UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MARK ALLAN CELENTANO, et al.,
Plaintiffs,

v.

NONNIE BURNES, in her official capacity as COMMISSIONER OF THE MASSACHUSETTS DIVISION OF INSURANCE,
Defendant.

Civil Action No. 1:09-11112-DPW

SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF THE CASE

As more fully stated in the parties' briefs, this case involves a show cause order issued by the Massachusetts Division of Insurance ("DOI") against Mark Allen Celentano, Jedediah Brettschneider, and affiliated insurance companies (collectively "plaintiffs"). DOI alleges that the plaintiffs violated two provisions of Massachusetts insurance law which were enacted for the protection of Massachusetts consumers: 1) Massachusetts General Law ("M.G.L.") c. 175, § 162R(a)(8), which prohibits the use of fraudulent, coercive or dishonest practices, or demonstrated incompetence, untrustworthiness or financial irresponsibility, and 2) M.G.L. c. 176D, § 2, which prohibits insurance agents and companies from engaging in an unfair or deceptive practice in the business of insurance. In support of these claims, DOI alleges, inter alia,[1] that the plaintiffs marketed group health benefit arrangements in a manner that induced or caused a customer to violate the nondiscrimination provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") contained in Part 7 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The customer is alleged to be the sponsor of a self-funded ERISA-covered plan. For purposes of this brief, we assume the truth of these allegations as stated by the parties.

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[1] One of the plaintiffs, Jedediah Brettschneider, the insurance company (NECHPA) for which he is president and chief executive officer, and the insurance underwriter (HMA MGU) for which he is a managing member and designated-responsible insurance producer, are also alleged to have failed to disclose Brettschneider's prior state (Georgia) felony conviction on their applications for insurance licenses, in violation of Massachusetts law. The first twenty-five of the thirty-three claims in the show cause order concern these allegations. The plaintiffs, however, do not seek to enjoin DOI's investigation and adjudication of these claims, and the Secretary’s brief will not address them.

The show cause order initiates a state administrative proceeding, which is subject to state court judicial review. As relief for the asserted violations, DOI seeks a cease and desist order, revocation of all insurance licenses, the prohibition of any direct or indirect transaction of insurance business by the plaintiffs, and imposition of maximum fines on the plaintiffs.

The plaintiffs filed this separate federal court action seeking an injunction against the Commonwealth on the ground that the show cause proceeding is preempted by ERISA. The Commonwealth of Massachusetts ("Commonwealth") sought dismissal of the federal court action on grounds of Younger abstention. See Younger v. Harris, 401 U.S. 37 (1971). In a hearing on October 15, 2009, this Court directed the parties to request an amicus curiae brief from the Secretary on the issues of ERISA preemption and Younger abstention. The Secretary sought and received leave to file this brief on or before December 18, 2009.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enforcement of standards relating to the insurance industry, including standards relating to insurance agent licensing and conduct, is traditionally a matter of state law. This includes proceedings to revoke agents' licenses for such misconduct as inducing, aiding and abetting violations of law by customers and third parties. In this case, the Commonwealth seeks to exercise its traditional authority to protect its citizens from sharp and deceptive practices by insurers and their agents. The Commonwealth has a legitimate interest in conditioning the right to market insurance on the insurers' and agents' adherence to high standards of conduct, including their general compliance with state and federal law. The fact that, in this case, the agents sought to induce or abet

violations of HIPAA (a section of ERISA), as opposed to some other state or federal law, does not undermine the Commonwealth's interest in the relief sought here, or turn what is otherwise a state proceeding relating to the marketing of insurance in Massachusetts into a federal proceeding.

Based on the facts above, DOI's enforcement action against the plaintiffs is not preempted by ERISA, because it does not "relate to" employee benefit plans within the meaning of ERISA section 514(a), 29 U.S.C. § 1144(a), which sets forth ERISA's preemption standard. This is so because DOI is merely enforcing general standards for the protection of insurance consumers and exercising its traditional authority to control who can market insurance within Massachusetts. The Commonwealth does not impermissibly regulate ERISA-covered plans by imposing a general obligation on insurers and their agents to comply with state and federal law and to refrain from inducing others to violate the law. The applicable state laws do not create a special exception for ERISA, and the DOI proceeding does not single out ERISA-covered plans for special treatment, require plans to change their benefit or administrative structures, or affect employers' ability to structure their ERISA benefit arrangements as they see fit. Indeed, the only plan in the picture – that of the customer of the plaintiffs that is alleged to have been induced to discriminate under HIPAA – is not a party to the state proceeding or an object of DOI's investigation.

