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No. 97-1868

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNUM LIFE INSURANCE COMPANY OF AMERICA, PETITIONER

v.

JOHN E. WARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether California's "notice-prejudice" rule, which prevents an insurance company from avoiding liability on the basis of an untimely notice or submission of proof unless the insurer has been substantially prejudiced by the delay, is a state lat that "regulates insurance" and is thereby saved from preemption by Section 514(b)(2)(A) of the Employee Retirement Security Act of 1974 (ERISA), 29 U.S.C. 1144(b)(2)(A), even assuming the rule itself does not spread risk and thus does not meet one of the three criteria identified by the Supreme Court for determining whether a law falls within the scope of that provision.

2. Whether the "notice-prejudice" rule is not preempted, despite the fact that the rule conflicts with the written terms of the ERISA plan in this case and thus purportedly conflicts with ERISA's civil enforcement scheme.

3. Whether a state common law rule of agency law, known as the Elfstrom rule, under which an employer may, in some circumstances, be deemed to be the agent of the insurance company, "relate[s] to" an ERISA plan within the meaning of ERISA's preemption provision, 29 U.S.C. 1144(a), when applied in an action by a plan participant to recover benefits under ERISA Section 502, 29 U.S.C. 1132.

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INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), as well as the scope of the provision that saves state insurance regulation from ERISA preemption. Id. § 1144(b)(2)(A). Because the Secretary of Labor has primary authority for enforcing and administering Title I of ERISA, see 29 U.S.C. 1002(13), 1136(b), the United States has a substantial interest in ensuring that ERISA preemption principles are appropriately applied.

STATEMENT

1. Respondent John E. Ward was president and chief executive officer of Management Analysis Company (MAC) until he resigned in May of 1992. Pet. App. 3a, 27a. During his nine years of employment with MAC, respondent had premiums deducted from his paycheck for long-term disability insurance under a

group policy issued by petitioner UNUM Life Insurance Co. to MAC. Id. at 28a. This disability policy insures the benefits provided under MAC's employee welfare plan, which is governed by ERISA. Id. at 2a.

In December 1992, respondent was diagnosed as suffering from diabetic neuropathy, which had for some time been causing him severe and disabling leg pain. Pet. App. 3a, 28a. In 1993, he applied for and received an award of state disability benefits, and shortly thereafter, a determination of eligibility for Social Security disability benefits. Ibid. Respondent forwarded a copy of this determination to MAC's human resources department to arrange for continuation of his health insurance coverage, but was not notified that he might obtain coverage under the long-term disability plan. Ibid.

In April 1994, while cleaning out a safety deposit box, he came across a booklet summarizing the disability plan, at which time he again contacted MAC's human resources department to inquire whether he might be covered. Ibid. He was informed by the company that he was covered and was given an application for long-term disability benefits, which he completed and returned to MAC. MAC completed the employer's portion of the application and forwarded it to petitioner on April 11, 1994. Id. at 3a, 28a-29a. Two days later, petitioner denied respondent's claim for benefits as untimely under the terms of the policy, which specifies that written proof of claim be given to petitioner not later than one year and 180 days after the onset of disability.

Id. at 3a, 4a-5a, 29a, 32a. On July 12, 1994, petitioner affirmed its denial, after respondent requested review of his claim. Id. at 3a; see id. at 29a (different date).

2. Respondent filed suit against the MAC plan and petitioner to recover benefits under Section 502 of ERISA, 29 U.S.C. 1132. Pet. App. 77a. The district court granted summary judgment for petitioner, agreeing that the claim for benefits was untimely under the terms of the plan. Id. at 32a-33a.

Respondent argued that the claim was timely under the Elfstrom rule, see Elfstrom v. New York Life Ins. Co., 432 P.2d 731 (Cal. 1967), a pre-ERISA state agency principle providing that where an employer administers an insured group health plan, it acts as the agent of the insurance company. In respondent's view, MAC acted as petitioner's agent for purposes of the disability insurance policy, and the notice respondent gave MAC therefore constituted timely notice of claim to petitioner. The district court rejected that argument on the ground that the Elfstrom rule is preempted by ERISA and is not saved as a law that "regulates insurance" under ERISA's insurance savings clause, 29 U.S.C. 1144(b)(2)(A). The court reasoned that the Elfstrom rule is not a saved insurance regulation for two reasons: it does not transfer risk and it is not an integral part of the policy relationship between the insurer and the insured, since California law specifically allows insurance contracts to define the extent of the employer's agency relationship with the insurance company. Pet. App. 30a-31a.

3. The Ninth Circuit reversed, on two grounds.

First, although the court agreed that the notice and proof of claim were clearly untimely under the express terms of the plan, Pet. App. 4a-5a, the court nevertheless held that the case should be remanded for further consideration of whether, under California's "notice-prejudice" rule, petitioner suffered actual prejudice from the untimely notice. Pet. App. 6a. The notice-prejudice rule provides that an insurer may not deny a claim as untimely unless it can show actual prejudice resulting from the delay. Id. at 5a-6a. In holding that ERISA does not preempt the notice-prejudice rule, the court relied on its recent decision in Cisneros v. UNUM Life Insurance Co. of America, 134 F.3d 939, 945-947 (9th Cir. 1998), petition for cert. pending, No. 97-1867.

