

Health Law

How Will Tennessee's Health Care Provider Anti-Discrimination Laws Be Impacted By *Kentucky Association of Health Plans v. Miller*?



By Walter E. Schuler

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In *Kentucky Ass'n of Health Plans v. Miller*,¹ the U.S. Supreme Court held that two Kentucky "any willing provider" (AWP) laws were not preempted by the Employee Retirement Income Security Act of 1974 (ERISA)² because they were excepted from ERISA pre-emption as laws that regulate insurance. In general, ERISA pre-empts state laws that relate to an ERISA plan, unless the state law is one that regulates, among other things, insurance.³ While Tennessee does not have an AWP law covering health care providers,⁴ as does Kentucky, Tennessee does have a number of health care provider anti-discrimination laws on the books which could be impacted by the *Miller* decision.

A. The United States Supreme Court's Decision in *Miller*.

At issue in *Miller* were *Ky. Rev. Stat. Ann.* §§304.17A-171(2) (Banks-Baldwin 1999) (Requirements for health benefit plans that include chiropractic benefits) and 304.17A-270 (Banks-Baldwin 1999)

(Nondiscrimination against provider in geographic coverage area). *Ky. Rev. Stat. Ann.* §304.17A-171(2) provides:

A health benefit plan that includes chiropractic benefits shall:

(2) Permit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan.

Ky. Rev. Stat. Ann. §304.17A-270 provides:

A health insurer shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation established by the health insurer, including the Kentucky State Medicaid program and Medicaid partnerships.

The issue of whether or not Kentucky's AWP laws "relate to" an ERISA plan in the first place, one of the preliminary determinations required in
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Message from the Incoming Chair



By Claire Miley

As I look forward to assuming the chair of the Health Law Section in July, I am grateful for the support of a dedicated and energetic executive council. In particular, I would like to thank our outgoing chairperson, **Kevin Campbell**, for the great job that he has done over this past year. I hope he will continue to stay involved with the Health Law Section for a long time.

We have an exciting year ahead. Already our executive council has done most of the planning for our two principal CLE programs, the *3rd Annual Health Law Primer* and the *15th Annual Health Law Forum*, both of which will occur in the fall of this year. In addition, our executive council produces this newsletter so that we can keep our members informed of recent developments and upcoming events.

You will find a full listing of our executive council members in the text box at the bottom of this page. I also want to thank the TBA staff: **Lynn Pointer**, TBA Sections/Committees Coordinator; **Kathleen Caillouette**, CLE Administrator; and, **Heather Caldwell**, Director of CLE. The TBA staff members provide invaluable help in keeping us organized and on schedule.

HEALTH LAW PRIMER — Mary Parsons, who is our chair elect, is producing the 3rd Annual Health Law Primer, scheduled for September 5 at BellSouth Auditorium in Nashville. This year we have expanded the Health Law Primer to a full-day session, with six CLE general credits available. The Primer is designed as an introductory course for health law “beginners” as well as a refresher course for seasoned veterans. Attendees will receive an overview of regulatory and operational topics that health lawyers routinely address,

including Medicare reimbursement, fraud and abuse, HIPAA, and more.

HEALTH LAW FORUM — With assistance from outgoing chair Kevin Campbell and the rest of the executive council, I am producing the 15th Annual Health Law Forum to be held at the Hilton Suites in downtown Nashville on October 2 and 3 of this year. As always, the Health Law Forum provides a convenient way to obtain all required Tennessee CLE credits for the year (12 hours of general credit and 3 hours of “dual,” or ethics, credit). An agenda for the forum is included with this newsletter. Please don’t forget two special events on the first day of the forum — the Health Law Section annual business luncheon and an evening reception that will be held at the TBA offices (within walking distance from the Hilton Suites). Both the luncheon and the reception provide a great chance to network with attorneys and with health care business people from all parts of our state.

