No. 14-1984 and 14-2302

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARY C. FONTAINE
Plaintiff-Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois (Gottschall, J.)
Civil Action No. 1:12-CV-08738

Brief of the Secretary of Labor, Thomas J. Perez, as Amicus Curiae in Support of Plaintiff-Appellee

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STATEMENT OF THE ISSUE

Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA") generally preempts all state laws that "relate to" an employee benefit plan, but expressly saves from preemption any state law "which regulates insurance." 29 U.S.C. 1144(a), (b). The question presented is:

Whether ERISA saves from preemption an Illinois law that regulates insurance by proscribing discretionary clauses in policies and other agreements issued or offered in Illinois by insurer carriers to cover the costs of health care services.

STATEMENT OF INTEREST, IDENTITY AND AUTHORITY TO FILE

In order to ensure a uniform regulatory regime, ERISA section 514(a) preempts state laws that "relate to" ERISA plans. 29 U.S.C. § 1144(a). Under ERISA section 514(b)(2)(A), state insurance laws are expressly saved from ERISA preemption. 29 U.S.C. § 1144(b)(2)(A). This provision evinces a congressional intent to allow states to continue their historic role regulating insurance despite ERISA's broadly preemptive effect. The Secretary of Labor has primary authority for enforcing and administering the provisions of Title I of ERISA, as amended, including authority to regulate claims procedures, 29 U.S.C. §§ 1133-35, and therefore has an interest in ensuring that courts give effect to ERISA's carefully delineated exceptions to its preemptive scope, particularly as they apply to benefit

claims. The Secretary files this brief as of right under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

I. Factual Background

Plaintiff-Appellee Mary Fontaine, a partner for thirty years in the structured finance group of the law firm Mayer Brown LLP, participated in the firm's long-term disability plan (the "Plan").[1] Met. A2.[2] The Plan was insured and administered by Defendant-Appellant Metropolitan Life Insurance Company ("MetLife"), which also served as the claims fiduciary. Id.; Fontaine A71-72.

In 1997, Fontaine was diagnosed with myopic retinal degeneration of both eyes. Met. A6-7. Because of the progressive nature of this condition, her vision deteriorated over time. Id. Fontaine returned to her doctors many times over the years suffering from difficulty focusing, migraines, floaters, flashes, blind spots, blurred and double vision, and bursting blood vessels. Met. A23. In 2011, her vision was so impaired that she determined she could not continue performing the extensive reading required by her job. Met. A4-5.

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[1] Fontaine also participated in a separate disability Plan sponsored by Mayer Brown and insured and administered by MetLife. Her claim for benefits under that Plan was also denied. The district court ruled that Fontaine is entitled to benefits under that Plan, Met. A27, and MetLife has not appealed that ruling.

[2] MetLife and Fontaine filed separate appendices in this appeal, which are cited "Met. A" and "Fontaine A" respectively.

In May 2011, Fontaine filed a claim for disability benefits under the Plan. Met. A4. In support of her claim, Fontaine provided her medical records, a list of her treating physicians, and a statement explaining why her condition prevented her from working. Id. In November 2011, relying on the views of medical consultants who reviewed Fontaine's medical records, but who had not themselves examined Fontaine, MetLife denied Fontaine's claim. See Met. A8-10, 12. In November 2012, MetLife upheld the benefit denial. Met. A18.

II. Applicable Provisions of the Plan and Illinois Law

MetLife issued a group insurance policy to Mayer Brown as the policyholder and certificates of insurance to individual insureds such as Fontaine. Fontaine A1, 15. The certificate of insurance, an expressly incorporated part of the Group Policy, "includes the terms and provisions of the Group Policy that describe" the participant's benefits. Fontaine A15. As described in the certificate, Fontaine was entitled to monthly benefit payments if she became disabled, which the certificate defines as follows:

> Disabled or Disability means that, due to Sickness or as a direct result of accidental injury:
> - You are receiving Appropriate Care and Treatment and complying with the requirements of such treatment; and
> - You are unable to earn:
>   - More than 80% of Your Predisability Earnings at Your Own Occupation from any employer in Your Local Economy; and
>   - Unable to perform each of the material duties of Your Own Occupation.

