No. 01-30922

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JULIO ARANA,

Plaintiff-Appellee,

v.

OCHSNER HEALTH PLAN, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF OF AMICUS CURIAE ELAINE L. CHAO, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR

For the Secretary of Labor:

HOWARD M. RADZELY
Acting Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation

JAMES L. CRAIG, JR.
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W., Room N-4611
Washington, D.C. 20210
(202) 693-5600

TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

INTEREST OF THE SECRETARY OF LABOR 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. A State Court Action by a Plan Participant to Enforce the Terms of a State Anti-subrogation Statute is Properly Recast as a Suit Under § 502 and Is Thus Removable to Federal Court Under the "Complete Preemption" Doctrine 7

A. Arana's Claim Is Actionable Under ERISA § 502 As A Claim to Clarify His Rights To Benefits 10

B. Alternatively, Arana's Suit May Be Viewed As An ERISA Action to Enforce His Rights Under The Terms Of The Plan If Louisiana Statute 22:663, Which Is Saved As An Insurance Regulation, Is Incorporated Into His Insurance Contract As A Matter Of State Law 11

C. This Court Need Not Decide Whether OHP Could Properly Seek Reimbursement From Arana Under Great West and Bauhaus 16

II. ERISA Completely Preempts The State Law Provisions That Impose Double Damages And Attorney's Fees For Improper Claims Processing 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: Page

Arana v. Ochsner Health Plan, Inc.,
134 F. Supp.2d 783 (E.D. La. 2001) 4

Arana v. Ochsner Health Plan, Inc.,
302 F.3d 462 (5th Cir. 2002) 4,5,6

Bauhaus USA, Inc. v. Copeland,
292 F.3d 439 (5th Cir. 2002) 17

Carducci v. Aetna,
No. 01-4675, 2003 WL 722477 (D.N.J. Mar. 4, 2003) 15

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 8,21

Donovan v. Cunningham,
716 F.2d 1455 (5th Cir. 1983), cert. denied,
467 U.S. 1251 (1984) 1

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 11,12

FMC Corp. v. Holliday,
498 U.S. 52 (1990) 13,14,15

Franchise Tax Bd. v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983) 8,17,18,19

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 17,18

Hotz v. Blue Cross & Blue Shield of Massachusetts,
292 F.3d 57 (1st Cir. 2002) 20

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,
510 U.S. 86 (1993) 12,13

Kentucky Ass'n of Health Plans v. Miller,
No. 00-1471, 2003 WL 1726508 (U.S. Apr. 2, 2003) 14

Louisville & Nashville R.R. v. Mottley,
211 U.S. 149 (1908) 8

Medical Mut. of Ohio v. deSoto,
245 F.3d 516 (6th Cir. 2001) 15

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 13,15

Metropolitan Life Ins. Co. v. Taylor,
481 U.S. 58 (1987) 10,19,20,21

New York State Conference of Blue Cross &
Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 12

Pilot Life Ins. Co. v. Dedeaux,
481 U.S. 41 (1987) 13,16,20,21

Plumb v. Fluid Pump Serv., Inc.,
124 F.3d 849 (7th Cir. 1997) 15

Ramirez v. Inter-Continental Hotels,
890 F.2d 760 (5th Cir. 1989) 20

Rivet v. Regions Bank,
522 U.S. 470 (1998) 8

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355, 122 S. Ct. 2151 (2002) 14,16

Secretary of Labor v. Fitzsimmons,
805 F.2d 682 (7th Cir. 1986) 1

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 12

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 21

UNUM Life Ins. Co. v. Ward,
526 U.S. 358 (1999) 14,15,16

Whitlinger v. Continental Casualty Co.,
129 F. Supp.2d 924 (E.D. Va. 2001) 16

Statutes:

Employee Retirement Income Security Act of 1974,
as amended, 29 U.S.C. § 1001, et seq.:

Section 502, 29 U.S.C. § 1132 ..... 1,7,10,17, 19,20

Section 502(a), 29 U.S.C. § 1132(a) 4,5,6,10,16, 20,21

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 5,6,7,10,11, 15,16,18,19

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) 16,17,18

Section 502(g)(1), 29 U.S.C. § 1132(g)(1) 19

Section 505, 29 U.S.C. § 1135 1

Section 514, 29 U.S.C. § 1144 6,12

Section 514(a), 29 U.S.C. § 1144(a) 4,11

Section 514(b)(2), 29 U.S.C. § 1144(b)(2) 7

Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A) 4,12,13,15

Section 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) 13

28 U.S.C. § 1292 4

28 U.S.C. § 1292(b) 20

28 U.S.C. § 1331 8,10

28 U.S.C. § 1441(a) 7

28 U.S.C. § 1441(b) 8,9

Louisiana Rev. Stat. 22:657 ..... 3,5,7,19 20,21

Louisiana Rev. Stat. 22:663 ..... 2,3,6,10,11, 12,14,15

Other Authorities:

Fed. R. App. P. 29(a) 2

2 Lee R. Russ. & Thomas F. Segalla, Couch on Insurance 3d § 19:1 (1996) 15

STATEMENT OF THE ISSUES

1. Whether an ERISA health plan participant's declaratory judgment action to enforce the terms of a state anti-subrogation insurance statute is removable to federal court under the "complete preemption" doctrine.

2. Whether a state court action for penalties and attorney fees under a state insurance law is completely preempted.

INTEREST OF THE SECRETARY OF LABOR

The Secretary of the United States Department of Labor (the "Secretary") has primary authority to interpret and enforce the provisions of Title I of ERISA and therefore has a strong interest in ensuring that the fiduciary duties of loyalty and prudence in the administration of plan assets are strictly applied. 29 U.S.C. §§ 1132, 1135. See Donovan v. Cunningham, 716 F.2d 1455, 1462-63 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The Secretary's interests further include promoting the uniform application of the Act, protecting plan participants and beneficiaries, and ensuring the financial stability of plan assets. Secretary of Labor v. Fitzsimmons, 805 F.2d 682 (7th Cir. 1986) (en banc). Here the Secretary has an interest in ensuring that claims to enforce the terms of ERISA plans, including terms incorporated into plans from saved state insurance laws, are brought under § 502 of ERISA, 29 U.S.C. § 1132, and not through state proceedings.

This brief is filed pursuant to Fed. R. App. P. 29(a) and this Court's April 3, 2003 order granting the Secretary an extension of time until April 11, 2003 to file.

STATEMENT OF THE CASE

Ochsner Health Plan (OHP), which is an HMO insurer providing health benefits to an ERISA-covered employee benefit plan, paid approximately $180,000 in health benefits on behalf of Julio Arana, a plan beneficiary, in connection with treatment he received for serious injuries he received in an automobile accident. Arana subsequently obtained recoveries totaling roughly $1.1 million from various automobile insurers; $150,000 of this amount is in a trust account maintained by Arana's attorney pursuant to the terms of a settlement agreement with one of the insurers, while the remaining amounts have been disbursed. Relying on a provision in OHP's agreement with the employer allegedly giving OHP subrogation and reimbursement rights, OHP demanded reimbursement of the $180,000 in health benefits that OHP paid.

Arana filed a class action in Louisiana state court, on behalf of himself and a class of similarly situated persons, seeking a declaratory judgment that OHP was prohibited from enforcing the subrogation provisions by a provision of Louisiana insurance law. Arana's action is based on Louisiana Statute 22:663, which prohibits group health insurers from issuing a policy that excludes or reduces the payment of benefits to an individual because benefits have been paid under any

other individually written contract or plan of insurance.[1] In addition, Arana sought statutory penalties and attorney fees under Louisiana Statute 22:657.[2]

OHP removed the case to federal district court, claiming that the state law cause of action was completely preempted by ERISA. The district court accepted removal based on complete preemption, and granted partial summary judgment to Arana, ruling that OHP has no subrogation or reimbursement rights against him.

---

[1] La. Rev. Stat. 22:663 provides:

> §663. Hospitalization, accident and health insurance; reduction of benefits prohibited
> Notwithstanding any other provisions in this title to the contrary, no group policy of accident, health or hospitalization insurance, or of any group combination of these coverages, shall be issued by any insurer doing business in this state which by the terms of such policy group contract excludes or reduces the payment of benefits to or on behalf of an insured by reason of the fact that benefits have been paid under any other individually underwritten contract or plan of insurance for the same claim determination period. Any group policy provision in violation of this section shall be invalid.

[2] La. Rev. Stat. 22:657 provides, in pertinent part:

> §657. Payment of claims; health and accident policies; prospective review; penalties; self-insurers; telemedicine reimbursement by insurers
> A. All claims arising under the terms of health and accident contracts issued in this state, except as provided in Subsection B, shall be paid not more than thirty days from the date upon which written notice and proof of claim, in the form required by the terms of the policy, are furnished to the insurer unless just and reasonable grounds, such as would put a reasonable and prudent businessman on his guard, exist. The insurer shall make payment at least every thirty days to the insured during that part of the period of his disability covered by the policy or contract of insurance during which the insured is entitled to such payments. Failure to comply with the provisions of this Section shall subject the insurer to a penalty payable to the insured of double the amount of the health and accident benefits due under the terms of the policy or contract during the period of delay, together with attorney's fees to be determined by the court. Any court of competent jurisdiction in the parish where the insured lives or has his domicile, excepting a justice of the peace court, shall have jurisdiction to try such cases.