Moreover, even if the operable state laws under which DOI is proceeding did "relate to" plans, DOI could still pursue its claims because the state laws specifically regulate the business of insurance. Section 514(b)(2)(A) of ERISA expressly saves from preemption "any law of any State which regulates insurance." 29 U.S.C. §

1144(b)(2)(A). Because the state-law provisions at issue do not conflict with any provision of ERISA, and are expressly saved by the insurance savings clause, DOI's enforcement action is not preempted. Indeed, tellingly, HIPAA provides for state enforcement of the nondiscrimination rules against insurance companies (but not against plans) under the Public Health Service Act. 42 U.S.C. §§ 300gg-22. Accordingly, the plaintiffs have not raised a "facially conclusive" claim of preemption, and the exception to Younger abstention does not apply.

ARGUMENT

A. ERISA Preemption Principles

The starting point for preemption analysis is the "'assumption that the historical police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" New York State Conference of Blue Cross v. Travelers Ins., 514 U.S. 645, 655 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The presumption informs ERISA preemption analysis, id. at 654, placing a heavy burden on any challenger to a state law or state enforcement action to show that it is preempted. Id. at 654. Insurance regulation is quintessentially within "the historical police powers of the States," as reflected in the McCarran-Ferguson Act, a federal statute which generally leaves the regulation of insurers to the states. See 15 U.S.C. 1012(a) ("[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business").

Subject to several exceptions, including one for insurance regulation, section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that ERISA preempts "any and all State

laws insofar as they . . . relate to any employee benefit plan" covered by the statute. The Supreme Court has cautioned against an "uncritical literalism" in determining when state laws "relate to" employee benefit plans, and has instructed courts to "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." See Travelers, 514 U.S. at 656 ; 29 U.S.C. § 1001(b) (general statement of ERISA policy objectives). Accordingly, ERISA does not preempt a state law that, through "indirect economic influence," "simply bears on the costs of benefits" or other administrative costs or decisions, since such laws "leave plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money." Id. at 659-660, 662. However, laws that bind ERISA plan administrators to a particular choice of rules, or that impermissibly threaten the ability of plan officials to administer nationwide or multi-regional plans on a uniform basis are preempted. Id. at 658-60.

In determining whether a state law "relates to" employee benefit plans, the courts have focused on whether the law 1) has a "connection with" or 2) a "reference to" ERISA-covered plans. Travelers, 514 U.S. at 656 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). Under the "connection with" prong, ERISA preemption encompasses "'state laws dealing with the subject matters covered by ERISA,'" Travelers, 514 U.S. at 661 (citing Shaw, 463 U.S. at 98 & n.19), and state laws that "mandate[] employee benefit structures or their administration," id. at 658, such as by "preclud[ing] uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one." Id. at 659-660; see Egelhoff v. Egelhoff, 532 U.S. 141,

146-47 (2001). Under the "reference to" prong, a state law can be preempted if ERISA-covered plans are "essential to the law's operation" or the law acts "immediately and exclusively" upon ERISA plans. Cal. Div. of Labor Standards Enforcement v. Dillingham, 519 U.S. 316, 325 (1997).

Even if a law "relates to" ERISA-covered plans under the two-prong test, there is an important exception for state insurance regulation. ERISA section 514(b)(2)(A) preserves the states' right to regulate insurance. 29 U.S.C. § 1144(b)(2)(A). A state law regulates insurance within the meaning of this "savings clause" if it is "specifically directed toward entities engaged in insurance" and "substantially affect risk pooling arrangement between the insurer and the insured." Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 342 (2003). Under the savings clause, states retain the authority to enforce a wide range of standards with respect to insurance companies, agents, and brokers, including solvency, licensing, sales practices, and other standards.[2] In addition, states may, without being preempted, regulate insurance by requiring that policies contain or omit certain terms and provisions, such as requiring health insurance policies to provide specific types of benefits. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) (upholding state external review procedure for insurance policies purchased as ERISA plans); UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 375-77 (1999) (rejecting insurer's argument that ERISA preempts state insurance laws "altering the . . . provisions