Cisneros had held that the California notice-prejudice rule is saved from ERISA preemption as a law "which regulates insurance." 29 U.S.C. 1144(b)(2)(A). Noting that the rule dictates the terms of the insurance relationship and is specifically and exclusively applicable to insurance contracts, the court concluded in Cisneros that the rule is saved because it fits a common-sense understanding of insurance regulation. 134 F.3d at 945, citing Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740-742 (1985). As this Court had done in Metropolitan Life, the Cisneros court also looked to the three factors that are used in determining whether a particular state law relates to the "business of insurance" under the

McCarran-Ferguson Act, 15 U.S.C. 1012.[1] The Cisneros court concluded that the notice-prejudice rule does not satisfy the first factor because it does not transfer or spread policyholder risk as required by that factor. But, the court held, that "imperfection" is not "dispositive," Cisneros, 134 F.3d at 945; the McCarran-Ferguson criteria are simply factors to be weighed in determining whether a law "regulates insurance." Id. at 946. Because the notice-prejudice rule creates a mandatory contract term and is applicable only to the insurance industry, the court determined that it clearly meets the other two McCarran-Ferguson Act factors, and that on balance it "regulates insurance" under Section 514(b)(2)(A) of ERISA. Id. at 945-947.

Second, in addition to remanding in light of Cisneros, the Ninth Circuit also held that the rule of state agency law announced in Elfstrom -- that "the employer is the agent of the insurer in performing the duties of administering group insurance policies," Pet. App. 9a -- is not preempted by ERISA Section 514(a), 29 U.S.C. 1144(a). Pet. App. 22a. The court concluded that the Elfstrom rule does not "relate to" employee benefit

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[1] The three factors are:

> [F]irst, whether the practice has the effect of transferring or spreading the policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pilot Life, 481 U.S. at 48-49, quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982).

plans under Section 514(a) because it does not govern the structure or administration of employee benefit plans or "provid[e] alternative enforcement mechanisms." Id. at 21a-22a (citation omitted). Moreover, reasoning that "[n]othing in [Section] 514(a) empowers a plan fiduciary to extend ERISA's preemptive reach by using policy language that negates agency law principles," the court declined to attach significance to the fact that the policy expressly provided that the employer should not be deemed to be the insurer's agent. Id. at 22a-23a. The court left to the district court on remand the question whether MAC in fact acted as an agent in administering petitioner's plan, particularly with respect to the receipt and forwarding of benefit claims. Id. at 24a-25a.

SUMMARY OF ARGUMENT

ARGUMENT

I. CALIFORNIA'S NOTICE-PREJUDICE RULE IS A LAW THAT "REGULATES INSURANCE" AND IS THEREFORE SAVED FROM PREEMPTION BY 29 U.S.C. 1144(B)(2)(A)

A. The Notice-Prejudice Rule "Relates To" ERISA plans

1. Under Section 514(a) of ERISA, 29 U.S.C. 1144(a), the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The California notice-prejudice rule does "relate to" ERISA plans. As stated by the court of appeals, the rule provides that "the insurer * * * may not deny benefits by reason of untimely notice or submission of proof of claim unless the insurer proves that it has suffered actual prejudice because of the delay." Pet. App. 5a-6a. That rule is equivalent to requiring each insurance policy -- including those issued to ERISA plans, see 29 U.S.C. 1002(1) (defining "employee welfare benefit plan" under ERISA to apply to plans providing benefit "through the purchase of insurance or otherwise") -- to contain a term prohibiting denial of benefits where prejudice cannot be shown.

In Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985), this Court addressed an analogous issue regarding the preemption under ERISA of a state law mandating that certain mental health benefits be provided to any state resident who is insured under certain types of policies. The Court held that that kind of mandated benefits law "relates to" ERISA plans insofar as it is sought to be applied to such plans. 471 U.S. at

739. Neither the fact that the state law was not inconsistent with any substantive provision of the plan, nor the fact that the state law applied widely to individuals and entities other than ERISA plans was sufficient to remove it from the preemptive force of ERISA's "relates to" language. Accord New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 663-664 (1995) ("Because regulated policies [in Metropolitan Life] included those bought by employee welfare benefit plans, we recognized that the law 'directly affected' such plans."); Shaw v. Delta Airlines, 463 U.S. 85, 97 (1983) (state disability law "which requires employers to pay employees specific benefits, clearly 'relate[s] to' benefit plans").

The same principle applies here. Although the notice-prejudice rule does not mandate that insurance policies issued to ERISA plans include any particular substantive benefit, its effect is similar to that of the laws at issue in Metropolitan Life or Shaw, because it in effect requires plans to include particular provisions (in this case, regarding the enforcement of claim filing deadlines) in their insurance contracts. Indeed, the argument that the statute "relates to" ERISA plans is stronger in this case than in Metropolitan Life or Shaw, since -- unlike the substantive benefits that an ERISA plan must offer, as to which the statute itself is silent -- ERISA itself contains some provisions regarding claims processing.[2] Accordingly, like

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[2] [very brief summary and citation of DOL's new regs regarding claims processing]

the rules at issue in Metropolitan Life or Shaw, the notice-prejudice rule "mandates employee benefit structures or their administration" when applied to ERISA plans. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 646 (1995). It therefore "relates to" such plans.