Met. A3. The certificate defines "Own Occupation" for attorneys as "the specialty in the practice of law in which You were practicing just prior to the date Disability started." Id. A section entitled "ERISA Information" following "the end of the Certificate," lists MetLife as the party that "insured the benefits" and is "liable for any benefits." Fontaine A71. This section also describes the processing of claims by MetLife and contains a clause that states:

> [T]he Plan administrator and other Plan fiduciaries shall have discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits in accordance with the terms of the Plan.

Met. A20.

In Illinois, the Director of Insurance ("Director") has rulemaking authority, as well as the authority to approve all policies, certificates of insurance, or evidence of coverage, issued by companies transacting the kind of business listed in section 4 of the insurance code. 215 Ill. Comp. Stat. § 5/143 (2014). Section 4 is entitled "Classes of Insurance" and lays out how insurance and insurance businesses will be classified under the Code. Moreover, under the Illinois insurance law, the Director is charged with the duty

> to withhold approval of any such policy, certificate, endorsement, rider, bylaw or other matter incorporated by reference or application blank filed with him if it contains provisions which encourage misrepresentation or are unjust, unfair, inequitable, ambiguous, misleading, inconsistent, deceptive, contrary to law or to the public policy of this State, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy.

Id. Pursuant to this duty and authority, the Director promulgated section 2001.3 of the Illinois Administrative Code, which provides:

> No policy, contract, certificate, endorsement, rider application or agreement offered or issued in this State, by a health carrier, to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or of a disability may contain a provision purporting to reserve discretion to the health carrier to interpret the terms of the contract, or to provide standards of interpretation or review that are inconsistent with the laws of this State.

50 Ill. Adm. Code § 2001.3 (2010); 29 Ill. Reg. 10172 (effective July 1, 2005).

III. Procedural History

After exhausting her Plan remedies, Fontaine filed suit against MetLife in the United States District Court for the Northern District of Illinois. Met. A2. She challenged MetLife's denial of benefits on the grounds that the extensive medical and vocational evidence in fact established that she was disabled under the policy. See Met. A2-3. Fontaine and MetLife filed cross-motions for entry of judgment and requested a trial on the papers under Federal Rule of Civil Procedure 52. Met. A3. On March 27, 2014, the court granted Fontaine's motion and denied MetLife's. Met. A1.

The parties disputed the standard of review that applied to its review of the claims denial. Fontaine argued that the proper standard of review was de novo, because section 2001.3 of the Illinois Administrative Code, quoted above, was saved from ERISA preemption and rendered the Plan's discretionary language

void. See Met. A21. MetLife, however, argued that the court should apply arbitrary and capricious review to its denial of benefits because ERISA preempted the Illinois law and thus the Plan's discretionary clause was effective. Met. A20-22. MetLife advanced three arguments in support of its position. First, MetLife asserted that the Director lacked the authority to enact a statewide ban on discretionary clauses in ERISA plans. Met. A20. The court rejected this argument and concluded that, "under state law, the Director's adoption of Section 2001.3 was a valid exercise of discretion to adopt regulations barring insurance policies that are unfair, inequitable, or contrary to public policy." Met. A20-21 (citing Schlattman v. United of Omaha Life Ins. Co., 2013 WL 3147368, *5 (N.D. Ill. June 19, 2013); Zuckerman v. United of Omaha Life Ins. Co., 2012 WL 3903780, *6 (N.D. Ill. Sept. 6, 2012)).

