GROOM LAW GROUP

Publications

Data Marketing Poses Significant Implications for Health Plans Regulation

ATTORNEYS & PROFESSIONALS

Jon Breyfogle
jbreyfogle@groom.com
202-861-6641

Tamara Killion
tkillion@groom.com
202-861-6328

PUBLISHED
09/09/2022

SOURCE
Groom Publication

SERVICES
Health Services
- ERISA
- Privacy & Security
- Federal Insurance Regulation
- State Insurance Regulation

Litigation
- Health Services Litigation

Data Marketing Partnership, LLP ("Data Marketing") offers a health insurance plan to individuals that download an app that tracks phone usage. The company treats such persons as "partners" in their business. The result is that thousands of unrelated individuals may participate in the Data Marketing group health plan, which Data Marketing asserts is a single-employer group health plan under ERISA. As a result, Data Marketing argues that ERISA preempts states from regulating it as an insurance company or a MEWA.

Data Marketing challenged a Department of Labor ("DOL") advisory opinion that finds the arrangement is not an ERISA plan and states are free to regulate it. In 2019, Data Marketing sued the DOL in the Northern District of Texas and emerged victorious—the court finding that DOL was arbitrary in issuing the advisory opinion and concluding that the Data Marketing program was a single employer ERISA plan. The court issued an injunction precluding DOL from taking any action to the contrary.

The DOL appealed that decision and the Fifth Circuit recently ruled on the appeal. *See Data Mktg. P'ship, LP v. United States Dep't of Lab.*, No. 20-11179, 2022 WL 3440652 (5th Cir. Aug. 17, 2022). While the Fifth Circuit's decision represents a loss for DOL on key issues, the DOL did score a win in the fact that the Fifth Circuit remanded for consideration of the proper interpretation of "working owner" and "bona fide partners." As such, the district court has more work to do.

This case bears watching closely. If arrangements like Data Marketing are legitimate single employer ERISA-covered health plans, other similar arrangements could proliferate. The Data Marketing plan operates much like an insurance company offering individual market coverage to persons with no employment relationship to each other or to Data Marketing (beyond downloading an app). These plans are exempt from many consumer protections under the Affordable Care Act—guaranteed issue and renewal, community rating and essential health benefits to name a few. They would also be exempt from state insurance laws, including financial solvency regulation. As such, it is possible that plans like the one offered by Data Marketing could undermine insurance markets and bypass ACA insurance market requirements.

We discuss the decision below and the likely next steps for the case as it progresses through the courts.

Summary of the Decision

The Decision begins by deciding that the advisory opinion was final because it satisfied both prongs of the finality test: first, the Court found that the advisory opinion consummated DOL's decision-making process; and, second, that the advisory opinion determined rights, produced obligations or caused legal consequences. The Court found the first prong to be satisfied because the advisory opinion is "not subject to additional agency review" a point which the Court found that DOL "effectively concede[d]." *Id*. at *3. In finding that the advisory opinion determined rights, produced obligations or caused legal consequences, the Court pointed to three reasons undergirding its decision: First, the Court found "the advisory opinion bound the Department to some degree and withdrew its previously held discretion" despite DOL's argument that plaintiff could only rely on the advisory opinion if it met certain preconditions, which had not been met. Second, the Court found that the decision was binding as a practical matter because the applicable advisory opinion regulation provides that "'failure to obtain an advisory opinion' can cause 'unusual hardship.'" *Id*. at *4. Finally, the Court found that an advisory opinion is distinct from an information letter and that the choice to use an advisory opinion rather than an information letter produced consequences. *Id.* ("The Department thus had the choice to provide final agency action (advisory opinion) instead of non-final agency action (information letter)."). This part of the decision alone is a big deal—setting up future challenges to DOL guidance documents when DOL reaches a conclusion adverse to the party seeking guidance.

The Court's determination that DOL's decision was arbitrary and capricious hinged on two points. First, the department failed to address and reconcile two prior advisory opinions concerning working owners. The Court found that DOL's

failure is hardly 'reasoned decision-making.' The opinion at issue adopts a definition of 'working owner' materially different from the definitions in the 1999 and 2006 opinions. The opinion thus has 'an unexplained inconsistency'—the hallmark of 'an arbitrary and capricious change from agency practice.'

Id. at *6 (internal cites omitted). Second, it failed to address a promulgated regulation that included a definition of a "working owner." *Id*. at *7. Further, the Court noted that the counter arguments offered by DOL in each instance were not included in the advisory opinion, making them post hoc rationalization of the rule, which the Court did not credit. *Id*.

The Court next reviewed the district court's evaluation of the terms "working owner" and "bona fide partner" finding in each case that the district court had performed an incomplete inquiry. Concerning the working owner question, the Court found that,

[The district court] appears to have understood *Yates* to say that ERISA always provides specific guidance for all working-owner questions. In our estimation, however, *Yates* only concluded there was sufficient guidance for the particular threshold question before the Court—i.e., whether working owners may qualify as participants at all. That, however, does not mean the same guidance is relevant, let alone specific enough, to resolve all working-owner questions. Rather, the question on remand is whether all of the *Yates* factors, including the various provisions of ERISA and the IRC, combine to make these particular working owners qualify as plan participants.

Id. at *8. Regarding the "bona fide partners" issue, the Court found that the district "did not appear to apply a totality-of-the-circumstances inquiry" and because of that the Court remanded the question back to the district Court with the additional question of whether DOL's interpretation merited *Auer* deference (which requires deference to reasonable readings of genuinely ambiguous regulations). *Id*.

Finally, the court affirmed the lower court's vacatur of the advisory opinion, but vacated the injunction the district court had put in place enjoining DOL "from refusing to acknowledge the ERISA-status of the Plan or refusing to recognize the Limited Partners as working owners of Data Marketing…[because the] injunction…turned on the interpretative questions that the district court must further address on remand." *Id.* at 9. This part of the decision is very important, in that at least in the interim the Data Marketing arrangement is not simply deemed to be a single employer ERISA plan with DOL and states being precluded from regulating it.

Next Steps

Procedurally, the next substantive steps in the process will likely occur in the district court (though there is the possibility of a request for en banc review by the Fifth Circuit or an appeal to the Supreme Court). The district court will likely invite briefing by the parties on the issues identified in the Fifth Circuit's decision. That process could take months (if it is not on an expedited schedule) and a decision by the district court will follow after the end of briefing. Whatever the outcome, it will likely be appealed again to the Fifth

Circuit by the losing party and perhaps higher. In sum, there will likely significant further litigation on this matter at every level of the federal courts.

Data Marketing Poses Significant Implications for Health Plans Regulation