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[2] This state authority is contemplated not only by the ERISA savings clause, but is also required by the McCarran-Ferguson Act, a separate federal law providing that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). ERISA Section 514(d) provides that ERISA does not preempt other federal laws such as the McCarran-Ferguson Act. 29 U.S.C. § 1144(d).

of the insurance contract"); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739-47 (1985) (upholding state insurance law mandating mental health coverage).[3]

The insurance "savings clause" preserves the states' power to seek state remedies for violations of state insurance law, and to regulate the sale of insurance within a state. However, the states cannot enforce laws, including insurance laws, that conflict with ERISA's statutory or regulatory requirements. State and federal laws conflict when compliance with both laws is not possible, or when compliance with the state law would frustrate the purpose of the federal law. Boggs v. Boggs, 520 U.S. 833, 841 (1997). The Supreme Court has held that the civil enforcement remedies provided in section 502(a), 29 U.S.C. § 1132(a), for violation of ERISA are exclusive and that a state law that duplicates or supplements the remedies for ERISA violations would conflict with ERISA's exclusive remedy scheme.[4] See Aetna Health Inc. v. Davila, 542 U.S. 200, 216 (2004); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 136 (1990) ; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 43 (1987) (ERISA plan participant could not sue to recover state insurance law remedies, because Congress in section 502 sought to comprehensively regulate remedies available under ERISA, making state "alternative enforcement" remedies that Congress chose not to include in ERISA unavailable); cf. Rush Prudential,

[3] Under a separate "deemer" clause, not otherwise applicable to this case, ERISA prohibits states from deeming plans to be insurance companies or insurers for purposes of the insurance savings clause. 29 U.S.C. § 1144(b)(2)(B). Thus, while the states have full authority to regulate the sale of insurance and the terms of insurance policies, including policies issued to plans, they generally cannot directly regulate the benefit plans themselves.

[4] Thus, for example, a state could not give plan participants a new damages remedy for the wrongful denial of benefits that would supersede ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which provides a specific and limited remedy for benefit denials.

536 U.S. at 379-80 (ERISA participants must sue under ERISA § 502 to force insurers to comply with state mandate incorporated into ERISA plan); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (complete preemption analysis under ERISA). Significantly, this type of conflict preemption does not apply to state law actions that have no counterpart in ERISA, such as DOI's cease and desist proceeding which is based on general laws governing insurers and insurance agents, and which is brought by the state itself rather than the actors that have standing under ERISA – participants, beneficiaries, and fiduciaries.

B. State Government Enforcement of State Insurance Laws and ERISA Preemption

1. The state laws invoked by DOI to bring its enforcement action do not relate to ERISA plans within the meaning of ERISA section 514

DOI's action is based on its traditional authority to set standards relating to the insurance industry, including standards relating to insurance agent licensing and conduct. As reflected in the Massachusetts deceptive practices laws and insurance licensing requirements, the Commonwealth has a strong interest in preventing insurers and insurance agents that do business in the state from engaging in untrustworthy behavior or practices, including inducing, aiding and abetting violations of law by customers and third parties. This is equally true regardless of whether the particular misconduct at issue concerns ERISA (including HIPAA), or some other state or federal law. If, as alleged, the plaintiffs induced a customer (a sponsor of a self-insured plan) to violate HIPAA's non-discrimination provisions, the Commonwealth could reasonably conclude that they should not be permitted to market insurance or act as insurance agents in Massachusetts, just as the Commonwealth would prohibit agents from marketing insurance after aiding or abetting the violation of other state or federal laws. The Commonwealth has a general

interest in ensuring that its insurers and insurance agents adhere to all applicable federal and state laws, and from protecting consumers from those who would act in disregard of such laws. There is nothing unique about ERISA in this regard, and the Massachusetts law does not single out ERISA misconduct for special treatment. In this case, in particular, and under the Massachusetts laws at issue generally, the Commonwealth does not seek to regulate employee benefit plans, but rather to regulate insurance practices.

