

DOES ERISA STILL PREEMPT BAD FAITH CLAIMS FOLLOWING

MORAN? SIGNS POINT TO "YES".

Although the Third Circuit has yet to rule on the issue, district courts in Pennsylvania have repeatedly and consistently held that the Pennsylvania bad faith statute, 42 Pa.C.S. §8371, is preempted by ERISA. See, e.g., Campbell v. Prudential Insurance Company, 2002 WL 462085 (E.D. Pa. 03/25/02); Cecchanecchio v. Continental Casualty Company, 2001 WL 43783 (E.D. Pa. 01/19/01); Ginsberg v. Independence Blue Cross, 2001 WL 267874 (E.D. Pa. 03/16/01); Murphy v. Metropolitan Life Insurance Company, 152 F.Supp.2d 755 (E.D. Pa. 2001); Stead v. UNUM Life Insurance Company of America, CA No. 99-4470 (E.D. Pa. 03/14/00); Tutolo v. Independence Blue Cross, 1999 WL 274975 (E.D. Pa. 1999); Zimnoch v. ITT Hartford, 2000 WL 283845 (E.D. Pa. 03/14/00); Norris v. Continental Casualty Company, 2000 WL 877040 (E.D. Pa. 06/28/00); Miller v. Aetna Healthcare, 2001 WL 1609681 (E.D. Pa. 2001); Brown v. Paul Revere Life Insurance Company, 2002 WL 1019021 (E.D. Pa. 2002); Sopak v. Highmark, Inc., 2002 WL 1271366 (W.D. Pa. 2002).

Recently, however, Senior Judge Newcomer departed from his brethren and with his own prior decisions in Zimnoch and Stead, supra, to hold that ERISA's savings clause, 29 U.S.C. §1144(b)(2)(A), saves from preemption actions arising out of the Pennsylvania bad faith statute. Rosenbaum v. UNUM Life Insurance Company of America, 2002 WL 1769899 (E.D. Pa. 07/29/02). Judge Newcomer concluded that the Pennsylvania bad faith statute "regulates insurance" under both the common sense view of ERISA's savings clause and the McCarren – Ferguson Test. In particular, Judge Newcomer concluded that §8371 became an "obvious contractual requirement" which was an "integral part of the policy relationship," between the insurer and insured.

Judge Newcomer's decision thus far stands alone among the district courts of Pennsylvania. That it did not signal a U-turn among the judges of the Eastern District was confirmed by the August 19, 2002 opinion of Judge Buckwalter in Sprecher v. Aetna U.S. Healthcare, Inc., 2002 WL 1917711 (E.D. Pa. 08/19/02). In that case, Judge Buckwalter respectfully disagreed with the Rosenbaum decision, finding that the Pennsylvania bad faith statute is still preempted by ERISA.

Judge Buckwalter explained that, in order to determine whether a state law "regulates insurance" within the meaning of ERISA's savings clause, 29 U.S.C. § 1144(b)(2)(A), the court must first determine whether, from a "common sense view of the matter," the state statute regulates insurance. Second, the court must consider the McCarren – Ferguson factors to determine whether the statute fits within the regulation of the "business of insurance." Judge Buckwalter agreed that the Pennsylvania bad faith statute appeared to satisfy the common sense view of a state law that regulates insurance. However, the statute failed to satisfy two of the three McCarren – Ferguson factors.

The first McCarren – Ferguson factor asks whether the state law has the effect of transferring or spreading a policyholder's risk. Judge Buckwalter concluded that the statute did not have the effect of transferring the risks for which the parties had contracted, flatly rejecting plaintiff's contention that the statute had the effect of transferring the risk that the claim would be improperly denied. "Furthermore, ERISA already accounts for the risk that a policyholder's claim will be improperly handled through its exclusive remedial scheme, without necessitating resort to state laws allowing alternate remedies." 2002 WL 1917711, *4.

The second McCarren – Ferguson factor requires that the state statute serve as "an integral part of the policy relationship between the insurer and the insured." In other words, the state statute must in some manner control the terms of the insurance relationship by changing the

bargain between insurer and insured. Based on a thorough analysis of the Supreme Court's recent decisions in Rush Prudential HMO, Inc. v. Moran, ___ U.S. ___, 122 S. Ct. 2151, ___ L.Ed.2d ___ (2002) and UNUM Life Insurance Company v. Ward, 526 U.S. 358, 119 S. Ct. 1380, 143 L.Ed.2d 462 (1999), Judge Buckwalter concluded that while Pennsylvania's bad faith statute created a deterrent for insurance carriers to refuse to pay a claim, this deterrence did not change the bargain between the insurer and insured.

The final McCarren – Ferguson factor, that the law be aimed at a practice limited to entities within the insurance industry was satisfied. However, satisfaction of this single factor was insufficient, in Judge Buckwalter's view, to save the statute from preemption.

Judge Buckwalter took the analysis a step further to consider the issue of “categorical preemption,” a factor that was not considered, or even mentioned, by the Rosenbaum court. Judge Buckwalter concluded that even if the Pennsylvania bad faith statute “regulates insurance,” which in his view it did not, he would nevertheless have found the statute to be categorically preempted. As the Supreme Court established in Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987), Congress intended that the civil enforcement provisions of ERISA, 29 U.S.C. §1132(a), be the exclusive vehicle for actions by ERISA plan participants and beneficiaries. Thus, even if a state law “regulates insurance,” it is preempted if it provides a vehicle to assert a claim outside of, or in addition to, the causes of action available under §1132(a). Clearly, the Pennsylvania bad faith statute authorizes relief beyond that available under ERISA. Since it is incompatible with ERISA's enforcement scheme, the statute fails Pilot Life's categorical preemption test.

