

No. 03-4363

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JAMES BARBER,

Plaintiff-Appellee,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

Interlocutory Appeal from the Order of the United States District Court for
the Eastern District of Pennsylvania, entered on September 8, 2003,
in Civil Action No. 03-3018

**MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE
JAMES BARBER FOR AFFIRMANCE**

ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

*Counsel for Amicus Curiae
United Policyholders*

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Fed. R. App. P. 29(b), United Policyholders respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Appellee's position in the above-captioned case as follows:

1. United Policyholders ("UP") is a non-profit charitable organization founded in 1991 and dedicated to education on insurance issues and consumer rights. The organization is tax-exempt under § 501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

2. UP's first initiative was to aid thousands of home and business owners whose properties were destroyed by a firestorm in Northern California. Through educational forums, workshops and printed materials, the organization helped the victims understand their policies and negotiate fair claim settlements. Since that time, UP has done similar work in hurricane, flood, wildfire and earthquake areas in New Mexico, Florida, Oklahoma, Texas, Michigan, Washington, Oregon and throughout California.

3. UP monitors legal and marketplace developments affecting the interests of all policyholders, including HMO subscribers. UP receives

frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

4. UP advances policyholders' interests in courts throughout the country by filing *amicus curiae* briefs in cases involving important insurance principles. United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). UP was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003). United Policyholders has filed *amicus* briefs on behalf of policyholders in over one hundred and thirty cases throughout the United States in the past six years. See www.unitedpolicyholders.org for a partial listing of the cases.

5. UP seeks to appear as *amicus curiae* to address certain issues presented in this case that are of significance beyond the application of law to the specific facts of this case. The issue before the Court -- the scope of ERISA preemption -- is and has been a fundamental issue of importance to United Policyholders for many years. UP seeks leave to file a brief *amicus curiae* because resolution of this issue will have a direct impact on the consumers it serves. Policyholders which it serves are continually faced with disadvantages, barriers, confusion, impediments and severe

consequences in connection with disability and health insurance claims as a result of the fact that they have been forced to proceed only through ERISA and have been unable to pursue state law insurance remedies. UP believes that the issue before the Court is of great importance and will have wide application to insureds throughout the Third Circuit and beyond and will directly impact consumers' ability to obtain insurance benefits due them and to compensate them for benefits wrongfully denied them.

6. UP believes that ERISA's statutory language and legislative history is clear and that it is of utmost importance that insureds be permitted to pursue those state remedies, such as the Pennsylvania Insurance Bad Faith Statute 42 Pa.S.C. § 8371, which will permit insureds to exercise the rights to which they are entitled when seeking to obtain insurance benefits that have been wrongfully denied or withheld.

7. Pursuant to Fed. R. App. P. 29(a), UP has requested the consent of the parties to this matter to file its brief *amicus curiae*. As of the filing of this brief, Appellant's counsel has refused to consent to the filing of this brief; Appellee's counsel has consented to the filing.

8. United Policyholders believes that the *amicus curiae* brief submitted with this motion will assist the Court in understanding the scope of ERISA preemption as enacted and as intended by Congress at the time of

its enactment and will serve as a useful supplement to the submissions presented by the parties.

WHEREFORE, United Policyholders respectfully requests this Court grant its motion for leave to file the attached brief as *amicus curiae*.

Dated: February 11, 2004

Respectfully submitted,



ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

*Counsel for Amicus Curiae
United Policyholders*

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2004, I caused two (2) copies of the foregoing Motion of United Policyholders for Leave to File *Amicus Curiae* Brief in Support of Appellee James Barber for Affirmance to be served by Federal Express for overnight delivery on the following counsel:


E. Thomas Henefer, Esq.
Kirk L. Wolgemuth, Esq.
STEVENS & LEE
111 North Sixth Street
P.O. Box 679
Reading, PA 19601
Counsel for Appellant

Joseph F. Roda, Esq.
Eric L. Keepers, Esq.
RODA & NAST, P.C.
801 Estelle Drive
Lancaster, PA 17601
Counsel for Appellee

Gerald B. Baldino, Jr., Esq.
SACCHETTA & BALDINO
308 East Second Street
Media, PA 19063
Counsel for Appellee

Glen D. Nager, Esq.
Jack W. Campbell, IV, Esq.
William K. Shirey, II, Esq.
JONES DAY
51 Louisiana Avenue, Northwest
Washington, DC 20001-2113
Counsel for Amicus Curiae, Chamber of Commerce

Stephen A. Bokat, Esq.
Robin S. Conrad, Esq.
Joshua A. Ulman, Esq.
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, Northwest
Washington, DC 20062
Counsel for Amicus Curiae, Chamber of Commerce



ARNOLD R. LEVINSON

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(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

*Counsel for Amicus Curiae
United Policyholders*

STATEMENT REGARDING CONSENT TO FILE *AMICUS* BRIEF

Counsel for appellee James Barber has consented to the filing of this *amicus* brief. Counsel for appellant Unum Life Insurance Company of America, however, has refused to consent. This brief is therefore accompanied by a Motion For Leave To File *Amicus Curiae* Brief, pursuant to Fed. R. App. P. 29(b).

