

ERISA & DISABILITY BENEFITS NEWSLETTER

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Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the National Board of Social Security Disability Advocacy. For more information, visit our website at www.buchanandisability.com.

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ERISA AND THE SUPREME COURT AFTER 40 YEARS ERISA PREEMPTION CASES BY ERIC BUCHANAN

The Employee Retirement Income Security Act of 1974 ("ERISA"), was passed to protect employees' pension benefits, as well as other benefits provided by an employer or through a union. In some ways ERISA has provided protection for employment benefits, while in some ways ERISA has been used to shield employers and insurance companies.

Employers and unions offer benefits that ERISA breaks down into two broad categories: pension benefits and welfare benefits. Pension benefits include benefits that are provided under traditional defined benefit plans or defined contribution plans. ERISA welfare benefits include almost all the other benefits employers and unions typically provide, such as health insurance, life insurance, long-term disability insurance, accident benefits, and other similar benefits.

Since ERISA's enactment over 40 years ago, the U.S. Supreme Court has issued many decisions¹ that interpreted ERISA and "filled in the gaps" left by the statute. Some cases deal with issues related to pension plans and others deal with ERISA welfare benefit plans. Other cases

deal with ERISA issues that apply to both types of benefits, such as ERISA preemption issues and the fiduciary obligations of ERISA administrators.

In this newsletter, and in a few more to follow, we discuss many of the most important U.S. Supreme Court ERISA cases that attorneys should be familiar with to have a basic understanding of how ERISA works. The cases are broken down into broad categories; in this first newsletter in this series, we will address cases dealing with ERISA preemption

One of the fundamental rules of ERISA is that ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a); 29 U.S.C. § 1144(a). However, ERISA's "saving clause" (ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A)) saves, or excepts, from preemption, "any law of any State which regulates insurance, banking, or securities."

ERISA's broad preemption language only preempts state laws; it does not preempt other federal laws. 29 U.S.C.

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§ 1144(d) (Nothing in ERISA “shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.”) If state laws are part of a federal enforcement scheme, and are consistent with federal law, those laws might not be preempted. After New York passed a Human Rights Law that required disability plans to provide benefits for employees who are disabled due to pregnancy, the Supreme Court held in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100-02 (1983) that Title VII of the Civil Rights Act of 1964 included in its federal enforcement scheme integration with state laws and requires exhausting state law remedies. Therefore, a state fair employment law was not completely preempted by ERISA when, if it were preempted, such an interpretation by ERISA would interfere with the enforcement of another federal law. However, to the extent the state law prohibits conduct that is not prohibited by federal law, that provisions of the state law would still be preempted. *Shaw*, 463 U.S. at 103-105.

This case is also one of the first wherein the Supreme Court noted that remedies outside of those found in ERISA are preempted, noting that the court is “reluctant to tamper with [the] enforcement scheme” embodied in the statute by extending remedies not specifically authorized by its text, as explained soon thereafter in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

In *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) the Supreme Court addressed whether a Massachusetts statute that required certain minimum mental healthcare benefits be provided to Massachusetts residents under a general insurance policy, an accident or sickness insurance policy, or an employee health-care plan that covers hospital and surgical expenses was preempted by ERISA. Applying the test of whether common sense reveals that the law was directed at insurance, and the factors in the McCarran-Ferguson Act, the Court found the Massachusetts law was saved from ERISA preemption under ERISA’s savings clause at ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). *Metro. Life Ins. Co.*, 471 U.S. at 740-745.

In the case of *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), a Mississippi plaintiff brought a claim under Mississippi common law bad faith. The Supreme Court held, first, that the common law claim was not a law strictly aimed at insurance, but was a common law claim that applied to bad faith contract actions more generally, and thus was not saved as a law regulating insurance. *Id.* at 50-52. So, for a law to “regulate insurance” it must be directed at the insurance industry. *Id.* at 50. Further, the Supreme Court looked at the

intent of ERISA, and the remedies found in ERISA, and held that state insurance laws that provide an additional remedy beyond that found in ERISA would be preempted.

the detailed provisions of § 502(a) [29 U.S.C. § 1132(a)] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The 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.

Pilot Life Ins. Co., 481 U.S. at 54.

Under the Secretary of Labor’s ERISA regulations, certain payroll practices are exempted from ERISA preemption as payroll practices, such as regular pay, overtime pay, holiday premium pay, sick pay and vacation pay. 29 CFR § 2510.3-1(b). Massachusetts law required an employer to pay a discharged employee his full wages, including holiday or vacation payments, on the date of discharge. Massachusetts charged an employer with criminal violations for failing to pay certain employees their accumulated, unused, vacation pay. The employer claimed the practice of allowing an employee to accumulate unused vacation was an employee benefit plan, and thus the state law was preempted by ERISA. In *Massachusetts v. Morash*, 490 U.S. 107 (1989) the Court held that the Massachusetts law was not preempted because it addressed the types of payroll practices that the Secretary of Labor had exempted from ERISA preemption. The Court explained that the Secretary “is specifically authorized to define ERISA’s ‘accounting, technical, and trade terms,’ ERISA § 505, 29 U.S.C. § 1135,11 and to whose reasonable views we give deference” *Id.* at 116, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (“If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” However, “if the statute is silent or ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”). In this case, the Secretary’s regulation was found to be a reasonable interpretation, and accumulated vacation, like other payroll practices are not subject to ERISA.