The states act within their police power when they take steps to prevent unethical or dishonest agents or brokers from having any further contact with customers. It has long been recognized that states' insurance agent licensing requirements "vitally affect the public interest." Robertson v. California, 328 U.S. 440, 447 (1946) (see also cases cited therein). Under Massachusetts law, as elsewhere, it is a "proper exercise of the police power of the commonwealth to require that persons acting as insurance brokers or insurance agents shall be licensed, in order that the business may be in the hands of trustworthy persons." Commonwealth v. Roswell, 173 Mass. 119, 121, 53 N.E. 132, 133 (1899). State licensing requirements are designed to protect the public from such evils as "fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship." Robertson, 328 U.S. at 447. Indeed, state insurance statutes typically contain enforceable general standards such as these to insure the trustworthiness, competence, and integrity of licensed insurance agents and brokers. See generally Public Regulation or Control of Insurance Agents or Brokers, 10 A.L.R.2d 950. The standards are designed to root out agents and insurers whose practices, for whatever reason, fall below the state's ethical or legal standards. In Massachusetts and other states, these laws

are applied to a wide variety of facts and circumstances demonstrating insurance agents' failure to live up to the high standards embodied in the licensing requirements. See Bowley Assoc., Ltd. v. State Ins. Dep't, 98 A.D.2d 521, 527, 471 N.Y.S.2d 585, 589 (N.Y. App. Div. 1984) ("The term 'untrustworthy' is a term of art . . . [that] is apparently used in a broader sense than that term is popularly employed.").

Under the Massachusetts version of the deceptive practices statute applicable to the insurance industry, DOI alleges that the plaintiffs "us[ed] fraudulent, coercive or dishonest practices or demonstrat[ed] incompetence, untrustworthiness or financial irresponsibility in the conduct of business." M.G L. c. 175, § 162R(a)(8). DOI also alleges violations of M.G.L. c. 176D, § 2, a parallel law that prohibits regulated parties from engaging in "an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." These claims mirror those that the Supreme Court recognized as reflecting important insurance regulation interests in Robertson and other cases.

DOI's allegations, while yet to be proven, are little different from numerous other examples of dishonesty, incompetence, untrustworthiness, or other "sharp practice" that laws like 162R and 176D are designed to root out. See, e.g., Stith v. Lakin, 129 S.W.3d 912 (Mo. Ct. App. 2004) (court upheld license revocation based on questionable loan transactions with customer); Bowley Assoc., Ltd., 471 N.Y.S.2d at 587-88 (court upheld penalty imposed by insurance department for failure to refund commissions attributable to cancelled portion of auto policies); Friedland v. Curiale, 192 A.D.2d 387, 596 N.Y.S.2d 41 (1993) (court upheld license revocation where licensees "conducted business under a fictitious entity, solicited business on behalf of unlicensed insurers, commingled

funds and failed to exercise their fiduciary responsibilities to policy holders"); James v. Comm'r of Insurance, 10 Mass. App. Ct. 883, 410 N.E.2d 713 (1980) (court upheld license revocation for violation of insurance and motor club statutes); Story v. Commonwealth, 175 Va. 615, 9 S.E.2d 344 (1940) (court upheld revocation of agent's certificates of registration as representative of several insurance companies for having solicited insurance without certificates of registration and for having misrepresented the provisions of policies of mutual companies).

These deceptive practices laws apply to instances in which an agent or broker induced or abetted violations of law by others, without regard to what those other laws themselves regulate. This is not surprising since the states have a valid interest in revoking the licenses of those insurance companies or agents who engage in such conduct. An insurance agent with a propensity to act badly in one respect is likely to act badly with respect to other matters as well. See David v. Comm'r of Insurance, 53 Mass. App. Ct. 162, 757 N.E.2d 748 (2001) (court upheld license revocation where insurance agent and broker conspired with another person to help that other person evade federal income tax); Medley v. Dep't of Ins., 223 Ill.App.3d 813, 585 N.E.2d 1235 (1992) (court upheld license revocation where insurance producer, who was also a controlling shareholder of a bank, helped a friend make an illegal cash transaction); Ballew v. Ainsworth, 670 S.W.2d 94 (Mo. Ct. App. 1984) (court upheld refusal to issue license where applicant had been discharged by an insurance company for disclosing information about a customer's premises to criminals to assist them in committing a burglary of the premises). See Mack v. Dep't of Fin. Servs., 914 So.2d 986 (Fla. Dist. Ct. App. 2005) (court upheld suspension of license of insurance customer service representative for