Arana v. Ochsner Health Plan, Inc., 134 F. Supp.2d 783, 789 (E.D. La. 2001). The court held that the state law prohibits subrogation or reimbursement by OHP with respect to payments made by other insurers under individually written insurance contracts such as those from which Arana had obtained recoveries. The court further held that although the Louisiana anti-subrogation law "relates to" an employee benefit plan within the meaning of the basic preemption clause, 29 U.S.C. § 1144(a), the statute escapes preemption because it regulates insurance within the meaning of ERISA's saving clause, id. § 1144(b)(2)(A). 134 F. Supp.2d at 788-89. The court further concluded that the claim did not arise under state law, as Arana claimed, but rather under § 502(a) of ERISA, 29 U.S.C. § 1132(a), while the state anti-subrogation law merely supplies the "rule of decision" on the claim. 134 F. Supp.2d at 788. In particular, the court noted that Arana's action attempted to prevent OHP from reducing the amount of Arana's benefits and thus was properly viewed as a claim to obtain benefits under § 502(a) of ERISA. 134 F. Supp.2d at 788 n.9. The case is before the court of appeals as an interlocutory appeal under 28 U.S.C. § 1292.

On appeal, a panel of the Fifth Circuit reversed the district court, holding that there was no complete preemption, and therefore no federal jurisdiction. Arana v. Ochsner Health Plan, Inc., 302 F.3d 462 (5th Cir. 2002). The panel thus ordered that the case be remanded to state court for proceedings under state law.

In so holding, the panel disagreed with the lower court's conclusion that Arana's claim for declaratory judgment was properly viewed as a claim for benefits and thus as an action under ERISA § 502(a)(1)(B). The panel reasoned that Arana was not seeking an award of benefits because OHP had already paid contractually owed benefits, and that Arana was not seeking to enforce the terms of the benefit plan because the plan as written provides OHP with subrogation and reimbursement rights.[3] 302 F.3d at 470-72. The panel stated that the true gravamen of Arana's action -- that Louisiana law should be enforced instead of the terms of the plan -- had no analogue in ERISA's civil enforcement scheme. Id. at 472. Accordingly, having concluded that Arana neither seeks benefits under the terms of the plan nor seeks to enforce the terms of the plan, the panel held that his cause of action does not fall within the scope of § 502(a) and is not completely preempted by ERISA.

The panel further ruled that Arana's claim for penalties and attorney's fees under Louisiana Statute 22:657 was not completely preempted. 302 F.3d at 473-74. The panel observed that ERISA's civil enforcement scheme does not afford a mechanism for obtaining punitive damages and mandatory attorney's fees. Because ERISA § 502(a) does not authorize such a suit, the panel reasoned, Arana's suit cannot form the basis for federal court jurisdiction. Id. at 473.

[3] The panel also questioned whether the subrogation and reimbursement provision upon which OHP relied was actually a part of the employee benefit plan, although this does not seem to have been questioned by the parties.

Instead, the panel reasoned, OHP could raise in state court its arguments that the state insurance provisions, including the anti-subrogation provision, and the penalty and punitive damages provisions are subject to ordinary preemption under ERISA § 514. Id. at 474. The panel decision has been vacated pending en banc review.

SUMMARY OF ARGUMENT

The panel erred in holding that Arana's lawsuit was not removable to federal court. Under the removal statute, a case filed in state court may be removed to federal court when it "arises under" federal law. Normally, a cause of action arises under federal law in the relevant sense only when issues of federal law appear on the face of plaintiff's complaint. However, under the "complete preemption" doctrine, a claim that is brought under state law is properly viewed as federal in character and thus removable to federal court if Congress has created an exclusive federal cause of action that occupies the field in which the plaintiff's claim arises. This doctrine has been applied in the ERISA context such that a state court action that comes within the scope of § 502(a) of ERISA, 29 U.S.C. § 1132(a), must be recharacterized as an action arising under federal law for purposes of removal jurisdiction. Thus, Arana's state court declaratory judgment action to clarify the applicability of a state anti-subrogation provision such as Louisiana Statute 22:663 is properly recast as an action under ERISA § 502(a)(1)(B) to clarify his right to

future benefits or to enforce his rights under the terms of the plan, and is removable to federal court under the "complete preemption" doctrine. Because Arana's suit is correctly viewed as one under § 502(a)(1)(B) and is removable on that basis, this Court need not transpose the parties and decide if OHP could enforce a hypothetical claim against Arana for subrogation or reimbursement in order to resolve the jurisdictional issue.