B. The Notice-Prejudice Rule Is Saved From Preemption By ERISA's Insurance Savings Clause

Under the "insurance savings clause" of ERISA, Section 514(b)(2)(A), 29 U.S.C. 1144(b)(2)(A), the general "relates to" criterion for preemption is qualified. The insurance savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A). By saving such insurance regulation from preemption, ERISA "leaves room for complementary or dual federal and state regulation" of the insurance industry. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 87 (1993). The ultimate question in determining whether a state law is saved from preemption under the insurance savings clause is whether the law "regulates insurance."

This Court has employed a two-stage analysis for deciding whether a state law "regulates insurance" in this context. First, the Court undertakes a "common-sense" examination of the state law at issue. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). "A common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987). Second, because a purpose of the insurance savings clause was "to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States," Metropolitan Life, 471 U.S. at 744 n.21, the three factors used to determine whether a state law regulates the "business of insurance" under the McCarran-Ferguson Act are also relevant to the ERISA determination. See note 1, supra.[3]

Under this two-tiered analysis, a state law that mandates benefits to be provided in an insured plan falls within the savings provision and is not preempted. Metropolitan Life, 471 U.S. at 746. On the other hand, a general state tort or contract law that applies to the insurance industry, but is not directed specifically at the industry, is not an insurance regulation falling within the savings provision and, to the extent it "relate[s] to" a plan, is preempted. Pilot Life, 481 U.S. at 50, 57.

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[3] A state law that purports to regulate insurance by "deem[ing]" a plan to be an insurance company is also outside the savings provision and subject to preemption. 29 U.S.C. 1144(b)(2)(B). As a result of that provision, self-insured plans are generally outside the scope of state insurance regulation. See, e.g., [cases]. Because this case does not involve a self-insured plan or an attempt to deem a plan to be an insurance company, this "deemer" clause is not at issue in this case.

1. The court of appeals correctly held that the notice-prejudice rule, as a matter of "common sense," is directed at the insurance industry. The court of appeals in this case relied on its recent decision in Unum Life Ins. Co. v. Cisneros, 134 F.3d 939 (9th Cir. 1998), to hold that the notice-prejudice rule is saved under the ERISA insurance savings provision. In Cisneros, the court had reasoned that the notice-prejudice rule, "by requiring the insurer to prove prejudice before enforcing proof-of-claim requirements, * * * dictates the terms of the relationship between the insurer and insured and so seems, as a matter of common sense, to 'regulate insurance.'" Id. at 945. The court also noted that "[t]he rule is directed specifically at the insurance industry and is applicable only to insurance contracts." Ibid. The Ninth Circuit's conclusion in Cisneros that the notice-prejudice rule satisfies an ordinary understanding of insurance regulation is correct.[4]

Petitioner belatedly argued in its reply brief at the certiorari stage of this case that the notice-prejudice rule "is nothing more than a basic principle of contract law which applies to all contracts, not merely insurance policies." Pet. Reply Br.

[4] The notice-prejudice rule is not unique to California insurance regulation. As one influential treatise has noted, "there is something approaching a consensus in regard to the general proposition that an insured's coverage should only be lost when the insurer has been prejudiced." Robert Keeton and Alan Widiss, Insurance Law: A Guide To Fundamental Principles, Legal Doctrines, and Commercial Practices, § 7.2, at 763 (1988). Indeed, if the rule were not saved by the insurance savings clause, it would nonetheless have to be decided whether the rule should be adopted as a matter of federal common law under ERISA itself.

5. Assuming that this issue is properly before the Court because it is "fairly included" in the questions presented, see Sup. Ct. R. 14.1(a), petitioner's argument should be rejected. Determining whether California's notice-prejudice rule is directed at the insurance industry narrowly, or is instead a "basic principle of contract law" recognized throughout a State's law, requires an analysis of the law of California. Petitioner offers no reason to disturb the conclusion of the court of appeals, which is presumed to be familiar with the law of the States in its circuit, that the notice-prejudice rule under California law is directed specifically at the insurance industry. See Sheridan v. United States, 487 U.S. 392, 401-402 (1988); Runyon v. McCrary, 427 U.S. 160, 181 (1976); Huddleston v. Dwyer, 322 U.S. 323, 237 (1944).

In any event, our survey of California law reveals no cases where the state courts apply the notice-prejudice rule as such outside the insurance area. Nor is this surprising, given that the rule is stated in terms of prejudice to an "insurer" resulting from untimeliness of notice. See Shell Oil Co. v. Winterthur Swiss Ins. Co., 12 Cal. App. 4th 715, 760 (Ct. App. 1993) ("California law is settled that a defense based on an insured's failure to give timely notice requires the insurer to prove that it suffered substantial prejudice."). Thus, even if petitioner is correct in viewing the notice-prejudice rule (like most insurance regulation) as having its roots in established common law contract doctrine, or more broadly as being a species of harmless error doctrine, we agree with the Ninth and D.C. Circuits that, as it now exists, the rule of notice-prejudice "applies only to insurers." O'Connor v. UNUM Life Ins. Co. of Am., 146 F.3d 959, 964 (D.C. Cir. 1998); compare Security Life Ins. Co. of Am. v. Meyling, 146 F.3d 1184, 1189 (9th Cir. 1998) (California insurance code provision allowing rescission in the event of material misrepresentation merely codifies the common law remedy of rescission and is not an insurance regulation).[5]