"knowingly aiding, assisting, advising, or abetting another person in violating the insurance code."). Cf. Forsyth v. Woods, 78 U.S. (11 Wall) 484, 487 (1870) (invalidating on public policy grounds an agreement to indemnify "the defendant for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust"). There is no reason why these laws should not also extend to instances where the deceptive practices involve inducing or abetting violations of ERISA, since there is nothing unique about ERISA that would put an agent who induces violations of HIPAA or ERISA beyond the reach of such state laws.

As a "proper exercise of the police power of the commonwealth," Roswell, 173 Mass. at 121, 53 N.E. at 133, the state laws enforcing the standards prohibiting such conduct are entitled to the presumption against preemption. Travelers, 514 U.S. at 654-55. Not only from the state's perspective, but from the perspective of ERISA preemption, it is of no legal consequence that the law the plaintiffs allegedly induced their customer to break was contained in Part 7 of ERISA. Instead, the legally significant fact is that the Massachusetts laws at issue in the DOI proceeding are facially neutral and do not remotely purport to regulate ERISA plans. Under Travelers, state laws that are facially neutral with respect to ERISA plans, and do not restrict the choices of such plans, are enforceable, even when there may be an indirect economic effect on plans. To trigger preemption, a facially neutral law like the ones at issue in this case would have to impose burdens on plans so acute as to "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." Id.. at 659. That is clearly not the case here.

The show cause order and the laws it invokes are directed solely at the agents and their insurance company, and not at ERISA entities such as the plan sponsor, the plan, the plan fiduciaries, and beneficiaries. See LeBlanc v. Cahill, 153 F.3d 134, 147, 149 (4th Cir. 1998); Morstein v. Nat'l Ins. Serv., Inc., 93 F.3d 715, 722 (11th Cir. 1996). If the agents and insurer lose their licenses, the only impact on ERISA plans would be that some plans would have to locate other service providers to provide administrative services or stop-loss insurance. This hypothetical indirect economic effect does not interfere with any of ERISA's purposes. For example, it does not preclude customers from continuing to sponsor their ERISA-covered plans, force them to alter their plans, or prevent other employers from establishing or maintaining plans in a uniform manner. See Travelers, 514 U.S. at 660 ("[n]or does the indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one"). There is no indication whatsoever that plans in Massachusetts lack alternative service providers. And to the extent DOI's action influences employers to comply with ERISA (or, specifically, HIPAA) requirements, it does so through the employers' voluntary actions and, needless to say, is entirely consistent with ERISA's purposes. Therefore, any impact on self-funded plans is indirect at most, and revoking the license of an untrustworthy insurance agent is "a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." Travelers, 514 U.S. at 668; cf. DeBuono v. NYSA-ILA Med. and Clinical Serv. Fund, 520 U.S. 806, 815-16 (1997)

(New York hospital surcharge with a "direct impact" on plan as owner of hospital did not "relate to" plans).[5]

2. The state laws invoked by DOI to bring its enforcement action fall within the savings clause for insurance regulation under ERISA section 514 and do not conflict with ERISA's civil enforcement scheme

Even if the enforcement action related to ERISA plans within the meaning of section 514 of ERISA, it would be saved by the insurance saving clause. The laws that DOI relies on in its show cause order are found in Chapters 175 and 176D of the Massachusetts General Laws –chapters that specifically govern "[i]nsurance." As applied to insurers and enforced through the remedial mechanisms available to the Commissioner of Insurance, M.G.L. c. 175, 162R(a)(8), and M.G.L. c. 176D, § 2, are laws regulating insurance within the meaning of the savings clause.