As a final note, I would like to thank **Walter E. Schuler** of The Bogatin Law Firm in Memphis for this month’s article, and I would like to encourage all of our section members to consider contributing an article. Please email your suggestions to Lynn Pointer at lpinter@tnbar.org. With the support of our members, the Health Law Section newsletter can remain a great way to keep informed about Tennessee health law developments and about the ways in which national developments might particularly affect the health care industry here in Tennessee. ♦

Claire Miley

Health Law 2003-4 Executive Council

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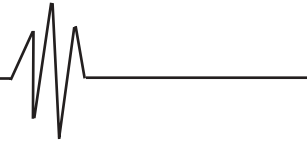
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Message from the Outgoing Chair



By Kevin Campbell

It has been a privilege to serve as the chair of the Tennessee Bar Association Health Law Section for this past year. Due to the hard work of our executive committee members and the TBA Staff, I think we have had another outstanding year. Our 14th Annual Health Law Forum held last October featured a great collection of speakers and was among the most heavily attended Health Law Forums in our history. In addition to the Health Law Forum, we also continued to grow our Health Law Primer seminar and distributed several newsletters to our members. We are already well underway with our plans for this coming year

under the leadership of our incoming chair, Claire Miley, who is doing an outstanding job.

I can tell you that the best part of being chair of the TBA Health Law Section over the past year has been the opportunity it provides to interact with other health care lawyers across the state. I look forward to continuing to work with you all as a member of the section in the upcoming year. Thank you again for the opportunity to be of service to the Tennessee Bar and the Health Law Section. ♦

Kevin Campbell

Kentucky Association of Health Plans v. Miller

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ERISA pre-emption analysis, was not at issue in *Miller*. This issue was addressed in the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit, in which the Kentucky laws were found to “relate to” an ERISA plan, making a complete ERISA pre-emption analysis necessary.⁵ Both the District and Circuit courts held that while Kentucky’s AWP laws “relate to” an ERISA plan, they are laws that regulate insurance, and are therefore saved from pre-emption under ERISA’s savings clause. The Supreme Court agreed.

Unanimously affirming the Circuit court’s decision, the Supreme Court overruled its prior case law utilizing the McCarran-Ferguson Act factors in determining whether or not a law regulates insurance, and announced a new two-part test for determining when a state law regulates insurance for purposes of applying ERISA’s savings clause, stating, “Today we make a clean break from the McCarran-Ferguson factors.”⁶ The Supreme Court held that in order for a state law to be considered to “regulate insurance,” the law must (1) be “specifically directed toward entities

engaged in insurance,” and (2) “substantially affect the risk pooling arrangement between the insurer and insured.”⁷ The Court made it clear that not all laws that are directed toward entities engaged in insurance will be saved from pre-emption under ERISA’s savings clause.⁸

In reaching its unanimous decision in *Miller*, the Supreme Court found that Kentucky’s AWP laws met the first prong (“directed toward insurers”) of its newly-announced, two-part test. The Supreme Court held that “Kentucky’s statutes are transgressed only when a ‘health insurer,’ or a ‘health benefit plan that includes chiropractic benefits,’ excludes from its network a provider who is willing and able to meet its terms.”⁹ The court noted that “Regulations ‘directed toward’ certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA’s savings clause.”¹⁰ The Supreme Court further observed that there is no reason to think Congress would have meant that some minimal application of a state law to noninsurers removes the state law

entirely from the category of insurance regulation saved from preemption.¹¹

The Supreme Court also found that Kentucky’s AWP laws met the second prong (“substantial effect on risk pooling”) of the two-part *Miller* test. The Court held that “By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope of permissible bargains between insurers and insureds ... No longer may Kentucky insureds seek insurance from a closed network of health-care providers in exchange for a lower premium.”¹² Having found that the Kentucky AWP laws met both prongs of its newly-announced test, the Supreme Court ruled that Kentucky’s AWP laws were saved from ERISA pre-emption as laws which regulate insurance.¹³

B. Tennessee’s Health Care Provider Anti-Discrimination Laws.

As noted above, Tennessee currently has no AWP law pertaining to physicians or other health care providers. Nevertheless, a number of other Tennessee statutes similar to AWP laws may be affected by the *Miller* decision. For example, *Tenn. Code Ann.* §56-7-

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TennBarU and the Health Law Section Present ...