In addition, Arana's claim for double damages and attorney's fees under Louisiana Statute 22:657 also comes within the scope of § 502, which provides the exclusive cause of action for improper claims processing, and allows for attorney's fees in certain circumstances. It is therefore likewise completely preempted, even if a federal court cannot award the remedy sought.

ARGUMENT

I. A State Court Action by a Plan Participant to Enforce the Terms of a State Anti-subrogation Statute Is Properly Recast as a Suit Under § 502 and Is Thus Removable to Federal Court under the "Complete Preemption" Doctrine

The general removal statute provides that, absent an express exception, any action filed in state court may be removed to federal court if it is "[a] civil action . . . of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Here, removal is based on the original jurisdiction of the district courts over "[a]ny civil action . . . founded on a claim or right arising under the . . . laws of the United States."

28 U.S.C. § 1441(b); see 28 U.S.C. § 1331. Whether an action "aris[es] under" the laws of the United States is determined by the well-pleaded complaint rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). Because a defense is not part of the plaintiff's well-pleaded statement of his claim, a plaintiff may not obtain federal jurisdiction by anticipating and refuting a federal defense. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908).

A corollary of the well-pleaded complaint rule, however, developed in the case law is the rule that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." Rivet v. Regions Bank, 522 U.S. 470, 475 (1998) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22 (1983)). Under that rule, known as the "complete preemption" or "artful pleading" doctrine, "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law" and may be removed to federal court. Franchise Tax Bd., 463 U.S. at 24.

Thus, complete preemption occurs whenever Congress has created an exclusive federal cause of action and the plaintiff's claim, as presented in the

facts set out in the complaint, falls within the scope of that cause of action. When federal law provides a cause of action that occupies the field in which the plaintiff's claim arises, the plaintiff's claim necessarily is encompassed by the federal cause of action and arises under federal law. And, as described above, the text of the removal statute provides that any action "arising under" federal law "shall be removable" to federal court. 28 U.S.C. § 1441(b).

The complete preemption rule advances the purposes of the removal statute without encroaching on the legitimate rights of plaintiffs or offending principles of comity and federalism. Federal question removal jurisdiction is designed both to promote the accurate and uniform interpretation of federal law by ensuring the availability of a forum with special expertise in that law and to protect the federal rights of defendants. The complete preemption rule advances those purposes because it ensures that defendants retain access to the district courts to litigate federal claims even when plaintiffs -- artfully or inadvertently -- incorrectly characterize those claims as arising under state law. At the same time, the rule also respects the autonomy of state courts. Removal is not permitted if federal law provides only a defense -- even if the defense is that state law is preempted under conflict preemption or ordinary field preemption analysis. The complete preemption rule therefore preserves

both state court primacy in resolving questions of state law and state court authority to determine in the first instance whether state law must yield to contrary federal law. The rule provides for removal only when federal law actually provides the plaintiff's cause of action. In that circumstance, removal is entirely appropriate, because, in our federal system, federal courts have primary responsibility for resolving questions of federal law.

A. Arana's Claim Is Actionable Under ERISA § 502 As A Claim to Clarify His Rights To Benefits

The Supreme Court has applied the complete preemption doctrine in the ERISA context to hold that state court actions that come within the scope of § 502(a) of ERISA, 29 U.S.C. 1132(a), such as for improper processing of benefits under state law, are "displaced by [ERISA § 502]" and are thus "removable to federal court." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 60 (1987). Because such a claim within the scope of Section 502 is "necessarily federal in character," it "'arise[s] under the . . . laws . . . of the United States,' 28 U.S.C. § 1331, and is removable to federal court." Id. at 67.