DOI's show cause order is based on these two deceptive practices acts, which are "specifically directed toward entities engaged in insurance." These laws permitting the Commonwealth to revoke the insurance licenses also "substantially affect the risk pooling arrangement between the insurer and the insured." Kentucky Ass'n, 538 U.S. at 342. The states' exercise of control over who can sell insurance in a state is a critical gatekeeping function, determining who can market risk pooling arrangements in the first place. Cf. Fidelity and Cas. Co. of New York v. Tillman Corp., 112 F.3d 302, 304-05 (7th Cir. 1997) (state strictly limits roles of insurers and agents in regulating state's workers

[5] The plaintiffs argue that a state employee's email offered settlement terms which would be preempted if contained in a DOI order. Without opining on the contents of the email, the Secretary disagrees. Even if the email implicates preemption concerns, the email has no binding effect. Nor does the email imply that DOI's prosecutorial arm might ask for improper relief in the administrative proceeding. There is no reason to assume that the adjudicators would grant it, and, while the possibility of a state prosecutor overreaching is inherent in any adversary proceeding, it is up to the judge or other adjudicator to make a proper decision taking that possibility into account.

compensation "assigned-risk pool"); Dillon v. Combs, 895 F.2d 1175, 1176 (7th Cir. 1990) (banning agents from selling malpractice insurance furthered state goal of maintaining a state run malpractice risk pool). Such laws assure that risk pooling is in the hands of reputable and reliable people and companies, protecting insurance customers and ensuring that consumers can rely upon agents' statements about policy terms and risk coverage.[6]

Revoking a license affects the insurer-insured relationship in a most fundamental way and, as the Court observed in Robertson, assuring the trustworthiness of insurance agents is a particularly important state function. 328 U.S. at 447. Thus, wholly apart from the argument that the state laws do not "relate to" ERISA plans within the meaning of section 514(a), ERISA also does not preempt DOI's enforcement action because the laws at issue fall within ERISA's insurance savings clause.

Moreover, in light of the insurance savings clause, it would be particularly incongruous if state insurance departments could generally forbid licensed agents from aiding or abetting violations of other state and federal laws, but were somehow uniquely forbidden from sanctioning insurers and agents when they induced violations of ERISA. Certainly, such a reading would seem to be inconsistent both with ERISA's protective

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[6] By regulating who can enter into risk pooling agreements in the first place, insurance licensing laws affect risk pooling even more substantially than other insurance laws that the Supreme Court has held saved under section 514(b)(2)(A). See, e.g., Rush Prudential, 536 U.S. at 373-75 (external review of disputed health claims); UNUM Life Ins. Co., 526 U.S. at 368 (imposition of notice-prejudice rule). The Kentucky Association Court reiterated these earlier holdings and reinforced their reasoning in announcing the second part of the Kentucky Association test. As the Court described UNUM, "[t]he notice-prejudice rule governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay for the risk that it has assumed. This certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and the insured." Kentucky Ass'n, 538 U.S. at 339 n.3 (citation omitted).

purposes and Congress' decision to save state insurance laws. Cf. Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 841 (1987) (preempting state law that exempted only ERISA plans from generally applicable state garnishment procedures). Indeed, the purpose of the savings clause was obviously not to insulate insurers and their agents from state as well as federal regulation, but quite the contrary. Morstein, 93 F.3d at 723-24 (if ERISA preemption immunized insurance agents, employees, beneficiaries, and employers could no longer rely on agents' statements about policy terms where state law places the duty on agents to deal honestly).

Both ERISA and the McCarran Ferguson Act have left to the states the regulation of insurance agent and broker behavior, as illustrated by cases where states regulate the insurers who do business with ERISA plans. See Morstein, 93 F.3d at 722 (permitting state law claim by business owner against insurance agency and agent who fraudulently induced her to change her company's health insurance plan from one insurance company to another because suit "does not affect relations among principal ERISA entities as such"); Safeco Life Ins. Co. v. Musser, 65 F.3d 647 (7th Cir. 1995) (Wisconsin tax on health insurers' sales not preempted as applied to stop loss insurance policies sold to self-funded plans); Employee Benefit Managers, Inc. v. Indiana Dep't of Ins., 882 N.E.2d 230 (Ind. App. 2008) (state revoked insurance producer and third party administrator licenses where licensees had acted as a health insurer by commingling the funds of employers with self-funded ERISA plans and paying claims from the pooled funds); Bennett v. Indiana Life and Health Ins. Guaranty Ass'n, 688 N.E.2d 171 (Ind. App. 1997) (upholding as not preempted Commissioner's order finding state guaranty association

liable to ERISA plan trustees for up to $100,000 per plan participant for guaranteed investment contracts issued by defunct insurers).