Second, MetLife argued that ERISA section 514 preempts section 2001.3 because it usurped the power from the federal judiciary to develop standards of judicial review and attempted to regulate the scope of fiduciary authority that a plan can grant a fiduciary. Met. A21. Fontaine, on the other hand, argued that section 2001.3 falls under section 514(b), which "saves" from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The court rejected MetLife's argument and agreed with cases from the Northern District of Illinois that "have consistently held that the Illinois law

falls within ERISA's savings clause, is not preempted, and requires de novo review." Met. A21 (quoting Zaccone v. Standard Life Ins. Co., 2013 WL 1849515, *4 (N.D. Ill. May 1, 2013)).

Lastly, MetLife argued section 2001.3 precludes insurers only from reserving discretionary authority to "interpret the terms of the contract," but does not prohibit plan administrators from reserving discretionary authority to make benefit determinations. Met. A21. The court also rejected this argument. Met. A21-22. Relying on cases from the Northern District of Illinois that "carefully considered the text" of section 2001.3, the court concluded that the regulation was intended to prohibit any clause granting discretion to an insurer in an Illinois insurance policy or plan funded by such policy. Id. (citing Zaccone, 2013 WL 1849515, *7-11).

The court thus conducted a de novo review of Fontaine's claims. Applying this standard, the court found that Fontaine had established by a preponderance of the evidence that her disability left her unable to perform her material job duties. Met. A22, 27.

SUMMARY OF THE ARGUMENT

Although ERISA preempts state laws relating to employee benefit plans, it expressly exempts state laws regulating insurance. Under this "savings clause," which protects the historical sovereignty of states in regulating insurance, the

Illinois regulation is beyond ERISA's preemptive scope, and was properly given effect in this case.

1. State laws regulate insurance under the "savings clause" when they are specifically directed towards entities engaged in insurance and substantially affect the risk pooling arrangement between the insurer and insured. District courts in Illinois have uniformly and correctly held that the Illinois law at issue in this case is saved from preemption under this test. Likewise, the Sixth and Ninth Circuits have applied this test to similar state regulations prohibiting discretionary clauses in insurance contracts and have concluded that these laws are saved from ERISA preemption.

State laws satisfy the first prong of the test when they impose obligations on parties engaged in the business of insurance. The Illinois regulation here meets that test, as it was intended to prevent insurers from deciding claims under agreements that contain discretionary clauses. Under Supreme Court precedent, the fact that such laws will also prevent non-insurance entities like plan sponsors from entering into such agreements with insurers does not change the fact that the law is aimed at insurers.

State laws satisfy the second prong of the test when the laws are directed not just at insurers but at their insurance practices by substantially affecting the risk pooling arrangement between insurers and insureds. Like the independent review

law that the Supreme Court concluded was a saved insurance regulation in Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 383-84 (2002), the Illinois regulation, by eliminating the possibility of deferential review of claims denials, alters the scope of permissible bargains between insurers and insureds and thus affects risk pooling in the relevant sense.

2. Contrary to MetLife's contention, the Illinois insurance regulation is not preempted by virtue of section 514's "deemer clause." Although the deemer clause forbids state insurance regulation of uninsured or self-funded plans, it does not, as MetLife contends, mean that ERISA preempts state insurance laws, such as the Illinois laws at issue here, which indirectly regulate employee benefit plans through the regulation of their insurers.

Nor is the Illinois regulation preempted, as MetLife asserts, by virtue of ERISA's exclusive enforcement scheme. The Illinois discretionary clause ban provides plan participants and beneficiaries no new cause of action or remedy under state law, but instead is enforced in an ERISA benefit claim by reading the offending clause out of the governing documents. Likewise, the Supreme Court in Rush Prudential made it clear that nothing in ERISA entitles a claims administrator to deferential review and, accordingly, a state law eliminating the possibility of such review in no way conflicts with ERISA. MetLife's argument to the contrary

based on the Supreme Court's decision in Conkright v. Frommert, 559 U.S. 506 (2010), which did not even address ERISA preemption, is meritless.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE ILLINOIS INSURANCE REGULATION IS SAVED FROM PREEMPTION

A. The Regulation Satisfies the Supreme Court's Two-Part Test for Saved State Insurance Laws

Subject to a number of exemptions, including one for state insurance regulation that is at issue in this case, ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A law "relate[s] to" an employee benefit plan within the meaning of section 514(a) "if it has a connection with or reference to such a plan." N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995).