Arana's claim under Louisiana Statute 22:663 is completely preempted under the reasoning of Taylor. ERISA § 502(a)(1)(B) provides that a plan participant or beneficiary may bring suit under ERISA "to recover benefits due him under the terms of the plan, to enforce his rights

under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Under this provision, any claim, such as Arana's, intended to clarify the rights of a plan participant with regard to an employee benefit plan, is encompassed by the federal cause of action. Therefore, Arana's suit is properly viewed as one to clarify rights under the plan, and, as such, is no different than any other claim he might have brought under ERISA § 502(a)(1)(B) to enforce or clarify his rights.[4]

B. Alternatively, Arana's Suit May Be Viewed As An ERISA Action to Enforce His Rights Under The Terms Of The Plan If Louisiana Statute 22:663, Which Is Saved As An Insurance Regulation, Is Incorporated Into His Insurance Contract As A Matter Of State Law

Under § 514(a) of ERISA, 29 U.S.C. § 1144(a), the provisions of ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan." In general, a state law "relate[s] to" an ERISA plan "'if it has a connection with or reference to such a plan.'" Egelhoff v.

[4] Arana's claim is most sensibly seen as one to clarify his rights to benefits under the plan, although, as discussed below, it could also be viewed as a claim to enforce the terms of the plan if, as a matter of state law, the saved insurance provision becomes a term of the contract. Furthermore, in different circumstances, a plan participant could bring a claim under the Louisiana Statute before he has received all his benefits from a plan, in which case the claim would best be seen as a claim "to recover benefits under the terms of the plan." Whether it is a pure benefits claim, or a claim to clarify benefits or to enforce a plan term, however, such a claim under a state provision prohibiting subrogation or reimbursement clearly comes within the scope of § 502(a)(1)(B). We do not take any view on the meaning of the state law on incorporation. Nor do we express a view on OHP's argument that the state law does not actually prohibit it from seeking reimbursement here, although the district court held otherwise.

Egelhoff, 532 U.S. 141, 147 (2001) (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)). Although "relates to" preemption is not without limits, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995), where a state law purports to regulate matters at the core of ERISA -- such as the content or administration of ERISA plans or the mechanisms for enforcing rights under the plans -- the requisite connection to ERISA plans is present. Louisiana Statute 22:663 does have the requisite connection to ERISA plans inasmuch as it purports to regulate the content of such plans with respect to insurers' rights to subrogation or reimbursement from payments made by other insurers.

However, it is equally plain that Louisiana Statute 22:663 is saved under ERISA's insurance saving clause, ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." That clause is one of a series of provisions of § 514 that preserves certain other laws -- state and federal -- even though they "relate to" ERISA plans. By saving state laws that "regulate[] insurance," § 514(b)(2)(A) "leaves room for complementary or dual federal and state regulation." John Hancock Mut. Life Ins.

Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 98 (1993), and preserves the States' traditional role in insurance regulation.

In FMC Corp. v. Holliday, 498 U.S. 52, 58-59 (1990), the Supreme Court explained that a Pennsylvania anti-subrogation provision "directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain." Id. at 61, citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740-41 (1985). And, the Court noted, the law "does not merely have an impact on the insurance industry; it is aimed at it." Id. (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987)). Although the Court ultimately concluded that the Pennsylvania provision was not saved under the facts of that case, it did so only because the plan there was self-funded, and thus "excluded from the reach of the saving clause by virtue of the deemer clause." 498 U.S. at 61.[5] However, on the general question of whether a statutory anti-subrogation provision of state law constitutes an insurance regulation, FMC Corp. is controlling on this question and dictates that a state anti-subrogation clause is saved under ERISA § 514(b)(2)(A) in its application to an insured employee benefit plan. This reading of FMC is

[5] The insurance saving clause is qualified by the "deemer" clause, 29 U.S.C. § 1144(b)(2)(B), which provides that an employee benefit plan shall not be "deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts." The effect is to preclude States from "deem[ing]" self-insured plans to be insurers and thereby subjecting them to state insurance laws. Thus, the holding of FMC Corp. with respect to anti-subrogation clauses is that they are saved with respect to insured plans such as Arana's, but not saved with respect to self-funded plans.

affirmed by the Supreme Court's decision last week in Kentucky Ass'n of Health Plans v. Miller, No. 00-1471, 2003 WL 1726508, slip op. at 5 (U.S. Apr. 2, 2003) (referring to the Pennsylvania anti-subrogation provision as a "state law[] we held saved from preemption in FMC Corp.").[6] Thus, because Arana's health plan at issue here is insured, the "deemer clause" is inapplicable to this case, and the insurance saving clause applies to save the state law from preemption. See UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 367 n.2 (1999).