Furthermore, the causes of actions stated in DOI's show cause order do not conflict or in any way interfere with section 502, ERISA's exclusive civil enforcement scheme. Generally speaking, section 502, 29 U.S.C. § 1132, provides for claims to recover wrongfully denied plan benefits (section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)), to restore losses to the plan caused by a plan fiduciary's breach of its fiduciary responsibilities (section 502(a)(2), 29 U.S.C. § 1132(a)(2)), and for appropriate equitable relief to redress violations of ERISA (section 502(a)(3) and (5), 29 U.S.C. § 1132(a)(3) and (5)). DOI is not one of the "ERISA parties" that can bring any of these types of actions, and, even if it could, the violations of state law it alleges and the remedies it seeks against the plaintiffs do not duplicate or supplement any of the ERISA causes of actions. Rather, DOI is merely availing itself of the state administrative and judicial process to vindicate violations of general state laws that, as previously argued, do not "relate to" ERISA plans within the meaning of ERISA's express preemption provision and that in fact fall within the ERISA savings clause for insurance regulation.[7]

[7] Thus, a case brought by the state insurance commissioner under state insurance law against state insurance licensees who are not ERISA fiduciaries does not come close to intruding upon the ERISA civil enforcement scheme. It is worth noting, however, that even where the savings clause was not involved, numerous cases have rejected ERISA preemption defenses to state malpractice or similar professional misconduct claims against a variety of service providers. See, e.g., Gerosa v. Savasta & Co., 329 F.3d 317, 325-29 (2d Cir. 2003); Trustees of the AFTRA Health Fund v. Biondi, 303 F.3d 765, 777-79 (7th Cir. 2002), LeBlanc, 153 F.3d at 147; Ariz. State Carpenters Trust Fund v. Citibank, 125 F.3d 715, 717-18 (9th Cir. 1997); Custer v. Sweeney, 89 F.3d 1156, 1167 (4th Cir. 1996); Airparts Co. v. Custom Benefit Servs. of Austin, 28 F.3d 1062, 1064 (10th Cir. 1994); Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1152-53 (3d Cir. 1989); Harmon City, Inc. v. Nielsen & Senior, 907 P.2d 1162, 1169 (Utah 1995) (listing cases).

C. Federal and State Cooperation in Enforcing ERISA and State Insurance Laws

The plaintiffs purport to find support for preemption in the fact that the Department of Labor is investigating some of the same conduct that DOI investigated in this case. Plaintiffs' July 31 Memorandum at 5-6. Far from supporting preemption, however, this simply reflects the concurrent jurisdiction of the states and the Secretary over conduct that implicates both traditional areas of state concern and ERISA. This is, of course, particularly true with respect to the regulation of insurance, which Congress expressly saved from ERISA preemption. From ERISA's inception, the Act contemplated not only that state and federal authorities would retain authority within their respective areas of jurisdiction, but also that state and federal authorities would interact in areas of common interest. See ERISA section 506, 29 U.S.C. § 1136 (specifically providing for cooperation between state and federal investigators); cf. John Hancock Mut. Life Ins. Co. v. Harris Trust, 510 U.S. 86, 100 (1993) (noting "dual" federal and state regulation of group insurance contracts); Dona v. Levin, 263 A.D.2d 602, 693 N.Y.S.2d 677 (1999) (insurance agent's license revoked after conviction under 18 U.S.C. § 1027 for making false statement in an ERISA document).