3rd ANNUAL HEALTH LAW PRIMER

This convenient seminar represents a great opportunity for those new to health law, those who represent health care providers on other types of legal matters, and anyone who wants a refresher course, to get an overview of the major areas of law regulating health care providers, including reimbursement, fraud and abuse, hospital and medical staff issues, licensure and patient care, and privacy and patient rights

THE BASICS

Producer: Mary Parsons, HCA Healthcare Corp., Nashville

CLE Credits: 6 general

Time: Registration 8 a.m., Program: 8:30 a.m. – 4:15 p.m.

Date & Location: September 5 in Nashville (BellSouth Auditorium, 333 Commerce Street)

THE PROGRAM

- 8:30 – 9:30 a.m. **Fraud and Abuse Issues in Healthcare Acquisitions and Joint Ventures**, *Cindy Reisz, Bass, Berry & Sims, Nashville*
- 9:30 – 10:30 a.m. **Hospital and Medical Staff Issues**, *Gaye Thomas, general counsel and compliance officer, Williamson Medical Center, Franklin*
- 10:30 – 10:45 a.m. **Break**
- 10:45 – 11:45 a.m. **Fraud & Abuse Overview**, *Chris Bangerter, university counsel, Vanderbilt University, Nashville*
- 11:45 – 1 p.m. **Lunch**
- 1 – 2 p.m. **Reimbursement Basics**, *Charles Key, The Bogatin Law Firm PLC, Memphis*
- 2 – 3 p.m. **Licensure and Patient Care Standards**, *Scott Richardson, Boulton, Cummings, Conners & Berry, Nashville*
- 3 – 3:15 p.m. **Break**
- 3:15 – 4:15 p.m. **HIPAA**, *Stephen Page, Waller, Lansden, Dortch & Davis, Nashville*

COURSE REGISTRATION (up to three days prior to program)

\$150 for TBA Health Law Section members

\$180 for TBA members

\$220 for non-member attorneys

\$100 for law office personnel and other non-attorneys

No charge for judges and law students who are TBA members

Registration is Easy!

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or By FAX: Complete the form
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or By Phone: 800-899-6993 or in
Nashville 383-7421

or By Mail: Complete the form below
& mail to TBA, 221 Fourth Ave. N.,
Suite 400, Nashville, TN 37219

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Firm: _____

Address: _____

City/State/ZIP: _____

E-mail: _____

(We will send an e-mail confirmation of your registration when e-mail address is provided.)

BPR#: _____

Telephone: _____

Late Registration: Please add \$25 if registering three days or fewer prior to seminar and at-the-door registration.

Health Law Primer Health Law Forum Both days One day

Total Amount: \$ _____

Payment method: Check



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Expiration Date: _____

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Cancellation Policy: Cancellations received up until 4 p.m., Central time, three days prior to the seminar, will receive a refund, less a \$25 administrative fee unless otherwise noted. A substitute may attend for someone unable to do so. There will be no refunds for cancellations received after 4 p.m. three days before the seminar. However, a voucher may be requested for use within six months on a future TBA seminar for the value of the seminar, less a \$25 administrative fee. This voucher must be attached to the registration for the future seminar, in order to be redeemable.

TennBarU and the Health Law Section Present ...

15th ANNUAL HEALTH LAW FORUM

Make plans for this annual event. As always, this two-day seminar will present the latest in health care law from some of the most recognized practitioners in the state and in the country. Topics covered will include traditional core areas such as fraud and abuse, false claims and government investigations, physician contracting, the annual Tennessee health law update, and the annual three-hour ethics forum, as well as emerging topics related to professional liability and the current professional liability crisis, and exclusive contracting and other evolving medical staff issues.