2. The McCarran-Ferguson Act factors also suggest that the California notice-prejudice rule is a law that "regulates insurance" under ERISA. In its previous Cisneros decision, upon which the court in this case relied, the court of appeals considered the application of the McCarran-Ferguson Act factors to the California notice-prejudice rule. The court ruled that the notice-prejudice rule clearly satisfies two of the factors -- whether the rule is "an integral part of the policy relationship between the insurer and the insured" and whether the rule "is limited to entities within the insurance industry." See Cisneros, 134 F.3d at 946. Those conclusions are correct. By "effectively creat[ing] a mandatory contract term" that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision, the notice-prejudice rule "dictates the terms of

[5] We note that state common law created by the decisions of state courts, such as the notice-prejudice rule, fits ERISA's literal definition of state law. 29 U.S.C. 1144(c)(1) and (2) ("[t]he term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law"). In many States, a similar notice-prejudice rule is codified in the state insurance code. See [citation for source on this].

the relationship between the insurer and the insured, and consequently, is integral to that relationship." Ibid. In addition, as discussed above, the notice-prejudice rule appears to be specifically tailored to the insurance industry and applies only in that context. The primary dispute in this case, however, concerns the other McCarran-Ferguson criterion -- whether the notice prejudice rule "has the effect of transferring or spreading a policyholder's risk."

a. The Cisneros court held that the notice-prejudice rule does not satisfy the McCarran-Ferguson "risk spreading" criterion. The court held that this criterion "refers to the risk of injury for which the insurance company contractually agreed to compensate the insured." 134 F.3d at 945-946. The court stated that, although "[t]he notice-prejudice rule does shift the risk of lost coverage as a result of late submission of proof," it "does not alter the allocation of risk for which the parties initially contracted, namely the risk of lost income from long-term disability." Ibid.

In our view, although the distinction the court of appeals attempted to draw between different types of risk spreading finds substantial support in the case law, it is ultimately unsatisfactory.[6] Insofar as the notice-prejudice rule shifts the

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[6] See Davies v. Centennial Life Ins. Co., 128 F.3d 934, 941 (6th Cir. 1997); Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105, 108 (5th Cir. 1993); DeBruyne v. Equitable Life Assurance Soc'y of the United States, 920 F.2d 457, 469 (7th Cir. 1990); Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562, 569 n.9 (11th Cir.), cert. denied, 513 U.S. 808 (1994); cf. O'Connor v. UNUM Life Ins.
(continued...)

risk of late notice and stale evidence from the insured to the insurance company in some instances, it has the effect of raising premiums and spreading risk among policyholders. See United States Department of Treasury v. Fabe, 508 U.S. 491, 503-504 (1993) (in holding that the actual performance of a contract constitutes the "business of insurance" under the McCarran-Ferguson Act, the Court notes that "[w]ithout performance of the terms of an insurance policy, there is no risk-transfer at all."). Therefore, it could easily be found to satisfy the McCarran-Ferguson "risk spreading" criterion.

Moreover, although the court of appeals attempted to rely on this Court's decision in Metropolitan Life to support its distinction between "the risk for which the parties originally contracted" and the risk of late notice and stale evidence addressed by the notice-prejudice rule, its reliance was misplaced. The Court in Metropolitan Life held that a state law mandating the inclusion of certain mental health benefits in certain types of insurance policies tended to spread risks under the McCarran-Ferguson Act test. Just as in this case, however, the risk that was spread by the state rule -- the risk of mental illness -- was not a risk "for which the parties initially contracted," in the Ninth Circuit's phrase; the parties in Metropolitan Life specifically contracted only to spread other

[6](...continued)
Co. of Am., 146 F.3d 959, 962 n.* (D.C. Cir. 1998) (noting that because policyholder conceded the point, it had no occasion to decide whether the notice-prejudice rule transfers or spreads policyholder risk).

kinds of health risk. Nonetheless, just as in this case, the state law at issue required them to spread an additional risk, and it was therefore found to satisfy the McCarran-Ferguson "risk spreading" criterion. It would appear that the same conclusion applies here.

b. The Court need not, however, determine the soundness of the court of appeals' conclusion that the notice-prejudice rule spreads risk under the McCarran-Ferguson factors. Even if the notice-prejudice rule does not spread the kind of risk addressed by the McCarran-Ferguson factors, the fact that it does not is not fatal to a claim that the rule nonetheless "regulates insurance" under ERISA. That is because, as the Ninth Circuit correctly held, "the McCarran-Ferguson factors are simply relevant considerations or guideposts, not separate essential elements of a three-part test that must each be satisfied for a law to escape preemption." Cisneros v. UNUM Life Ins. Co. of Am., 134 F.3d 939, 946 (9th Cir. 1998), petition for cert. pending, No. 97-1867.[7]

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[7] The Ninth Circuit's view is in line with that of the District of Columbia and Sixth Circuits, O'Connor v. UNUM Life Ins. Co. of Am., 146 F.3d 959, 963 (D.C. Cir. 1998); Davies v. Centennial Life Ins. Co., 128 F.3d 934, 940 (6th Cir. 1997); cf. Soniat v. Travelers Ins. Co., 538 So. 2d 210, 214-215 (La. 1989) (holding policy-cancellation provision saved under common-sense approach without resort to Pireno factors), while the Fifth Circuit is the only circuit to have directly held that all three factors are essential. CIGNA Healthplan of La., Inc. v. Louisiana, ex rel. Ieyoub, 82 F.3d 642, 650 (5th Cir.) ("[I]f a statute fails * * * to satisfy any one element of the three-factor Metropolitan Life test, then the statute is not exempt from preemption by the ERISA insurance savings clause."), cert. denied, 519 U.S. 964 (1996); accord Tingle v. Pacific Mut. Ins.
(continued...)

