds Maryland’s ‘Wal-Mart’ Law Preempted by ERISA,” Sedgwick’s *Healthcare Law Newsletter* (Spring 2007).
- “You Can’t Get There From Here—ERISA Preemption of State Laws Mandating Employer Healthcare Contributions,” *ABA Health eSource* (March 2007) (coauthored with Sedgwick attorney John T. Seybert).
- “Court Rules That Provider Underpayment Claims Against HMO Are Preempted by ERISA,” DRI’s *ERISA Report* (September 2006), published by the Defense Research Institute (DRI).
- “Ninth Circuit Effects Sea Change in ERISA Discretionary Review,” Sedgwick’s *Sidebar* (August 2006) (coauthored with Sedgwick attorneys Rebecca A. Hull and Dennis G. Rolstad).
- “State Law Challenges in Managed Care,” Chapter 4 of “Managed Care Litigation” (October 2005), published by the Bureau of National Affairs, Inc. (coauthored with members of Sedgwick’s Healthcare Practice Group).
- “Court Must Consider Whether to Allow Amended Complaint Asserting Claim Under §502(a)(3),” *Life, Health and Disability News* (Summer 2005), published by the Defense Research Institute (DRI).
- “Second Circuit Court of Appeals Ushers in Next Phase of ERISA Preemption Litigation,” Sedgwick’s *Healthcare Law Newsletter* (Summer 2005).
- “A New Battleground for Patient Suits Against HMOs?,” *New Jersey Law Journal* (December 2004).

- “As One Door Closes, Another Opens: Medical Malpractice Claims in ERISA Healthcare Benefit Litigation,” *For the Defense* (November 2004), published by the Defense Research Institute (DRI).
- “Unequal Benefits for Disability Caused by Mental Illness Ruled Fair by New York’s Highest Court,” *Life, Health and Disability News* (Fall 2004), published by the Defense Research Institute (DRI).
- “U.S. Supreme Court Limits Patients’ Right to Sue HMOs,” Sedgwick’s *Healthcare Law Newsletter* (Fall 2004).
- “District Court Sets New Criteria for Electronic Discovery in Gender Discrimination Case,” *The Job Description* (Summer 2004), published by the Defense Research Institute’s (DRI) Employment Law Committee.
- “*Cicio v. Does*: The New ERISA Preemption Paradigm?”, written for presentation at the American Conference Institute (September 2003).
- “Are State Law Malpractice Claims Preempted by ERISA?”, *Life, Health & Disability News* (Summer 2003), published by the Defense Research Institute (DRI).
- Coauthor, “Managed Care Liability Update,” presented at the American Bar Association (ABA) Health Law Section and the ABA Center for Continuing Legal Education's teleconference, Managed Care Liability Update: Recent Developments Post-Rush (April 2003) (audiotape and materials available through the ABA Center for Continuing Education).
- “Second Circuit Affirms Summary Judgment for Plan Based on 24-Month Limitation for Mental Disorders,” *Life, Health and Disability News* (Fall 2002), published by the Defense Research Institute (DRI).
- “Second Circuit Says Plan Offered by Association Including Non-Employees Is Not an ERISA Plan,” *Life, Health and Disability News* (Fall 2002), published by the Defense Research Institute (DRI).
- “Second Circuit Holds That Settlement Agreement Distributing Marital Property Constitutes a QDRO,” *Life, Health and Disability News* (Summer 2002), published by the Defense Research Institute (DRI).
- Coauthor, “Navigating the Shoals of ERISA: The Effects of ERISA Preemption on New State Laws Creating Tort Liability Against Managed Care Entities,” *ABA Health Law Journal* (2002).
- “New York Court of Appeals: ERISA Does Not Preempt Claims of Medical Malpractice Against HMO Primary Care Physician,” Mealey’s *Managed Care Liability Report* (August 1999).