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ERISA § 514(b)(2)(B) states that plans or trusts established by employers are not, standing alone, deemed to be insurance companies; therefore, plans that are funded directly by an employer or a trust (commonly called "self-funded plans") cannot be regulated by state insurance law the way plans funded by insurance policies can be. In *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) the court clarified that self-funded plans were exempt from state laws aimed at insurance, even if the plan provided benefits similar to those an insurance funded plan would have provided. Pennsylvania had an anti-subrogation law that prohibited health insurance plans from collecting from people injured in automobile incidents who recovered from a third party. The Supreme Court found this law preempted to the extent it would apply to self-funded plans. The Court made clear that, because ERISA forbids states from deeming self-funded plans to be insurance plans, "self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans. State laws directed toward the plans are pre-empted because they relate to an employee benefit plan but are not 'saved' because they do not regulate insurance." *Id.*, at 61.

ERISA § 510, 29 U.S.C. § 1140 provides a cause of action for interfering with rights protected under ERISA. A plaintiff brought a state law claim alleging that he was discharged by an employer who allegedly did not want to make continued pension contributions. The Supreme Court held in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) that ERISA preempted the employee's state law wrongful discharge claim, because the state law both related to an employee benefit plan and because allowing a plaintiff a different state law remedy would interfere with ERISA's remedy scheme. *Id.* at 142.

In *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) the Supreme Court determined the California "notice-prejudice" rule related to employee benefit plans, but was also a law regulating insurance, thus it was saved from preemption under ERISA's savings clause, ERISA § 514(b)(2) (A). This case is significant, because the Court found that the "notice-prejudice" rule could fall under the ERISA savings clause as a law regulating insurance, even though it was a California common law decisional rule, and not a rule found in the state insurance code.

California's notice-prejudice rule, established by California decisional law, states that "a defense based on an insured's failure to give timely notice [of a claim] requires the insurer to prove that it suffered substantial prejudice. Prejudice is not presumed from delayed notice alone. The insurer must

show actual prejudice, not the mere possibility of prejudice." *Id.* at 363, 366-67, citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 760-761, 15 Cal.Rptr.2d 815, 845 (1st Dist.1993). Ward was found disabled under the California state disability program and by the Social Security Administration, but only after some time had passed did he find documents showing he had long-term disability coverage under a Unum policy offered at work; he filed a claim about five months later than the policy required. *Ward*, 526 U.S. at 365.

The Supreme Court found that under the "common-sense view of the matter," the notice-prejudice rule regulated insurance. *Id.* at 367, citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 and *Pilot Life*, 481 U.S., at 48. The Supreme Court then found that the rule fit within the business of insurance under the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 *et seq.* *Ward*, 526 U.S. at 367-68. The California rule first, "has the effect of transferring or spreading a policyholder's risk; second, . . . is an integral part of the policy relationship between the insurer and the insured; and third, . . . is limited to entities within the insurance industry." *Id.*

When a couple divorces in the state of Washington, state law deems that a beneficiary designation under an insurance policy is automatically revoked. The Supreme Court held in *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001), that to the extent such an insurance policy was issued as part of an ERISA plan, the state law is preempted. Thus, where a husband named his wife as the beneficiary of an ERISA policy he had at work, and he failed to change the designation after the couple were divorced, his ex-wife still was entitled to the proceeds of the life insurance. The Supreme Court reasoned that Washington state law was in direct conflict with the ERISA requirement that plans be administered, and benefits be paid in accordance with plan documents. *Id.* at 147-148.

Similarly, a divorcing spouse who signed a waiver of rights to benefits under federal law as part of a divorce decree was not divested of benefits still payable under the terms of the plan. Because the waiver was not a QDRO, which is recognized by ERISA, but was a different waiver, the plan administrator could properly disregard the waiver that conflicted with the designation made by the former husband in accordance with plan documents. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 288, (2009)

In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), the Supreme Court addressed the question whether a

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state law, that required an independent medical review before certain health insurance benefits could be denied, was preempted by ERISA. Section 4-10 of Illinois's Health Maintenance Organization Act, 215 Ill. Comp. Stat., ch. 125, § 4-10 (2000), required such review, and a plaintiff was denied coverage for a surgery despite such review saying the benefits should be covered. The HMO claimed it was not bound by the results of the review, claiming the Illinois rule was preempted by ERISA.