Initially, this Court itself has made quite clear that the McCarran-Ferguson criteria were not intended to introduce a rigid three-part test. Although the Court stated in Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 211-212 (1979), that risk-spreading is an "indispensable characteristic of insurance," it does not follow that regulation of the business of insurance always involves regulation of risk-spreading, either under the McCarran-Ferguson Act itself or under ERISA. Indeed, since its initial articulation of the three criteria in Royal Drug, the Court has been quite consistent in disavowing any attempt to use them as a rigid three-part test. That has been true both in cases directly applying the McCarran-Ferguson Act, such as Pilot Life, see 481 U.S. at 48, 49 (referring to the factors as "guide[s]" or "considerations [to be] weighed"), and in cases applying the ERISA insurance savings clause, see Metropolitan Life, 471 U.S. at 743 ("three criteria relevant to determining whether a particular practice falls within the

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(...continued)
Co., 996 F.2d 105, 108 (5th Cir. 1993) (holding statute preempted that "fails to satisfy at least one prong of the three part Metropolitan Life test"). Other courts have reached varying results that appear to depend on a more flexible analysis, not a rigid rule requiring state laws to satisfy each of the McCarran-Ferguson criteria to come within the ERISA insurance savings clause. See, e.g., Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150, 153 (8th Cir. 1990) (common law rule not saved because it failed two factors), cert. denied, 501 U.S. 1238 (1991); Howard v. Gleason Corp., 901 F.2d 1154, 1158-1159 (2d Cir. 1990) (statutory provision not saved because it failed to meet common sense test and two factors); Kelley v. Sears, Roebuck & Co., 882 F.2d 453, 456 (10th Cir. 1989) (statute not saved because it failed two of three factors); Anschultz v. Connecticut Gen. Life Ins. Co., 850 F.2d 1467, 1469 (11th Cir. 1988) (state law that failed to meet two of McCarran-Ferguson factors is not saved).

'business of insurance'") (emphasis added). As the Court stated in Pireno, "[n]one of these criteria is necessarily determinative in itself." Pireno, 458 U.S. at 129. Indeed, in FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990), the Court found a state anti-subrogation provision to be an insurance law without any reference to the Pireno factors.

Moreover, the Court demonstrated that the insurance savings clause analysis embodies a balancing approach in Pilot Life. After determining that the state law in that case met neither a "common-sense" understanding of insurance nor the first McCarran-Ferguson factor, because it did not spread risk, id. at 50, the Court proceeded to address the other two factors as well. Id. at 50-51. That additional analysis would not have been necessary if petitioner were correct that a regulation must qualify under all three prongs.

Furthermore, the textual differences between the McCarran-Ferguson Act and the ERISA insurance savings clause suggest a somewhat broader scope for the insurance savings clause. The ERISA insurance savings clause saves any law that "regulates insurance," 29 U.S.C. 1144(b)(2)(A) -- a somewhat broader formulation than the McCarran-Ferguson Act's reference to laws "for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). Consequently, the stricter approach that may be necessary in McCarran-Ferguson Act cases to distinguish between the "business of insurance," which displaces federal antitrust and securities laws, and the "business of insurance companies," which may be subject to those laws, see SEC v. National Sec., Inc., 393 U.S. at 459, would not have controlling significance in the ERISA context.

Finally, the differing legal contexts in which the McCarran-Ferguson Act and the ERISA insurance savings clause operate suggest that, even if a rigid application of the McCarran-Ferguson criteria were appropriate elsewhere, a more flexible approach should be applied in the ERISA context. The McCarran-Ferguson Act was primarily directed toward drawing a line between a well-developed federal regulatory regime under the antitrust laws and the equally swell-developed state regulation of insurance; accordingly, a conclusion that the McCarran-Ferguson Act does not apply does not prohibit all regulation, but merely has the effect of subjecting an insurer to the federal regime. By contrast, a conclusion that a state law is not a law that "regulates insurance" under the ERISA insurance savings clause frequently has the opposite effect: it displaces a settled state scheme that has been found necessary to protect consumers and beneficiaries of insurance policies without subjecting insurers to any corresponding alternative scheme of substantive regulation. The Congress that enacted ERISA was deeply concerned with protecting the rights of plan participants. A too-rigid application of the McCarran-Ferguson criteria in the context of the ERISA insurance savings clause could easily result in depriving ERISA participants -- whom Congress sought to protect -

- of needed consumer protections without providing any alternative.

C. The Notice-Prejudice Rule Does Not Conflict With ERISA'S Civil Enforcement Provisions

Petitioner contends that, even if the notice-prejudice rule would be saved under the insurance savings clause, it is nonetheless preempted because it conflicts with a substantive provision of ERISA and with the written terms of the plan. Petitioner relies on Pilot Life, which it reads as having held that "ERISA would bar these [state] causes of action [for improper claims processing and failure to pay benefits] -- even if the 'saving' clause were applicable -- because they conflict with one of ERISA's substantive provisions, its exclusive civil enforcement scheme in [Section] 502(a)." Pet. 23, citing Pilot Life, 481 U.S. at 51-57. Petitioner is wrong, however, in both its premise and in the broader implications of its argument.