Many saved state insurance laws will in effect add terms to ERISA plans. So long as the state insurance law does not attempt to add a contract term that conflicts with a provision of ERISA, the state law may impose terms that contradict policy language. See Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151, 2171 (2002) ("[t]his effect of eliminating an insurer's autonomy to guarantee terms congenial to its own interest is the stuff of garden variety insurance regulation through the imposition of standard policy terms."); UNUM, 526 U.S. at 375-77 (rejecting insurer's argument that ERISA preempts

---

[6] Kentucky Association sets out a new, two-part test for determining whether a state law constitutes an insurance regulation. "First, the state law must be specifically directed toward entities engaged in insurance." 2003 WL 1726508, slip op. at 12. For the reasons discussed above, there can be little doubt that, as a law "aimed directly" at insurance practices, the Louisiana anti-subrogation provision satisfies this prong. Second, "the state law must substantially affect the risk pooling arrangement between the insurer and the insured." Id. Although the Court explained that its cases "have never held that state laws must alter or control the actual terms of insurance policies" to qualify as an insurance law, id., slip op. at 8, certainly state laws that do so, such as Louisiana Statute 22:663, meet the requirements of this prong.

state insurance laws "altering the . . . provisions of the insurance contract"); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 739-47 (giving effect to state law mandating mental health coverage). As the Seventh Circuit noted regarding an Illinois insurance statute limiting the scope of pre-existing condition clauses in insurance contracts, "it is fundamental insurance law that '[e]xisting and valid statutory provisions enter into and form part of all contracts of insurance to which they are applicable,'" and supercede contrary provisions in the insurance contract. Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 861 (7th Cir. 1997) (quoting 2 Lee R. Russ. & Thomas F. Segalla, Couch on Insurance 3d § 19:1, at 19-2 to 19-4 (1996)). Such a provision thus becomes part of all insurance contracts in the state and "§ 502(a)(1)(B) of ERISA allows [the claimant] to sue to recover benefits under those terms." 124 F.3d at 861.

Similarly, here, Louisiana Statute 22:663 is saved by ERISA § 514(b)(2)(A) under FMC Corp., and it is likely that its terms apply to Arana's insurance contract with OHP. See e.g., Medical Mut. of Ohio v. deSoto, 245 F.3d 561, 572-74 (6th Cir. 2001) (California provision prohibiting health insurer from recouping payments made after settlement of malpractice claim is saved from preemption as state insurance regulation); Carducci v. Aetna, No. 01-4675, 2003 WL 722477 (D.N.J. Mar. 4, 2003) (New Jersey's collateral source rule, which New Jersey Supreme Court held prohibited insurers from recouping funds through subrogation

or reimbursement lien, is saved as an insurance regulation); Whitlinger v. Continental Casualty Co., 129 F. Supp.2d 924, 930 (E.D. Va. 2001) (Virginia anti-subrogation provision saved as an insurance regulation in its application to insured plan). If the Louisiana statute is incorporated into the insurance policy (and therefore the plan) as a matter of state law, § 502(a)(1)(B) can also be viewed as providing the mechanism by which Arana can "enforce his rights under the terms of the plan," and the state court declaratory judgment action was properly removed to federal court on this basis as well. See Rush Prudential HMO, Inc., 122 S. Ct. at 2167 (giving effect to state independent review law where "relief ultimately available would still be what ERISA authorizes in a suit for benefits under § 1132(a)"); UNUM, 526 U.S. at 377 (holding that state insurance law merely provided the rule of decision in a § 502(a) suit); cf. Pilot Life, 481 U.S. at 53 (§ 502(a)(1)(B) authorizes declaratory judgments regarding benefit entitlements).

C. This Court Need Not Decide Whether OHP Could Properly Seek Reimbursement From Arana Under Great West and Bauhaus

OHP also argues alternatively (OHP Supplemental Brief on Rehearing En Banc at 32), that federal jurisdiction exists because it could bring a claim against Arana for reimbursement under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), which entitles the court to award "equitable relief." OHP asserts that the federal court can assume jurisdiction based on the nature of the potential action against

Arana because federal courts assume original jurisdiction of declaratory judgment actions in which "if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." Franchise Tax Bd., 463 U.S. at 19. Because, as we have shown, Arana's claim is properly recast as a claim under § 502, there is no occasion for this court to decide the difficult issues presented by the Supreme Court's recent decision in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) and by this court's decision in Bauhaus USA, Inc. v. Copeland, 292 F.3d 439 (5th Cir. 2002), concerning what constitutes available "equitable relief" under § 502(a)(3).[7] Thus, we disagree with OHP's view that "[t]he essential question now before the Court is whether an attempt by [OHP] to subrogate or to obtain reimbursement from the specific settlement funds now in the trust account of Mr. Arana's attorney would constitute 'typical' equitable relief available under ERISA." See OHP Petition for Rehearing at 7.