Mr. Bernstein’s speaking engagements include:

- "ERISA Moot Court: Judicial Perspectives on Hot Topics in ERISA - Motion Requesting Discovery Beyond the Administrative Record," presented as a panelist at the American Conference Institute's Forum on Defending and Managing ERISA Litigation (New York, NY, October 20, 2011).

- “Making Strategic Arguments For and Against ERISA Preemption Based on Inconsistent and Ever-Evolving Legal Standards,” presented as a panelist at the American Conference Institute’s Advanced Forum on Managed Care Disputes and Litigation (Philadelphia, PA, May 17, 2011).
- “Healthcare Reform, One Year Later,” presented at the DRI Life Health and Disability Claims Seminar, (Boston, MA, April 28, 2011).
- “Practical Tips to Make Conflict of Interest Discovery Work For You And Tips to Defend Against Its Impact. A View From Both Sides of the Bench,” presented at ABA TIPS Midwinter Symposium on Insurance and Employee Benefits (January 15, 2011).
- “Trends and Future in Group Insurance Cases,” presented at a client’s in-house litigation team and outside counsel meeting (November 4, 2010).
- “ERISA Round-Up,” presented at the Hartford Life Litigation Legal Summit (June 11, 2010).
- “Comparative Preemption in Health Care—Is Any Area Left Unoccupied?” presented at DRI’s 2010 Life, Health, Disability & ERISA Claims seminar (April 28, 2010).
- “Fear and Loathing in ERISA Litigation - Collateral Attacks on Peer Review Physicians and Other Assorted Red Herrings,” presented at Sedgwick’s Annual Healthcare Seminar (October 8, 2009).
- “Focus on ERISA: MetLife v. Glenn, Circuit-by-Circuit Approaches, Attorney Fees and Beyond,” presented at the American Conference Institute’s Litigating Disability Insurance Claims Conference (June 15, 2009).
- “ERISA Fiduciary Liability Risks,” presented at Traveler’s Companies, Inc., St. Paul, Minnesota (December 4, 2008).
- “Health Insurance Hot Topics, Part I,” presented at DRI’s 2008 Life, Health, Disability & ERISA Claims seminar (April 25, 2008).
- “Employee Benefit Claim Review: A Litigation Perspective on the Claim Review and Appeal Process,” presented at Aetna Inc. (January 23, 2008).
- Panelist, “ERISA Rights and Preemption of Non-Contracted Providers’ Health Benefit Claims,” teleconference and live audio Webcast sponsored by the ABA Health Law Section and the ABA Center for Continuing Legal Education (July 25, 2007).
- “2006 ERISA Update,” presented at Sedgwick’s 2006 Healthcare Law Seminar (October 5, 2006).
- “Managed Care Errors and Omissions—The Litigation Landscape Then and Now,” presented as part of panel discussion sponsored by Willis (September 12, 2006).
- “Silent PPOs,” presented at OneBeacon Professional Partners (March 30, 2006).
- “2005 ERISA Update,” presented at Sedgwick’s 2005 Managed Care/ERISA Seminar (September 22, 2005).

- “Why Are Silent PPOs Making So Much Noise?”, presented at Chubb Specialty’s Managed Care Seminar (May 17, 2005).
- “Health Care Legal Perspectives: Managed Care Liability Exposures,” presented at Chubb Corporation’s “Mission: Possible” Producers’ Conference (October 27, 2004).
- “Unfair and Deceptive Practices in Healthcare,” presented at Sedgwick’s 2004 Managed Care Seminar (September 29, 2004).
- Interview, Forbes Radio audio program, “Designing a 21st-Century Healthcare System” (July 2004), aired on the Sky Radio Network for American Airlines.
- Moderator and panelist, the ABA Health Law Section and the ABA Center for Continuing Legal Education's teleconference, Managed Care Liability Update: Recent Developments Post-Rush (April 11, 2003) (audiotape and materials available through the ABA Center for Continuing Education).

Education

Mr. Bernstein received his B.A. (1983) in Rhetoric and Communication, *cum laude*, from the State University of New York at Albany. He received his J.D. (1986) from Pace University School of Law.