a. Petitioner's premise that a claim that conflicts with the written terms of a plan could not be a Section 502(a) claim for benefits -- and therefore must be a state cause of action for improper claims processing or failure to pay benefits -- is mistaken. In this case, the notice-prejudice rule is relevant not because it creates a separate state cause of action, but because it supplies a legal rule to be applied in an ordinary action under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), "to recover benefits due * * * under the terms of the plan." In this respect, this case is analogous to Metropolitan Life, which held a state law mandating certain insurance benefits to be saved and

And if it did create a separate state cause of action?

thus fully applicable under Section 502. It is also analogous to FMC Corp., in which the Court concluded that a state anti-subrogation rule would be saved and therefore applied to an insured plan, notwithstanding that the state rule affected the plan's payment of benefits. Analytically, there is no distinction among a state mandated insurance benefit law, an anti-subrogation rule, or a notice-prejudice requirement; each kind of mandate must be viewed, as a matter of state insurance law, as incorporated into the terms of insured plans in that state and as rendering nugatory any conflicting provisions of such plans; none "conflicts with a substantive provision of ERISA." Pilot Life, 481 U.S. at 57 (referring to Metropolitan Life); cf. John Hancock, 510 U.S. at 99 n.9 ("[n]o decision of this Court has applied the saving clause to supersede a provision of ERISA itself").

In short, as the Court concluded in FMC Corp., 498 U.S. at 64, "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts." Petitioner's argument to the contrary would virtually "read[] the saving clause out of ERISA entirely." Metropolitan Life, 471 U.S. at 741, since even the mandated benefits law at issue in Metropolitan Life would not be saved under such analysis.[8]

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[8] Contrary to petitioner's contention, Pet. 25, the notice-prejudice rule does not conflict with the requirement in Section 503 that plans must provide notice and the opportunity for review of denied claims, 29 U.S.C. 1133, or with the

(continued...)

b. More fundamentally, the insurance savings clause should not be narrowed to exclude state claims and remedies clearly directed at insurance, merely because Congress generally intended Section 502(a) to be the exclusive means of obtaining redress for benefit denials by plans. We recognize that Pilot Life has generally been read to have just that effect.[9] As explained below, however, this portion of Pilot Life's rationale cannot be squared with the plain language of the insurance savings provision and was unnecessary to Pilot Life's holding that the law at issue there was not an insurance regulation within the meaning of that provision. Accordingly, if the Court reaches this issue, it should make clear that a state law that "regulates insurance" is saved from preemption by ERISA, even if its

(...continued)
Secretary's regulation providing that "[a] claim is filed when the requirements of a reasonable claim filing procedure * * * have been met," 29 C.F.R. 2560.503-1(c), (d). Rather, the notice-prejudice rule complements the statute and regulation by providing a longer time to file a claim in the context of insured plans, if the insurer will not suffer prejudice thereby. Nor is petitioner correct in asserting (Pet. 25) that application of the notice-prejudice rule, contrary to a plan's express terms, conflicts with the statutory requirements that fiduciaries follow the written terms of the plan and pay benefits in accordance with those terms. 29 U.S.C. 1104(a)(1)(D), 1132(a)(1)(B). Those provisions could not reasonably be read to require fiduciaries to follow a plan's terms in contravention of applicable federal or state law.

[9] Most lower courts to have confronted the issue have concluded, like petitioner here, that Pilot Life requires the preemption of claims for benefits or remedies under state-law provisions that otherwise clearly constitute insurance law. See Kanne v. Connecticut Gen. Life Ins. Co., 867 F.2d 489, 493-494 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989); In re Life Ins. Co. of N. Am., 857 F.2d 1190, 1194-1195 (8th Cir. 1988) (citing district court cases); but see Franklin H. Williams Ins. Trust v. Travelers Ins. Co., 50 F.3d 144, 151 (2d Cir. 1995).

application in the ERISA context may create a new cause of action or remedy for a plan beneficiary.

In Pilot Life, the Court considered whether ERISA preempted state common law tort and contract causes of action for bad faith processing of a claim for benefits by an insurer. Analyzing the state law creating the cause of action at issue, the court initially concluded that (a) under a "common sense" view, it was not "specifically directed toward th[e insurance] industry," 481 U.S. at 50, and (b) it "at most meets one of the three criteria used to identify the 'business of insurance' under the McCarran-Ferguson Act," id. at 51. Those holdings were sound, they provided ample basis to conclude that the state law did not come within the ERISA insurance savings clause, and the Court's conclusion in Pilot Life that the state law was preempted was therefore correct.

In a succeeding portion of the Pilot Life opinion, however, the Court went on to consider whether its conclusion that the state law was preempted was supported by the exclusivity of the ERISA cause of action for plan benefits under Section 502(c). The Court concluded that it was, stating that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." 481 U.S. at 54. In that portion of its opinion, the Court did not advert to the language of the insurance savings clause, but it relied heavily on Congress's intent, evident from the legislative history of ERISA, to federalize ERISA remedies in the same way that Section 301 of the Labor Mangement Relations Act, 29 U.S.C. 185(a), had federalized remedies for violations of collective bargaining agreements. See 481 U.S. at 54-56.