THE BASICS

Producer: Claire Miley, Bass, Berry & Sims, Nashville

CLE Credits: 12 general & 3 dual

Location, Dates, & Times: Nashville (Hilton Suites Downtown for seminar, Tennessee Bar Center for reception)

Oct. 2 • Registration 7:30 a.m. – 8 a.m., Program 8 a.m. – 5:30 p.m., Reception 5:30 pm – 6:30 p.m.

Oct. 3 • Registration 7:30 a.m. – 8 a.m., Program 8 a.m. – 5:30 p.m.

THE PROGRAM

Thursday, October 2, 2003

8:15 – 9:15 a.m. **Compliance and Quality in the New World Order: Doing Well by Doing Right**, Alice G. Gosfield, Alice G. Gosfield & Associates PC, Philadelphia, Pa.

9:15 – 10:15 a.m. **Fraud and Abuse Update**, Sanford (Sandy) V. Teplitzky, Ober, Kaler, Grimes & Shriver, Baltimore, Md.

10:15 – 10:30 a.m. **Break**

10:30 – 11:30 a.m. **Trends in Government Investigations and False Claims Suits**, Steve Riley, Bowen, Riley, Warnock & Jacobson, Nashville

11:30 – 12:45 p.m. **TBA Health Law Section Lunch Business Meeting, Lunch Break (on your own)**

12:45 – 1:45 p.m. **Professional Liability: Trends in Medical Malpractice Cases**, James Howell, State Volunteer Mutual Ins. Co., Brentwood

1:45 – 3 p.m. **Stark II (if published); otherwise, EMTALA (final EMTALA regulations are expected mid-summer)**, Thomas Bartrum, Baker Donelson Bearman Caldwell & Berkowitz PC, Nashville

3 – 3:15 p.m. **Break**

3:15 – 4:30 p.m. **Physician Contracting**, John R. Voigt, Sherrard & Roe PLC, Nashville

4:30 – 5:30 p.m. **Case Study — The Economic Impact of an ASC Opening in a Community**, Dan Sullivan, Sullivan Consulting, Atlanta, Ga.

5:30 – 6:30 p.m. **Reception**

Friday, October 3, 2003

8 – 9:15 a.m. **Economic Credentialing and Other Current Issues in Medical Staff Privileging**, Bill West, Stokes, Bartholomew, Evans & Petree PA, Nashville; Claire Miley, Bass, Berry & Sims PLC, Nashville

9:15 – 10:30 a.m. **Professional Liability: The Intersection Between Sentinel Event Reporting and Medical Injury Compensation**, Charles M. Key, The Bogatin Law Firm PLC, Memphis

10:30 – 10:45 a.m. **Break**

10:45 – 11:45 a.m. **Tennessee Health Law Update**, John B. (Jay) Hardcastle Jr.; Kevin B. Campbell, Boulton Cummings Connors & Berry PLC, Nashville

11:45 – 1 p.m. **Lunch Break (on your own)**

1 – 2 p.m. **HIPAA Fallout**, Elizabeth S. Warren, Bass, Berry & Sims, Nashville

2:00 – 2:15 p.m. **Break**

2:15 – 5:30 p.m. **Ethics Session with Phil Pomerance as Moderator**, Philip L. Pomerance, Hinshaw & Culbertson, Chicago, Ill.

ACCOMMODATIONS

The TBA has reserved a block of rooms at the Hilton Suites for Wed. Oct. 2 - Fri. Oct. 3. Reservations must be made by Sept. 1. Room reservations can be made by calling 615-620-1000, specifying you are with the Tennessee Bar Association and asking for the room rate of \$139 for single or double room.