However, ERISA section 514(b)(2)(A) expressly preserves the states' traditional right to regulate insurance. As relevant here, this section provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A).[3] This

[3] This section also saves state banking and securities laws from ERISA's preemptive scope. 29 U.S.C. § 1144(b).

insurance savings clause "reclaims a substantial amount of ground" from preemption. Rush Prudential, 536 U.S. at 364.

Insurance regulation is quintessentially within the historic police powers of the States, as reflected in the McCarran-Ferguson Act, a federal statute which generally leaves the regulation of the insurance industry to the states. See 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.").[4] "The fundamental purpose behind ERISA's savings clause is to respect state sovereignty in insurance regulation." Stone v. Disability Mgmt. Servs., Inc., 288 F. Supp. 2d 685, 695-96 (M.D. Pa. 2003).

Under the Supreme Court's two-part test, a state law regulates insurance within the meaning of this "savings clause" and therefore is saved from preemption if it (1) is "specifically directed toward entities engaged in insurance" and (2) will "substantially affect the risk pooling arrangement between the insurer and the insured." Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 342 (2003) (simplifying former test of insurance regulation to 2-part test). Because of the savings clause, states retain the authority to enforce a wide range of standards with respect to insurance companies, agents, and brokers, including solvency, licensing,

[4] ERISA section 514(d) provides that ERISA does not supersede other federal laws such as the McCarran-Ferguson Act. 29 U.S.C. § 1144(d).

sales practices, and other standards. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 728 n.2, 742-43 (1985). Further, states may, without being subject to ERISA preemption, regulate insurance by requiring that policies contain or omit certain terms and provisions. Rush Prudential, 536 U.S. at 373-87 (upholding state external review procedure for insurance policies purchased as ERISA plans); UNUM Life Ins. Co. v. Ward, 526 U.S. 358, 375-77 (1999) (rejecting insurer's argument that ERISA preempts state insurance laws "altering the . . . provisions of the insurance contract"); Metro. Life Ins. Co., 471 U.S. at 739-47 (upholding state insurance law mandating mental health coverage).

Under these Supreme Court decisions, the Illinois law, which certainly "relates to" an employee benefit plan in this case, nevertheless is saved from preemption as a state insurance regulation, as multiple district courts in Illinois have correctly concluded. See Schlattmann, 2013 WL 3147368 (N.D. Ill. 2013); Zaccone, 2013 WL 1849515 (N.D. Ill. 2013); Zuckerman v. United of Omaha Life Ins. Co., 2012 WL 3903780 (N.D. Ill. 2012); Novak v. Life Ins. Co. of N. Am., 956 F. Supp. 2d 900, 908 (N.D. Ill. 2013); Borich v. Life Ins. Co. of N. Am., 2013 WL 1788478 (N.D. Ill. 2013); Ehas v. Life Ins. Co. of N. Am., 2012 WL 5989215 (N.D. Ill. 2012).

Two circuits have reviewed similar laws from other states that prohibit discretionary clauses, and determined that the laws are saved from preemption.

Am. Council of Life Insurers v. Ross, 558 F.3d 600 (6th Cir. 2009) (ERISA does not preempt nearly identical Michigan law that prohibits clauses granting discretion to insurers in deciding claims); Standard Ins. Co. v. Morrison, 584 F.3d 837, 849 (9th Cir. 2009) (ERISA does not preempt practice of Montana insurance commissioner in disapproving insurance contracts with discretionary clauses).[5] They held that state laws forbidding discretionary clauses are specific to the insurance industry. Ross, 558 F.3d at 605-06 (though fiduciaries may feel effect of discretionary clause ban, it is directed towards insurers); Morrison, 584 F.3d at 843-44 (state practice based on policy concerns specific to insurance industry such as ensuring fair treatment of claims by insurers). Both circuits also held that the state laws substantially affect the risk-pooling arrangement by forcing insurers to change the terms of insurance contracts. Ross, 558 F.3d at 606-07; Morrison, 584 F.3d at 844-45.

