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ABOUT OUR FIRM

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.

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WHAT RULES APPLY WHEN AN INSURANCE COMPANY DENIES EISA BENEFITS: DON'T FORGET THE SAVINGS CLAUSE!
BY: ERIC BUCHANAN

If your client obtained his or her insurance coverage at work, then any claim under that policy may be preempted by the Employee Retirement Income Security Act of 1974 (ERISA). For example, claims for long-term disability benefits, life insurance or health insurance benefits are ERISA claims in most cases, if the insurance was provided through work. This article will discuss how some state law insurance rules may be used to help a plaintiff recover the benefits due under an ERISA plan.

If your client is denied benefits under an ERISA plan, there are several special rules that apply, such as the requirement to exhaust administrative remedies by filing the required appeals with the insurance company or plan. Similarly, in most ERISA cases, the review by a court under ERISA § 502 (a)(1)(B) limits the information the court can review to those documents that were submitted to the insurance company or plan, and no new information on the merits of the case can be submitted in court. *See, e.g. Wilkins v. Baptist Healthcare Systems, Inc.*, 150 F.3d 609 (6th Cir. 1998). Also, in most ERISA cases, the scales are tipped toward the plan, limiting the court's review to an arbitrary and capricious or abuse of discretion standard of review if the plan has language granting discretion to the administrator. *See, e.g. Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, (1989).

When a plaintiff challenges a decision by an ERISA administrator, such as an insurance company, one of the questions attorneys face is, what rules apply to the insurance company to measure whether the insurance company abused its discretion? Some of those rules come from the common law of ERISA cases, as set out in various court opinions. However, attorneys for plaintiffs who have been denied ERISA benefits by an insurance company have another tool in their tool bag, in that some state laws regulating insurance companies are not preempted by ERISA.

ERISA contains a broad preemption provision, that preempts most state law causes of action and rules under state law; ERISA "shall supersede 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, some state law rules are not preempted, such as laws regulating insurance. Those laws are "saved" from ERISA preemption under the ERISA savings clause: "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates *insurance*, banking, or securities." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

In order to determine if a state law is "saved" from ERISA preemption, the first part of the analysis is to determine if the law is one that actually regulates insurance, as opposed to a general state law that affect insurers and other entities. The Supreme Court has set out the test to determine if a state law regulates insurance and thus potentially survives preemption by ERISA in *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 123 S.Ct. 1471 (2003). In order for a state law to survive ERISA preemption as a law regulating insurance, "it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. . . Second,…the state law must substantially affect the risk pooling arrangement between the insurer and the

insured." *Kentucky Ass'n of Health Plans,* 538 U.S. at 342.

Examples of laws that failed this test include New Mexico's law on contract interpretation, setting out the rules under which a contract is considered ambiguous. In *Miller v. Monumental Life Ins. Co.*, 502 F. 3d 1245 (10th Cir. 2007), the Court of Appeals held that it was a law directed more broadly at contracts generally, and not just insurance contracts, and thus was not saved from preemption.

If a state law meets the *Kentucky Ass'n* test as a law directed toward the regulation of insurance, the next step in the analysis is to determine whether the state law provides an additional remedy beyond that provided under ERISA. If the law provides an additional remedy, then the law is preempted by ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (Holding that Mississippi's bad faith claim was preempted by ERISA because Congress intended 29 U.S.C. § 1132(a), ERISA § 502(a) to be the exclusive remedy for plan participants and beneficiaries.) This rule was affirmed by the Supreme Court in *Aetna Health Inc., v. Davila*, 542 U.S. 200 (2004) (Holding that a law that qualified under the savings clause would still be preempted if it provided remedies "outside of, or in addition to, ERISA's remedial scheme.")

So, if a law is directed toward insurance companies, and substantially affects the risk-pooling arrangement, and does not provide a remedy beyond that provided by ERISA, it is not preempted. So what types of insurance laws are left?

In *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), the Supreme Court held that California's notice-prejudice rule was saved from preemption. Under California law, if a claimant files his insurance claim late, the burden is on the insurance company to show it was prejudiced by the late claim. As a law that was directed at the insurance industry that did not provide an additional remedy, it was not preempted.

Kentucky state law included an "any willing provider" provision regarding health insurance, and such a law was found to not be preempted by ERISA in *Kentucky Ass'n of Health Plans, supra.*

A recent trend in some states is to pass state laws or regulations banning discretionary clauses in insurance policies. Under these laws, an insurance policy could not grant the insurer discretion, and thus the review of an ERISA claim would be *de novo*, as the default rule set out in *Firestone Tire & Rubber Co. v. Bruch, supra.* Montana's practice of disapproving such clauses satisfied the two-part *Kentucky Ass'n* test, and thus was saved from ERISA preemption. Standard Ins. Co. v. Morrison, 584 F.3d 837 (9th Cir. 2009), *cert denied* 130 S. Ct. 3275 (2009).

Other state laws that may be helpful to claimants or ERISA plaintiffs, that are saved from ERISA preemption, include California Insurance Code § 10144, which requires insurers to base terminations of benefits due to physical or mental conditions on actuarial data or evidence. *Townsend v. Thomson Reuters Group Disability Income Ins. Plan*, No. CV 11-3555, 2011 WL 3625626 (C. D. Cal. Aug 16, 2011).

If you are helping a client with long-term disability benefits, life insurance benefits, health insurance benefits, or other insurance benefits provided through work, and thus subject to ERISA, be sure to check your state's insurance law to see if there are any rules that can help your case. If those rules apply to the insurance industry, and affect the risk-pooling arrangement, and do not provide a remedy outside of ERISA, then those laws are additional tools that you can use in your ERISA case. However, remember that if the ERISA benefits are provided by a self-funded ERISA plan (funded by the employer or an employer's trust, for example) and not by an insurance company, these rules do not apply, as they are limited to laws regulating insurance.

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