---

[7] Both Great-West and Bauhaus held that the relief sought by the plaintiff insurance companies pursuant to subrogation or reimbursement provisions, was not "equitable" because there were no identifiable or traceable plan assets in the possession of the defendants. The Court in Great-West held that a health insurer could not sue a participant for settlement proceeds held in a special needs trust established for the benefit of the injured participant. Because the funds in the trust were not in the participants' possession, any award would constitute legal damages and not an equitable remedy of the sort contemplated under ERISA. 534 U.S. at 214. In Bauhaus the Fifth Circuit, over a strong dissent, concluded that settlement proceeds held in the registry of a Mississippi Chancery Court were indistinguishable from the settlement proceeds held in the special needs trust in Great-West inasmuch as the defendants in both cases did not possess the assets sought by the plaintiffs. Thus, the court held that the relief sought was not "equitable relief" available under ERISA, and affirmed the dismissal of that case for lack of federal jurisdiction. Bauhaus, 292 F.3d at 445.

Any Great West issue in this case would be premised on a suit by OHP to enforce the subrogation provision. However, this case was brought by Arana and not OHP, and seeks not to enforce the Plan's subrogation provision, but to block it as a matter of saved state insurance law. Although it may be proper in some circumstances to invert the plaintiff and defendant in deciding whether a declaratory judgment action under state law is completely preempted, it is far from clear under Franchise Tax Bd. that this is the correct approach under ERISA. See 463 U.S. at 20-21 (rejecting the view that the State's declaratory judgment action against a union benefit plan was removable simply because the benefit trust could have brought suit under ERISA to prevent application of state tax law to it; the Court noted that ERISA "did not go so far as to provide that any suit against [ERISA plaintiffs] must also be brought in federal court when [the ERISA plaintiffs] themselves did not choose to sue"). Whether or not OHP could, as a general matter, enforce the subrogation provision under the remedial provision of § 502(a)(3), and concomitantly whether a federal court would have jurisdiction over such an action, there can be no doubt that Arana, as a plan beneficiary, may bring his suit under § 502(a)(1)(B) to enforce the terms of the plan or clarify his rights under the plan. Thus, his suit is completely preempted and removable to federal court. Because there is a relatively straightforward approach to the jurisdictional issue, there is no need for the en banc Court to resolve the issue of

whether Franchise Tax Bd. allows removal based on an inversion of the plaintiff and defendant, or to engage in the difficult task of hypothesizing a claim for subrogation or reimbursement and then attempting to decide, in an abstract context, what constitutes equitable relief such as unjust enrichment.

II. ERISA Completely Preempts The State Law Provisions That Impose Double Damages And Attorney's Fees For Improper Claims Processing

Arana's claim under Louisiana Statute 22:657 – which provides, in some circumstances, for payment of "double damages" and attorney's fees if the insurer fails to pay benefits that are due – is likewise completely preempted under Taylor and thus removal is properly supported on this basis as well. Both the penalty provision and the provision for attorney's fees, come within the scope of § 502, which provides exclusive remedies for improper claims processing, and allows for attorney's fees in certain circumstances.[8]

As discussed above, the dispute about whether state law prohibits the ERISA plan's insurer from invoking the reimbursement provision of the plan is one that falls within the scope of § 502(a)(1)(B), and is removable on that basis. As in Taylor, where the plaintiff also sought relief that went beyond what ERISA ordinarily provides in a suit under ERISA § 502(a)(1)(B), the relief that Arana seeks (statutory penalties in the amount of twice what is due under the policy plus

[8] ERISA has an attorney's fees provision, ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), which permits a court to award attorney's fees in a § 502 action by a plan participant or beneficiary.

attorney's fees) would be recoverable, if at all, only in a suit under § 502 of ERISA, Arana's suit for that relief therefore is likewise subject to complete preemption, irrespective of whether the courts, after removal, ultimately hold that those remedies are preempted by ERISA or are saved from preemption by the insurance saving clause.[9] Courts, including the Fifth Circuit, have thus correctly held that suits seeking recovery under penalty provisions such as 22:657 are completely preempted and properly recast as ERISA claims, even while rejecting the availability of such a remedy in an ERISA action. Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 762-64 (5th Cir. 1989) (holding both that plaintiff's action under Texas' treble damages insurance statute was completely preempted under Taylor and thus removable to federal court, and also that the Texas law was preempted and not saved as a rule of decision under Pilot Life); Hotz v. Blue Cross & Blue Shield of Massachusetts, 292 F.3d 57, 59-61 & n. 4 (1st Cir. 2002) (citing Ramirez and opinions of other courts of appeals, and holding a Massachusetts insurance statute providing for multiple damages to be both completely preempted and not saved as a matter of ordinary preemption under Pilot Life).[10]