At least three judges of the Eastern District of Pennsylvania have adopted Judge Buckwalter's view. In Kirkhuff v. Lincoln Technical Institute, Inc., 2002 U.S. District Lexis

17196 (E.D. Pa. 09/06/02), Judge Bartle denied a request for leave to amend a previously filed complaint in an ERISA case to assert a cause of action under the Pennsylvania bad faith statute.

In Smith v. Continental Casualty Company, 2002 U.S. District Lexis 18312 (E.D. Pa. 09/16/02), Judge Waldman dismissed a state law bad faith claim and denied plaintiff's request for a jury trial in connection with a claim under a group long-term disability policy. Finally, in Bell v. UNUMProvident Corporation, 2002 U.S. District Lexis 17693 (E.D. Pa. 09/19/02), Judge Baylson granted defendant's motion to dismiss state law claims including a claim under the Pennsylvania bad faith statute.

Each of these courts re-examined the question of whether ERISA preempts state law bad faith claims in light of the Supreme Court's decisions in Rush Prudential HMO, Inc. v. Moran, and UNUM Life Insurance Company of America v. Ward. All of the judges in the cases above cited agreed that under the "common sense view," the statute regulates insurance, if only because it is applicable to insurers, in actions arising under an insurance policy and is never applied outside the insurance industry. Bell, supra. Like Judge Buckwalter, these judges departed company with Senior Judge Newcomer, on the issue of whether the bad faith statute met the first two prongs of the McCarran-Ferguson test.

Even assuming, however, that the Pennsylvania statute satisfied the McCarran-Ferguson factors, these judges, like Judge Buckwalter in Specher, were unanimous in their view that the statute would still be preempted under ERISA. As the Supreme Court emphasized in Rush Prudential v. Moran, supra, "the civil enforcement provisions [of ERISA] are of such extraordinarily preemptive power that they override even the 'well pleaded complaint' rule for establishing the conditions under which a cause of action may be removed to a federal form." Id. 122 S. Ct. at 2165, quoted in, Kirkhuff, supra.

The conclusion that ERISA preempts state law bad faith claims is supported by the unanimous view of the Circuit Courts of Appeal that have considered the issue. Hotz v. Blue Cross and Blue Shield of Massachusetts, Inc., 292 F.3d 57 (1st Cir. 2002); Hollis v. Provident Life and Accident Insurance Company, 259 F.3d 410 (5th Cir. 2001), cert. denied, ___ U.S. ___, 122 S. Ct. 1538, 152 L.Ed.2d 465 (2002); Howard v. Coventry Health Care of Iowa, Inc., 293 F.3d 442 (8th Cir. 2002); Dishman v. UNUM Life Insurance Company of America, 269 F.3d 974 (9th Cir. 2001); Moffett v. Halliburton Energy Services, Inc., 291 F.3d 1227 (10th Cir. 2002); Gilbert v. Alta Health and Life Insurance Company, 276 F.3d 1292 (11th Cir. 2001); Walker v. Southern Company Services, Inc., 279 F.3d 1289 (11th Cir. 2002).

The vast majority of district courts that have considered the issue also support ERISA preemption of bad faith claims. See, e.g., Boone v. Health Strategies, Inc., 2002 WL 1783479 (M.D. Ala. 2002); Little v. UNUMProvident Corp., 196 F.Supp.2d 659 (S.D. Ohio 2002); Tarter v. United Wisconsin Life Insurance Company, 2002 WL 1379168 (E.D. La. 2002); Chamblin v. Reliance Standard Insurance Company, et al., 2001 WL 1250365 (N.D. Cal. 2001); Conover v. Aetna U.S. Healthcare, Inc., et al., 167 F.Supp.2d 1317 (N.D. Okla. 2001); Jabour v. CIGNA Healthcare of Cal., Inc., 162 F.Supp.2d 1119 (C.D. Ca. 2001); Salva v. Blue Cross and Blue Shield, F.Supp.2d 1324 (S.D. Ala. 2001); Brandner v. UNUM Life Insurance Company of America, et al., 152 F.Supp.2d 1219 (D. Nev. 2001). Coffman v. Metropolitan Life Insurance, 138 F.Supp.2d 764 (S.D. W.Va. 2001); Chiroff v. Life Insurance Company of North America, 142 F.Supp.2d 1360 (S.D. Fla. 2000); Hardy v. Welch, et al., 135 F.Supp.2d 1171 (M.D. Ala. 2000); Bridges v. Provident Life and Accident Insurance Company, 121 F.Supp.2d 1369 (M.D. Fla. 2000); Chilton v. Prudential Insurance Company of America, 124 F.Supp.2d 673 (M.D. Fla. 2000); Midwest Security Life Insurance Company v. Stroup, 730 N.E.2d 163 (Ind. 2000); Nations Personnel of Texas v. American Medical Security, 2000 WL 626868 (N.D. Tx. 2000);

Clancy v. Employers Health Insurance Company, 82 F.Supp.2d 589 (E.D. La. 1999), aff'd without opin., 248 F.3d 1142 (5th Cir. 2001); and Nelson v. UNUM Life Insurance Company, 1999 WL 33226241 (N.D. Cal. 1999).

Although it may ultimately take a Supreme Court decision to get all district judges singing from the same hymnal on this issue, the signs, at least at this moment, point in the direction of the continued viability of both statutory and categorical preemption of bad faith claims.

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