

# IS “DELIBERATELY BROAD” PREEMPTION UNDER ERISA STILL DELIBERATE OR BROAD?

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## Introduction

The Employee Retirement Income and Security Act of 1974 (“ERISA”) has effectively federalized and unified the law concerning most group insurance benefits secured through the work place. Whether Congress intended this result in 1974 is debatable – Congress specifically placed a “savings clause” into ERISA designed to avoid preemption of state laws that regulate the insurance industry. 29 U.S.C. Sec. 1144(b). However, for many years, the trend in ERISA case law has been to construe the “savings clause” narrowly, and to interpret ERISA preemption as “broad” in scope. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

Under ERISA, an insurer no longer needs to contemplate 50 individual state systems in place in the event of claimant or judicial disagreement with a benefits determination. In place of a 50 state patchwork of “bad faith” laws, there is a largely unified (although some variations do exist by circuit) body of ERISA case law. Generally, under ERISA, the insurer is required, in all states, to make determinations reasonably, and within the scope of whatever discretion it might have under the program of group insurance in question. According to Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989), a plan can give an administrator or fiduciary “discretionary authority” to determine eligibility for benefits and/or to construe the terms of the Plan. If so, judicial deference is mandatory, absent a finding of conflict of interest.

Although there is substantial disagreement on this point, it has and can be argued that the federalizing of group benefits litigation has been a benefit to employers

and employees as well as insurers. The effect of subjecting plans to a single, predictable, standard of review, in Federal Court, has reduced litigation expenses. ERISA cases are typically expedited. Discovery is often curtailed, with depositions being the exception rather than the norm in many cases, and document production often limited to the administrative record considered by the insurer at the time of the denial or termination of benefits in question. This enables insurers to provide insurance at lower cost to employers, who then have greater incentive to make those group benefits available to their employees.

### **Role of Preemption**

Preemption is a very critical part of the mechanics of the ERISA statute. If a group insurer were subject to suit under 50 sets of state “bad faith” laws, the uniformity goal of ERISA would be frustrated.

The preemption provisions of ERISA are often referred to as “deliberately broad.” [Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1328 \(5th Cir.\)](#), cert. denied, [506 U.S. 1033 \(1992\)](#). ERISA preemption is so broad, in fact, that since its enactment, ERISA issues have surfaced in fields that might appear to have nothing to do with employee benefits. In addition to group insurance, these areas include medical malpractice and lien collection and recovery.

Section 514(a) of ERISA provides that its provisions “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a). As the Supreme Court has held, a state law “relates to” an employee benefit plan when “it has a connection with or reference to such a plan.” [Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 \(1983\)](#). Even a state law which is not specifically designed to have an impact upon a benefit plan, or with only a

mere indirect effect upon a benefit plan, "relates to" the plan for preemption purposes. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

There are signs that ERISA preemption, although still broad, may have some important limits. The Supreme Court, as well as some lower courts, have taken some recent, and possibly troubling, steps towards narrowing the scope of ERISA preemption, and, concurrently, giving meaning to the "savings clause."

### **"Late Notice" Provisions**

Logically, "late notice" provisions in a group insurance policy "relate to" the administration of the group insurance program and plan, and would seemingly fit within the scope of ERISA preemption. Indeed, it is hard to contemplate a more "administrative" rule than one concerning "late notice," a rule whose purpose is to guarantee that the insurance carrier is given notice in a period sufficient to enable it to meaningfully investigate the bona fides of the claim.

The Supreme Court, however, has concluded otherwise. In UNUM Life Ins. Co. of America v. Ward, 119 S.Ct. 1380 (1999), Justice Ginsburg, speaking for the Court, held that while "late notice" rules are, on their face, preempted by ERISA, they are also within the "savings clause" provided for state laws that "regulate insurance." ERISA § 514(b)(2)(A), 29 U.S.C. Sec. 1144 (b)(2)(A).

Justice Ginsburg attempts to distinguish "late notice" rules from "bad faith" rules, which the Supreme Court held in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) were preempted and **not** saved by the "savings clause" for state laws that "regulate insurance":

"We do not find it fair to bracket California's notice-prejudice rule for insurance contracts with Mississippi's broad gauged "bad faith" claim for relief. . . .[t]he notice-prejudice rule is distinctive most notably because it is

a rule firmly applied to insurance contracts, not a general principle guiding a court's discretion in a range of matters.”