Accordingly, it is quite common for state and federal authorities to investigate the same conduct simultaneously. A prominent recent example involves the disability insurance carrier, UnumProvident, which entered into a joint settlement agreement with both the U.S. Department of Labor and state insurance regulators because of its claims handling practices. See http://www.dol.gov/ebsa/faqs/faq_unumprovident.html and http://maine.gov/pfr/insurance/unum/unum_exam_settlement.htm. Similarly, the Department of Labor often provides state insurance departments with advisory opinions

or other guidance to assist them in establishing their jurisdiction over violators of state insurance law. See U.S. Dep't Labor ERISA Opinion Letters 2005-18A, 1997-14A. In other cases, affidavits and other evidence provided by state insurance department employees have proved critical in actions brought by the Department of Labor against violators of ERISA. Federal and state authorities also often cooperate and exchange information when the enforcement action of one regulator reveals conduct that might be of concern to the other regulator. See e.g., Martin v. Feilen, 965 F.2d 660, 672-73 (8th Cir. 1992) (discussion of accountant's conduct in Labor Department enforcement action); Henss v. Iowa Accountancy Examining Bd., 2005 WL 1521918 (Iowa Ct. App. June 29, 2005) (discussing Labor Department involvement in state agency proceedings against same accountant arising out of the same facts); Henss v. Iowa Accountancy Examining Bd., 2005 WL 1522016 (Iowa Ct. App. June 29, 2005) (same).

With HIPAA in particular, the cooperation is very close and amounts to a sharing of enforcement authority. While the Secretary enforces HIPAA's nondiscrimination provisions against plans, the states enforce parallel provisions of the Public Health Service Act that apply to insurance companies offering health insurance coverage in the group market. 42 U.S.C. § 300gg-22. Compare 29 U.S.C. § 1182(a) (HIPAA nondiscrimination provisions in ERISA that apply to employee benefit plans) with 42 U.S.C. §§ 300gg-1 (parallel PHSA provisions applicable to health insurance issuers that are enforced by the states under § 300gg-22). Thus, the states are empowered to enforce HIPAA nondiscrimination rules against health insurance issuers. Even if the plaintiffs are correct that DOI is attempting to prosecute the HIPAA violation by indirect means, DOI has directed its prosecution toward insurance entities that HIPAA places within the

states' jurisdiction and not toward the ERISA plan or ERISA plan sponsor that are within the jurisdiction of the Secretary. [8]

D. The Effect of the Secretary's Preemption Analysis on Younger Abstention

Under the Younger abstention doctrine, federal courts must abstain from enjoining ongoing state judicial proceedings if

> (1) there is an ongoing state judicial proceeding involving the federal plaintiff that (2) implicates important state interests and (3) provides an adequate opportunity for the federal plaintiff to assert his federal claims.

Colonial Life & Acc. Ins. Co. v. Medley, 572 F.3d 22, 26 (1st Cir. 2009) (citations and internal quotations omitted). The plaintiffs argue, however, that the court need not abstain based on an exception for cases in which a plaintiff raises a "facially conclusive" claim of federal preemption. Id.

As argued above, DOI's action is not facially preempted by ERISA. Accordingly, this Court should apply the three-prong Younger test without regard to the "facially conclusive" exception. See Colonial Life & Acc. Ins. Co v. Medley, 572 F.3d 22 (1st Cir. 2009). If this Court ultimately grants the Commonwealth's motion and dismisses the federal case, the plaintiffs can raise their arguments in the state proceedings.

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[8] Part 7 of ERISA, which includes the HIPAA provisions, has its own preemption provision, which applies in addition to ERISA sections 514 and 502. This provision preempts state law only to the extent such law "prevents the application of a requirement of this part." ERISA section 731(a), 29 U.S.C. § 1191(a). It appears to be undisputed that DOI – which the plaintiffs charge with seeking to indirectly enforce HIPAA – has not triggered § 731(a) preemption. Compare DOI's July 17 brief at 17 (noting that the plaintiffs make no argument for preemption under 29 U.S.C. § 1191(a)) with Plaintiffs' July 31 brief at 7-8 (failing to rebut DOI's assertion). Even if DOI's action is an indirect attempt to redress a plan's HIPAA violation, it does not "prevent the application" of Part 7's HIPAA rules. If anything, it serves to advance those rules.

CONCLUSION

ERISA does not preempt the state enforcement action at issue in this case. Therefore, ERISA preemption is not conclusive on the face of the show cause order initiating the state proceeding, and the Court should proceed to analyze the case under the three-prong Younger test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the Electronic Case Filing (ECF) system and thus copies will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF); paper copies will be sent to those indicated on the NEF as non registered participants on December 18, 2009.

/s/ James L. Craig, Jr.