A handwritten signature in black ink, consisting of several large, overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Arnold R. Levinson

February 11, 2004

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INTEREST OF THE *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements. The resolution of the issue presented in this case is of great importance to United Policyholders and its members because of its potential application to a wide range of laws affecting employees insured through an ERISA plan. This brief is authorized by the Executive Director of United Policyholders and is consistent with its purpose.

ARGUMENT

A. ***All Laws Which Regulate Insurance Are Saved From Preemption Pursuant To The Clear And Unambiguous Text of ERISA.***

The Supreme Court has twice stated that *Pilot Life Ins. Co., v. Dedeaux*, 481 U.S. 41 (1987) does not resolve ERISA Section 502's impact on laws encompassed by the saving clause. "We have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States.'" *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 377 (2002). "[This] case does not raise the question whether § 1132(a) provides the sole

launching ground for an ERISA enforcement action.” *Unum Life Insurance Co. of Am. v. Ward*, 526 U.S. 358, 377 (1999). *Pilot Life’s* holding was “in the context” of a law which was not saved from preemption. *Id.* at 377, n.7. Further, in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25 (1983) the Supreme Court clearly held that “[the saving clause] makes clear that Congress *did not intend to preempt entirely every state cause of action relating to*” ERISA plans (emphasis added). In addition, the Solicitor General has specifically pointed out that the Section 502 implied preemption analysis in *Pilot Life* would not apply in a case where the state law remedy at issue was a state law regulating insurance. *Ward*, 526 U.S. 358, 377 n.7. Moreover, the limited application of *Pilot Life’s* Section 502 implied preemption analysis is reflected in the Court’s final sentence: “. . . [W]e conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [the saving clause] *and therefore* is pre-empted by [the preemption clause].” *Pilot Life*, 481 U.S. at 57 (emphasis added).

Critically, *Pilot Life’s* discussion of ERISA’s exclusive remedies applies with perfect sense to state laws outside the saving clause. However, its application to state insurance laws that are saved from preemption is not

only illogical, but defies all of the basic rules of statutory construction and is in direct conflict with ERISA's legislative history.

ERISA was enacted as a pension reform bill intended to protect the retirement benefits of workers. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001(b). Protecting "the continued well-being and security of millions of employees and their dependents" was an express Congressional declaration of policy. 29 U.S.C. § 1001. ERISA comprehensively regulates pension plans. Importantly, ERISA does not comprehensively regulate the terms of nonpension employee benefit plans.¹

ERISA's preemption clause, ERISA § 514(a), 29 U.S.C. § 1144(a), has been described as "expansive."² However, the saving clause is "phrased with similar breadth"³ as the preemption clause.⁴ A remedial provision is

¹ See Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?* 74 Tul. L. Rev. 951 (2000) (hereafter, Bogan, *Protecting Patient Rights*).

² See *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Pilot Life*, 481 U.S. at 46.

³ *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358, 363 (1999).

⁴ *Ward*, 526 U.S. at 363 ("[P]re-emption is substantially qualified by an 'insurance saving clause,' . . . which broadly [saves state insurance laws]. . . ."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-741 (1985) (" . . . [W]hile the general pre-emption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation").

found in the same subchapter as the preemption and saving clauses. ERISA § 502, 29 U.S.C. §1102. Thus, on the face of the statute, all remedies available under ERISA would constitute the exclusive remedies, *unless a state remedial law was saved from preemption*. In that event, the saving clause provides that “*nothing* in this subchapter”, which, by definition, includes Section 502’s remedial provisions, “*shall* [preempt] . . . *any* . . . State [law which] regulates insurance.” ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). (Emphasis added.) Accordingly, any state law that regulates insurance, regardless of whether it creates a remedy or not, is saved from preemption.

The Court must “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”⁵ The Court must also presume that Congress did not intend to preempt areas of traditional State regulation.⁶

Not only is insurance an area of traditional State regulation, but Congress has specifically designated insurance as a special area of State regulation to be zealously protected from federal regulation. The McCarran-

⁵ *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990).

⁶ *See Travelers*, 514 U.S. at 655.