We do not disagree even with this portion of the Court's opinion in Pilot Life. It is certainly true that, outside the context of state laws that "regulate insruance" under the ERISA insurance savings clause, the exclusivity of the Section 502 civil enforcement provisions appropriately informs the Court's understanding of the scope of ERISA preemption. See, e.g., Travelers, 514 U.S. at 656-658 (alternative enforcement mechanisms generally preempted); Ingersoll-Rand, 498 U.S. at 142; cf. Mertens v. Hewitt Assocs., 508 U.S. 248, 253-254 (1993) (because of comprehensive enforcement scheme, Court will not infer additional federal causes of action). Indeed, Congress clearly intended the remedial provisions of ERISA to be exclusive of any generally applicable state-law remedies related to plans. H.R. Conf. Rep. No. 93-1280, at 327 (1974); see also Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 62-64, 66 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 (1983).

But insofar as this portion of Pilot Life were read to suggest that ERISA Section 502 has the same preemptive force with respect to a state law cause of action or remedy that "regulates insurance" as it has with respect to one that does not do so, it should be rejected. The text of the savings provision provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A) (emphasis added). "[N]othing in this subchapter" includes Section 502 as well as Section 514(a), thus saving insurance regulations from the preemptive force of both provisions.[10] This Court recognized as much in Metropolitan Life, when it "declin[ed] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it," and concluded that "[i]f a state law 'regulates insurance,' as mandated-benefit laws do, it is not preempted." Metropolitan Life, 471 U.S. at 746; cf. Pilot Life, 481 U.S. at 56-57 (Metropolitan Life clearly "rejected an interpretation of the [insurance] saving clause * * * that saved from pre-emption 'only

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[10] Of course, an insurance law that directly conflicts with any ERISA provision is preempted by virtue of the Supremacy Clause. See John Hancock, 510 U.S. at 99-100. Although the insurance savings clause "leaves room for complementary or dual federal and state regulation," ERISA "calls for federal supremacy when the two regimes cannot be harmonized or accommodated." John Hancock Mut. Life Ins. Co. v. Harris Trust Sav. Bank, 510 U.S. 86, 98 (1993). "[I]n the case of a direct conflict, federal supremacy principles require that state law yield." Id. at 100. Such conflict preemption occurs when it is impossible to follow both a federal and state mandate. See Boggs v. Boggs, 117 S. Ct. 1754, 1762 (1997), citing Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992). There is no inconsistency or direct conflict between a state law that "regulates insurance" by creating a new cause of action or remedy for an ERISA participant or beneficiary and ERISA's provision, in Section 502, of a different cause of action or remedy for the same plan beneficiary.

state regulations unrelated to the substantive provisions of ERISA'").

Moreover, insofar as the reasoning of this portion of Pilot Life derived from Congress's intent to pattern ERISA "exclusive remedy" preemption on LMRA Section 301 preemption, that intent fails to provide guidance when the state law at issue "regulates insurance." That is because LMRA Section 301 does not contain any exception analogous to ERISA's insurance savings provision. Thus, while Section 301 may provide a useful analogy in cases in which ERISA's broad "relates to" preemption is applicable, Congress's enactment of the insurance savings provision makes clear that it did not intend that analogy to be controlling where the state law is saved by the insurance savings clause. Thus, this Court need not conclude from the discussion of Section 502(a) in Pilot Life that a state law that "regulates insurance," and so comes within the literal terms of the savings clause, is nevertheless preempted.[11]

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[11] In a brief in support of the petition for certiorari in Pilot Life, the government argued "that since Congress intended the procedures it established in Section 502 to be the exclusive procedures for enforcing claims for benefits due under employee benefit plans, the states are barred from establishing alternative procedures." Br. for the United States as Amicus Curiae, Pilot Life Ins. Co. v. Dedeaux, No. 85-1043, at 18. We adhere to that conclusion in circumstances like those in Pilot Life, where a beneficiary brought a claim under a general "state common law cause of action," ibid., to obtain benefits under a plan, as well as other remedies. For the reasons given in text, however, the exclusive nature of the Section 502 remedy is necessarily qualified where a beneficiary brings a claim under a state law that "regulates insurance." Insofar as our analysis here differs from that which we offered at the certiorari stage in Pilot Life, it is worth noting that our thinking -- as that of (continued...)

II. THE Elfstrom RULE DOES "RELATE TO" ERISA PLANS WHEN IT IS APPLIED TO THEM, AND IT IS THEREFORE PREEMPTED

The court of appeals erred in concluding that the Elfstrom rule, as a general principle of state agency law, does not unduly interfere with plan administration and thus does not "relate to" an employee benefit plan in this instance. To the contrary, the Elfstrom rule "relate[s] to" plans within the meaning of Section 514(a), because, when applied in the context of deciding a claim for benefits under ERISA, it could directly interfere with the goal of national uniformity in plan administration.[12]

1. The Elfstrom rule, which pre-dates ERISA and which provides that "the employer is the agent of the insurer in performing the duties of administering group insurance policies," Elfstrom v. New York Life Ins. Co., 432 P.2d 731, 737 (Cal. 1967), probably cannot be said to explicitly refer to or be dependent on the existence of an ERISA plan. See Ingersoll-Rand, 498 U.S. at 139. But the application of the Elfstrom rule to

[11](...continued)
the Court -- has been refined in light of the benefit of significant experience with ERISA preemption in the intervening 12 years. Specifically, it is now clear that preemption analysis must begin with the presumption that Congress did not intend to preempt state law, particularly in "fields of traditional state regulation." Travelers, 514 U.S. at 654-655. That presumption is particularly strong in the area of state insurance regulation, whose continued validity and application to ERISA plans Congress expressly provided for.