---

[9] Because the district court did not rule on whether Louisiana Statute 22:657 is saved from ordinary preemption by the ERISA saving clause, that issue is not encompassed in the certification for interlocutory appeal under 28 U.S.C. 1292(b). The panel did not address it, and it does not appear to be before the en banc Court. We accordingly do not address that issue here.

[10] In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987), a case decided the same day as Taylor, the Supreme Court reasoned that § 502(a) provides the exclusive avenue for judicial relief for

Even if a federal law does not permit the remedy sought, the claim is removable if, as here, it falls within the scope of an exclusive federal action. Caterpillar Inc., 482 U.S. at 391 n.4. Nor is jurisdiction precluded because the plaintiff's claim fails on the merits or fails to state a claim on which relief may be granted. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88 (1998).

ERISA participants and beneficiaries whose claims for benefits are denied. After noting that causes of action outside § 502(a) would lead to the award of judicial remedies, such as compensatory and punitive damages, that Congress had rejected, 481 U.S. at 53-54, the Court concluded 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." Id. at 54. Pilot Life (like Taylor), however, involved state common law of general applicability, not a state statute, like Louisiana Statute 22:657, that is directed to the insurance industry. In our view, that distinction does not affect the conclusion that Arana's suit to recover the penalties provided under 22:657 is necessarily one arising under ERISA § 502(a). The question whether La. Rev. Stat. 22:657 is preempted on the merits – i.e., whether it is saved from preemption under the saving clause – does not appear to be before the Court. See n.9, supra.

CONCLUSION

The decision of the district court concerning removal jurisdiction should be affirmed, and the federal action reinstated for further proceedings on the merits.

Respectfully submitted,

April 10, 2003

JAMES L. CRAIG, JR.
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Avenue, N.W.
Room N-4611
Washington, D.C. 20210
(202) 693-5600

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,804 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000, in 14 point Times New Roman typeface, except that footnotes have been prepared in 12 point Times New Roman typeface as permitted by Fifth Circuit Rule 32.1.

3. The undersigned understands that a material misrepresentation in completing this Certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(b)(7), may result in the Court's striking this brief and imposing sanctions against the person signing this brief.

James L. Craig, Jr.
Attorney for Amicus Curiae Elaine L. Chao,
Secretary of the United States Department
of Labor

Dated: April 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that two (2) paper copies and one (1) 3½ diskette containing a PDF version of Brief of Amicus Curiae Elaine L. Chao, Secretary of the United States Department of Labor, were sent to counsel listed below by Federal Express overnight courier service, this 10th day of April 2003:

George D. Fagan, Esq., Leake & Anderson, 1100 Poydras Street, Suite 1700, New Orleans, LA 70163, counsel for Julio Arana, Appellee and Plaintiff;

Perry R. Staub, Jr., Esq., Taggart, Morton, Ogden, Staub, Rougelot, Brocato & O'Brien, 1100 Poydras Street, Suite 2100, New Orleans, LA 70163, counsel for Ochsner Health Plan, Inc., Appellant and Defendant;

Errol J. King, Esq., McGlinchey Stafford, Ninth Floor, One American Place, Baton Rouge, LA 70825, counsel for Louisiana Managed Healthcare Association, Inc., Healthcare Recoveries, Inc. and United HealthCare of Louisiana, Inc., Amici Curiae;

Thomas H. Lawrence, Esq., Lawrence & Russell, 5050 Poplar Avenue, Suite 1717, Memphis, TN 38157, counsel for Benefit Recovery, Inc., Amicus Curiae;

Howard Shapiro, Esq., Shook, Hardy & Bacon, L.L.P., LL&E Tower, Suite 1100, 909 Poydras Street, New Orleans, LA 70112-4017, counsel for Benefit Recovery, Inc., Amicus Curiae;

Professor Dana M. Muir, University of Michigan Business School, 701 Tappan Street, Ann Arbor, MI 48109, Amicus Curiae;

Professor Edward H. Cooper, University of Michigan School of Law, 330 Hutchins Hall, 625 South State, Ann Arbor, MI 48109-1215, Amicus Curiae.

James L. Craig Jr.

JAMES L. CRAIG, JR.