In determining whether the Illinois law was a state law "regulating insurance," and thus "saved" from ERISA preemption, the court began with a "common-sense view of the matter," which focuses on whether the law addresses spreading policyholders' risk, and also whether the law was "directed toward that industry," citing *Pilot Life Ins. Co. v. Dedeaux*, supra, at 50. The Supreme Court also looked at the three factors used to point to insurance laws spared from federal preemption under the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. *Rush Prudential HMO, Inc.*, 536 U.S. at 365-66. The Supreme Court found the Illinois law that required an extra level of review does not provide a "new cause of action under state law and authorizes no new form of ultimate relief." *Id.*, at 355. Because the ultimate relief available was ultimately just the benefits due under the plan, the Illinois law "not enlarge the claim beyond the benefits available in any action brought under [ERISA's remedy provision at] § 1132(a)," *Id.* at 379-380. Thus, a state insurance law that provides an extra procedural protection that does not provide for an additional claim or remedy outside of ERISA is not preempted. *Id.*

Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003) is significant, because the Supreme Court further clarified the test to determine whether a state law is a law regulating insurance, and thus saved from ERISA preemption under the savings clause at ERISA § 514(b)(2) (A). The Court found that the test no longer required an analysis under the McCarran-Ferguson Act, but instead would be a two-part test: for a law to be a law that regulates insurance and falls under the savings clause, it must 1) be directed at entities engaged in insurance, and 2) substantially affect the risk pooling arrangement between the insurer and the insured. *Id.* at 341-42.

In the *Kentucky Ass'n of Health Plans* case, the Kentucky "any willing provider" law provided that "[a] health insurer shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and who is willing to meet the terms and conditions for participation established by the health insurer.

. ." *Id.* at 331-32. Similarly, the Kentucky law prohibited a health plan from discriminating against chiropractors. *Id.* The Supreme Court first clarified that not all laws aimed at the insurance industry would fall under the savings clause, but rather would only apply to those aspects of insurance that actually affects the business of insurance, which the court described as the "risk pooling arrangement" between the insurance company and the insured. For example, a state law requiring all insurance companies to pay their janitors twice minimum wage would be aimed at the insurance industry, but such a law would not affect the business of insurance in the context of the risk pooling arrangement. *Id.* at 338. The Court explained,

Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law ... which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. See *Pilot Life*, supra, at 50, 107 S.Ct. 1549, *UNUM*, supra, at 368, 119 S.Ct. 1380; *Rush Prudential*, supra, at 366, 122 S.Ct. 2151. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.

Kentucky Ass'n of Health Plans, Inc., 538 U.S. at 341-42.

The Supreme Court has also held that ERISA's preemption provision is broad enough to preempt state law tort claims related to benefits decisions made under plans. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), Texas plaintiffs sued their health maintenance organizations (HMOs) under the Texas Health Care Liability Act for failing to exercise ordinary care in the handling of coverage decisions. Both plaintiffs claimed that the HMO's decisions to deny certain benefits caused them harm (in one case the HMO refused an extended hospital stay, which caused complications and a return to the hospital; in the other the HMO refused to provide an arthritis medication, and forced the plaintiff to take another medication to which the plaintiff had an adverse reaction). The HMO removed to federal court, claiming ERISA preempted plaintiff's claims. The Supreme Court explained, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc.*, 542 U.S. at 209. The Court went on:

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It follows that if an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls "within the scope of" ERISA § 502(a)(1)(B). . . . In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B).

Id. at 210 (internal citation omitted). The plaintiffs also argued that the Texas law was a law regulating insurance,

however, the Court affirmed that "even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Id.* at 217-18. So what could the plaintiff have done differently? According to the Court, the plaintiffs "could have paid for the treatment themselves and then sought reimbursement through a[n ERISA] § 502(a)(1)(B) action, or sought a preliminary injunction." *Id.* at 211-12.

This summary of the important Supreme Court cases on ERISA preemption does not tell the whole story. Within each circuit are other important cases that are circuit-specific that ERISA practitioners should be familiar with. In our next issue about Supreme Court ERISA cases, we will the important cases dealing with remedies under ERISA, with further newsletters on other ERISA Supreme Court cases to follow.

END NOTES

¹2014 was the 40th anniversary of ERISA's enactment, and it was effective for the most part January 1, 1975. Probably the first Supreme Court decision interpreting ERISA was *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359 (1980), a case dealing with whether ERISA applied to certain vested benefits in a plan that was terminated the day before ERISA was effective.

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates, PLLC are available to speak to your organization regarding social security disability, ERISA long-term disability, group long-term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

ERIC BUCHANAN & ASSOCIATES, PLLC: UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be speaking at the upcoming NOSSCR Social Security Disability Conference on ERISA Long-Term Disability Claims for Social Security Practitioners. The conference is scheduled for June 1-4, 2016 in Miami Beach, Florida.

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