Register on the form to the left or register online at
www.tba.org/registrar.html
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COURSE REGISTRATION (up to three days prior to program)

Both days

\$320 for Health Law Section members

\$345 for TBA members

\$370 for non-member attorneys

\$220 for law office personnel and other non-attorneys

No charge for judges and law students who are TBA members

One day

\$245 for Health Law Section members

\$270 for TBA members

\$295 for non-member attorneys

\$145 for law office personnel and other non-attorneys

No charge for judges and law students who are TBA members

2404 essentially provides that whenever any “policy of insurance” or other medical service plan or contract governed under Tennessee’s insurance code provides for reimbursement for any service which is within the lawful scope of practice of a duly licensed chiropractor, the “insurer” must pay for such services without regard to whether the services are provided by a chiropractor or medical doctor — regardless of the terms of the insurance policy or any other statute. *Tenn. Code Ann.* §56-7-2404 further provides that duly licensed chiropractors must be allowed to participate in sickness and accident plans, hospital and medical service plans, and other plans and contracts governed under Tennessee’s insurance code to the same extent and subject to the same limitations as duly licensed medical doctors.

Title 56, Chapter 7, Part 24 of the Tennessee Code contains other similarly-worded anti-discrimination statutes covering optometrists, psychologists, podiatrists, social workers, nurse midwives, certified nurse practitioners, certified registered nurse anesthetists, and certified clinical specialists.¹⁴ *Tenn. Code Ann.* §56-7-2405 similarly requires that the terms “physician” and “doctor,” when used in individual or group health or accident insurance policies, or other medical service plans or contracts governed under Tennessee’s insurance code shall be construed to include duly licensed dentists and podiatrists when providing for payment for surgical procedures or other medical or health care services specified in such policy, plans, or contracts, provided that the services are within the scope of practice of dentistry or podiatry as defined in *Tenn. Code Ann.* §§63-5-108 and 63-3-101, respectively.

Finally, *Tenn. Code Ann.* §56-32-229 provides that a “managed health insurance issuer shall not discriminate with respect to participation, referral, reimbursement of covered services or indemnification” as to any optometrist, ophthalmologist, podiatrist, or chiro-

practor who is acting within the scope of his or her license or certification under state law, solely on the basis of such license or certification. The statute also prohibits managed health insurance issuers (MHIIs) from discriminating against such health care providers by excluding them as a class from participation in provider networks. The statute, however, does not mandate that MHIIs include any and all such providers in their networks, and MHIIs may select providers or classes of providers only to the extent necessary to meet the plan’s and its enrollees’ needs.

While each of the above-referenced Tennessee health care provider anti-discrimination laws contains substantial textual variations, their focus and effect are, for all intents and purposes, the same. Each of these statutes share the following characteristics with regard to health insurance policies, plans, and contracts governed under Tennessee’s insurance code:

- Each helps to make certain that insureds and other persons entitled to receive certain benefits under such policies, plans, and contracts actually receive those benefits;
- Each helps to ensure that certain *classes* of health care providers are not discriminated against in favor of any other *class* of providers under such policies, plans, and contracts;
- None requires such policies, plans, and contracts to include *any and all* of any class of health care provider who can meet the participation requirements of such policies, plans, and contracts (i.e., none are AWP laws);
- None enlarges the scope of practice of any health care provider; and
- None mandates coverage under such policies, plans, and contracts for any health care service that is not otherwise covered under such policies, plans, and contracts.

The Supreme Court’s new two-part test in *Miller* for determining when a state law regulates insurance for pur-

poses of determining whether or not the law is saved from ERISA pre-emption requires an examination of the text of such statute, as well as its effect. As discussed above, the *Miller* test requires that in order for a state law to be considered to “regulate insurance,” the law must (1) be “specifically directed toward entities engaged in insurance,” and (2) “substantially affect the risk pooling arrangement between the insurer and insured.” Each of Tennessee’s anti-discrimination laws falls under Tennessee’s insurance code, and none appears, at least on its face, to be directed at entities other than those engaged in insurance. Assuming that these anti-discrimination laws satisfy the first prong of the *Miller* test, the next question is whether an examination of the effects of these laws would lead to the conclusion that they also meet the second prong of the *Miller* test.