However, there are a whole range of state bad faith laws that can only, by their terms, apply to insurers. Justice Ginsburg’s “distinction” confuses, but does not clarify.

In permitting the “late notice” provision to be saved from ERISA preemption, we suggest that the Court opened a Pandora’s box. Prior to Ward, everyone knew that ERISA preemption was broad, and the savings clause regarding insurance, was narrow and often without meaning or effect. Post-Ward, the “savings clause” clearly has some teeth, but the law lacks a reasoned test to determine its applicability.

### **The Supreme Court Searches for a Reasoned Test -- [Kentucky Assoc. of Health Plans, Inc. v. Miller](#)**

In 2003, the Supreme Court rendered its decision in [Kentucky Assoc. of Health Plans, Inc. v. Miller](#), --- U.S. ----, 123 S.Ct. 1471, 155 L.Ed.2d 468 (2003). The issue was applicability of a state “any willing provider” law in the face of an argument of ERISA preemption. The Court used this decision to revisit the scope of the savings clause, holding:

“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.”

Again, we believe that the Supreme Court’s analysis confuses rather than clarifies. [Pilot Life](#) holds that “bad faith” laws are preempted, and not saved. However, applying the [Miller](#) test to “bad faith,” it is far from clear that the same result should apply, although the Court cites [Pilot Life](#) in a manner that suggests that “bad faith” laws would continue

to be preempted under ERISA. There is no reasoned basis for the distinction, and the practitioner is left without guidance for future issues of this sort.

### **The Rosenbaum Decision – “Bad Faith” Revisited**

It did not take long for a Court to pick up on the quandary created by Ward and Miller. In Rosenbaum v. UNUM Life Ins. Co. of Am., [2002 WL 1769899 \(E.D.Pa. 2002\)](#), *reconsideration denied*, 2003 WL 22078557 (E.D.Pa. 2003), Judge Newcomer considered this recent Supreme Court precedent and came to the conclusion that Pennsylvania’s bad faith statute is not preempted by ERISA, Pilot Life notwithstanding. Judge Newcomer’s approach has been roundly criticized within his own district. See [Kirkhuff v. Lincoln Technical Inst, Inc.](#), 221 F.Supp.2d 572, 575-76 (E.D.Pa.2002); [Bell v. Unumprovident Corp.](#), 222 F.Supp.2d 692, 697-98 (E.D.Pa.2002); [McGuigan v. Reliance Standard Life Ins. Co.](#), 256 F.Supp.2d 345, 347-48 (E.D.Pa.2002); [Morales-Ceballos v. First UNUM Life Ins. Co. of Am.](#), [2003 WL 22097493, at \\*2 \(E.D.Pa. May 27, 2003\)](#). Such criticism is misdirected. The Supreme Court, by creating ambiguity concerning the scope and breadth of ERISA preemption and savings, invited the result reached by Judge Newcomer in Rosenbaum. In essence, preemption and savings have become a litigant’s “wishing well.” All viewpoints are supported by the law, and everything is arguable. While such uncertainty is favorable to the litigator’s bottom line, it is a policy that is hardly consistent with the uniformity and cost-effectiveness goals of ERISA.

### **Conclusion**

The word “deliberate” connotes, in its dictionary definition, “to think about or discuss issues and decisions carefully.” In the wake of Ward and Miller the term

“deliberate” would appear an ill-chosen qualifier for the once broad scope of ERISA preemption. Rosenbaum, although an aberrational decision, is hardly an irrational one given current Supreme Court precedent. The ERISA case law concerning preemption and savings is becoming less predictable, and less manageable from the perspective of the group benefits insurer.

“Deliberately broad” ERISA preemption is no longer deliberate, nor is it broad. Uniformity and predictability are the casualties of this apparent shift in judicial policy. Ultimately, a lack of predictability operates to the detriment of the very employees and their families for whom ERISA was originally intended to streamline the securing of such fringe benefits through the workplace. If an employer or insurer cannot make reasoned judgments as to risk, provision of benefits becomes less attractive and more expensive. Certainly, this is not what Congress intended when it passed ERISA back in 1974.