A state law is directed towards entities engaged in the business of insurance, and thus satisfies the first prong of the Supreme Court's test, if it imposes

[5] The only other circuit to address a similar provision held that a Utah law forbidding the use of discretionary clauses that failed to conform to the state's font requirement was not saved from preemption because, in that court's view, the law addressed form and not substance and therefore had no substantial impact on risk-pooling. Hancock v. Metro. Life Ins. Co., 590 F.3d 1141, 1149 (10th Cir. 2009). In reaching this conclusion, however, the court specifically noted that had the state law "imposed a blanket prohibition on the use of discretion-granting clauses, we would have a different case." Id.

obligations on parties engaged in the business of insurance with respect to their insurance practices. See Ky. Ass'n, 538 U.S. at 334-35 (Kentucky's "any willing provider law" sufficiently directed towards insurers even though it had impact on other entities because it imposed conditions on right to engage in insurance business). The Supreme Court has held that a law grounded in a policy concern specific to the insurance industry is directed towards entities engaged in the business of insurance. UNUM, 526 U.S. at 372.

Like the Michigan and Montana laws, the Illinois law at issue here is clearly directed at entities engaged in the business of insurance and thus meets the first prong of the two-part test set forth in Kentucky Association. The regulation was intended to strip insurance policies and related agreements in Illinois of all discretionary clauses, Zaccone, 2013 WL 1849515, at *7, and to guarantee that decisions made by insurers under such policies be subject to court scrutiny under a non-deferential standard. The Director's power to issue the regulation comes from § 5/143, which gives the Director the authority to approve all policies, certificates of insurance or evidence of coverage, issued by companies engaged in the business of insurance. See also Zuckerman, 2012 WL 3903780, at *3.

MetLife argues (Br. at 26) that, as applied in this case, section 2001.3 is not specifically directed to entities engaged in insurance, but rather is specifically directed at plan sponsors and plan administrators like Mayer Brown, which are

effectively prohibited from delegating discretionary authority to insurers. The same argument could be made regarding any insurance regulation that directly affects the contract between an insurer and a policyholder. But that type of regulation is precisely at the heart of what the insurance savings clause saves. Thus, in UNUM, the Supreme Court rejected a similar argument that a state insurance law could not be given effect if it was contrary to anything in the plan. Under such a rule, "States would be powerless to alter the terms of insurance relationships in ERISA plans" and "insurers could displace any state regulation simply by inserting a contrary term in plan documents." 526 U.S. at 376. But the Supreme Court held that such a rule "makes scant sense," id. at 375, and "would virtually read the savings clause out of ERISA." Id. at 376. Similarly, the Supreme Court rejected the same argument that MetLife is making here in Kentucky Association when it held that the state "any willing provider" laws were "specifically directed at" insurers, despite the fact that "they equally prevent providers from entering into limited network contracts with insurers, just as they prevent insurers from creating exclusive networks in the first place." 538 U.S. at 334 (emphasis in original). "Regulations 'directed toward' certain entities will almost always disable other entities from doing, with the regulated entities, what the regulations forbid; this does not suffice to place such regulation outside the scope of ERISA's savings clause." Id. at 335-36. Likewise, section 2001.3

prohibits the grant of discretionary authority in any "agreement," including a plan document, under which the insurer of such a plan operates. See Ross, 558 F.3d at 605-06; Morrison, 584 F.3d at 842.