The effects of each of the above-described Tennessee provider anti-discrimination statutes are similar to one another and to AWP laws in general. The major difference between these anti-discrimination laws and AWP laws is that the former are focused more on protecting the interests of classes of providers, whereas the latter are focused more on protecting the interests of individual providers.

The following aspects of Tennessee’s health care provider anti-discrimination laws weigh in favor of a finding that these laws “substantially affect the risk pooling arrangement between the insurer and insured,” and therefore meet the second prong of the *Miller* test:

- They will likely cause the insurer to pay out more money in claims due to the increase in the instances in which an insured or other covered person will seek covered services involving care within the scope of practice of formerly excluded classes of providers, given the additional choice of being able to select a provider from a wider range of classes of providers.

- They prohibit insurers, going forward, from denying payment for covered services which have already been provided by a provider in a formerly excluded class, that the insurer otherwise would have paid for if the insured or other covered person had obtained the covered services from a provider in an included class.

- They reduce or eliminate insurers' ability to extract greater discounts from included classes of providers by the insurers agreeing to exclude other classes of providers from participation in the insurance policy or plan, thereby steering more business toward the included classes.

In the event of a legal challenge, insurers would likely argue that Tennessee's anti-discrimination laws do not necessarily change the amount of money the plans would otherwise have to pay out, and would not therefore affect the risk pooling arrangement between the insured and the insurer. Instead, insurers would argue, the laws do nothing more than interfere with the uniform administration of ERISA plans by requiring them to structure their panels of health care providers and reimbursement methodologies in various ways across state lines.

The Supreme Court's decision in *Miller* does not clearly address how substantial an effect the state law must have on the risk pooling arrangement between the insured and the insurer to be saved from ERISA pre-emption as regulating insurance. Tennessee's anti-discrimination laws probably affect such risk pooling arrangements to a slightly lesser degree than an AWP law such as Kentucky's does. As is often the case, we may need to hear further from the Supreme Court on this issue to be sure of the proper application of the *Miller* test. ♦

NOTES

1. 123 S. Ct. 1471, No. 00-1471 (U.S. April 2, 2003).
2. 29 U.S.C. §§1001 - 1461 (LEXIS through P.L. 108-21, 4/30/03).
3. 29 U.S.C. §1144 (LEXIS through P.L. 108-21, 4/30/03).
4. Tennessee currently does have an AWP law covering pharmacists and pharmacies. *Tenn. Code Ann.* §56-7-2359 (LEXIS through all 2002 legislation).
5. *Kentucky Ass'n of Health Plans v. Nichols*, 227 F.3d 352, 372 (6th Cir., Sep. 7, 2000), *aff'd sub nom. Kentucky Ass'n of Health Plans v. Miller*, 123 S. Ct. 1471, No. 00-1471 (U.S. April 2, 2003).
6. Slip Op. at 12.
7. *Id.*
8. Slip Op. at 8.
9. Slip Op. at 5.
10. Slip Op. at 5-6 (footnote omitted).
11. Slip Op. at 6, n1.
12. Slip Op. at 9.
13. Slip Op. at 12.
14. *Tenn. Code Ann.* §§56-7-2401 — 2403, 2407, 2408 (LEXIS through all 2002 legislation).

Walter E. Schuler is an attorney with The Bogatin Law Firm PLC in Memphis. He graduated *magna cum laude* from the University of Memphis in 1993 with a bachelor of business administration degree in international business. He received his law degree, *cum laude*, with a certificate in health law with honors from Saint Louis University in 1996. Schuler focuses his practice on health care law, representing health care providers and related organizations in corporate and business law matters, contracts, litigation, and state and federal regulation.

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