[12] In the same way, the notice-prejudice rule also "relate[s] to" the plan. Unlike the Elfstrom rule, however, notice-prejudice is a law regulating insurance that is saved from preemption, and any "disuniformities" that result from the application of the notice-prejudice rule "are the inevitable result of the congressional decision to 'save' local insurance regulation." Metropolitan Life, 471 U.S. at 747.

claims for benefits -- like those advanced by respondent in this case -- does have a direct effect on plan administration. In effect, it forces the employer, as plan administrator, to assume a role, with attendant legal duties and consequences, that it has not undertaken voluntarily. Compare De Buono, 117 S. Ct. at 1752-1753 (economic impact alone insufficient to "relate to" plan); Travelers, 514 U.S. at 662, 668 (same). That is especially troubling because, as petitioner points out (Pet. 28), state agency law varies from state to state, and it could easily be the case that one multi-state plan would be subject to contradictory agency principles depending on what state law is applied. See, e.g., First Nat'l Bank v. Nationwide Ins. Co., 278 S.E.2d 507, 514-515 (N.C. 1981) (North Carolina law "establishes that the employer-master policyholder is not ordinarily the agent of the insurer").Moreover, unlike a garnishment law like that at issue in Mackey, see 486 U.S. at 831-832, the effect on administration is not only substantial, but central and pervasive; it affects not merely the plan's bookkeeping obligations regarding to whom benefits checks must be sent, but instead regulates the basic services that a plan may or must provide to its participants and beneficiaries. Accordingly, application of the Elfstrom rule to claims for benefits like that of respondent is contrary to ERISA's goal of uniform federal administration of employee benefit plans and thereby "relates to" ERISA plans.[13]

Although we believe that the Elfstrom rule is preempted, however, we are not suggesting that general agency principles, or indeed contract, corporate or even trust principles, have no place in deciding an ERISA benefits claim. In this respect, the analogy to LMRA Section 301 is instructive. As in cases under that statute and in the absence of pertinent regulations issued by the Department of Labor, see [citation for source of regulatory authority], the federal courts are required to develop a uniform "federal common law of rights and obligations," Pilot Life, 481 U.S. at 56, concerning the circumstances under which ERISA plans will be held to have acted as agents of insurance companies. See, e.g., Allis-Chalmers v. Lueck, 471 U.S. 202, 210 (1985) ("[A] suit * * * alleging a violation of a provision of a

[13] Although the issue apparently was presented to the district court, see Pet. App. 30a-31a, no party appears to be contending that the Elfstrom rule, although formulated in the context of insurance, is a state law that "regulates insurance" for purposes of the ERISA insurance savings clause. In our view, the Elfstrom rule is not a law that "regulates insurance," both because it is not specifically directed at insurance and for the additional reasons discussed by the district court, see Pet. App. 31a. The court of appeals described as "sound" and "comport[ing] with [the Ninth Circuit's] prior determination of the issue" a formulation that makes quite clear that the rule is not law directed specifically at insurers, but is instead an application of general principles of agency law: "as the employer assumes responsibility for more administrative or sales functions which are customarily performed by an insurer, a question of fact will arise as to the agency relationship between the insurer and the employer." Pet. App. 13a n.6 (quoting Paulson v. Western Life Ins. Co., 636 P.2d, 935, 939 (Or. 1981)). Cf. Pet. App. 24a (noting that "[t]he question ultimate for the district court is whether MAC acted for UNUM and under UNUM's control in receiving and forwarding long-term disability claims").

labor contract must be brought under § 301 and be resolved by reference to federal law."). In developing that federal common law, the courts certainly can look to state-law principles. Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir. 1989). But, by subjecting plans to a federal common law standard, the statutory goal of consistent application in a multi-state setting can be achieved. See Shaw, 463 U.S. at 105. Given its roots in general principles of agency law, rules similar to the Elfstrom rule appear to be widespread in state law. See Pet. App. 12a (citing casees). Thus, on remand the courts below should consider whether the Elfstrom rule, or something like it, applies to the circumstances of this case as a matter of federal, not California, common law.[14]

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[14] See, e.g., Security Life Ins. Co. of Am. v. Meyling, 146 F.3d 1184, 1191 (9th Cir. 1998) (holding that rescission is an available remedy under the federal common law of ERISA); McClure v. Life Ins. Co. of N. Am., 84 F.3d 1129, 1135 (9th Cir. 1996) (adopting "reasonable expectations" doctrine as a matter of federal common law to aid in interpretation of ERISA insurance policies); City of Hope Nat'l Med. Ctr. v. HealthPlus, Inc., 156 F.3d 223, 228 (1st Cir. 1998) (applying federal common law principles of assignment in context of ERISA claim); Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir. 1998) (refusing to apply state law when calculating prejudgment interest award in context of successful ERISA benefits claim, but instead applying federal common law principles); Moriarty v. Glueckert Funeral Home, Ltd., 155 F.3d 859, 865-867 (7th Cir. 1998) (in case arising under ERISA and LMRA, court applied federal common law of agency in determining whether member of multi-employer association was bound by particular provision of collective bargaining agreement concerning contributions to employee benefit plan).

CONCLUSION

The judgment of the Ninth Circuit with respect to the applicability of California's notice-prejudice rule should be affirmed. The court's judgment with respect to the applicability of the Elfstrom rule, however, should be reversed.

Respectfully submitted.

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