Accordingly, the fact that the regulation also prevents the plan sponsor from granting such authority in an ERISA plan document is as inevitable as it is irrelevant to the preemption analysis. See Rush Prudential, 536 U.S. at 359 (concluding that Illinois independent medical review law, "as applied to health benefits provided by a health maintenance organization under contract with an employee welfare benefit plan" that did not require such external review was saved from preemption as a state insurance regulation); UNUM, 526 U.S. at 375-77 (rejecting insurer's argument that ERISA preempts state insurance laws "altering the . . . provisions of the insurance contract"); Metro. Life, 471 U.S. at 734, 740 (state law mandating mental health benefits in state-issued insurance contracts was saved from preemption and applied to insurance policies issued to ERISA plans that did not provide such coverage). See also Borich, 2013 WL 1788478, at *3 ("The regulation is written broadly to eliminate deference to an insurer's interpretation of policy language. The regulation's bar on insurer interpretive discretion would be meaningless, however, if it could be avoided by the expedient of entering into a separate agreement, outside the insurance policy, that provides the same discretion that § 2001.3 takes away.").

A state law satisfies the second prong of the test if it "substantially affect[s] the risk pooling arrangement between the insurer and insured." Ky. Ass'n, 538 U.S. at 338. This prong ensures that a state insurance law is not simply directed at insurers but is also directed at insurance practices. Id. The Supreme Court does not require that the state law actually spread the risk, only that it substantially affect the risk pooling, as by "dictat[ing] to the insurance company the conditions under which it must pay for the risk it has assumed." Id. at 339 n.3.

Here, by eliminating discretionary clauses, section 2001.3 substantially affects the risk pooling arrangement by changing the standard of review federal courts will apply from abuse of discretion to de novo, with the likely result of courts overturning more claims denials, and therefore requiring more claims to be paid. See Novak, 956 F. Supp. 2d at 908 (citing Ehas, 2012 WL 5989215, at *9); Am. Council of Life Insurers v. Watters, 536 F. Supp. 2d 811, 823 (W.D. Mich. 2008); Morrison, 584 F.3d at 844-45. It also alters the scope of permissible bargains between insurers and insureds, and dictates to the insurance company the conditions under which it must pay for the risk assumed. See Ross, 558 F.3d at 606-07.

MetLife claims (Br. at 34) that section 2001.3 lacks the features of state laws the Supreme Court has found to be saved because it does not establish terms or conditions that determine whether a class of risks is covered or require plans to

insure against an additional class of risks. However, the Supreme Court's decision in Rush Prudential involved a state law which, like section 2001.3, eliminated deferential review of benefit claims, in that case by requiring an independent medical review. 536 U.S. at 384-85. See also Morrison, 584 F.3d at 844-5; Ross, 558 F.3d at 606-07.

B. The Regulation is not Preempted Under ERISA's "Deemer Clause"

MetLife argues (Br. at 33) that even if the Illinois law would otherwise be saved, the state law is still preempted by virtue of section 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B), which states that a plan itself may not be "deemed" to be an insurance company or engaged in the business of insurance and thereby provides an exception to the saving clause for state laws that purport to regulate self-funded plans as insurers.[6] See Rush Prudential, 536 U.S. at 372 n.6. As applied to insured plans, this argument is just another formulation of MetLife's argument, directly contrary to Kentucky Association and UNUM, that ERISA does not save state insurance regulations that limit the choices of policyholders through requirements imposed on insurance contracts. The savings clause does not mean, as MetLife

[6] This part of ERISA section 514, often referred to as the "deemer clause," provides: "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 U.S.C. §1144(b)(2)(B).

argues, that state laws are preempted if they regulate the terms of an employee benefit plan. Br. at 25-26, 28, 33. After all, that is exactly the effect of the laws that the Supreme Court held saved in Metropolitan Life, 471 U.S. at 741, and UNUM, 526 U.S. at 376, which, by requiring plans to include certain provisions in their insurance contracts, effectively mandated the terms of those plans that could then be enforced in a claim for benefits under ERISA. See UNUM, 526 U.S. at 377 (California's "notice-prejudice rule supplied the relevant rule of decision for this § 502(a) suit").

Instead, the deemer clause only forbids state insurance regulation of uninsured (i.e., self-funded) plans. FMC Corp. v. Holliday, 498 U.S. 52, 62-65 (1990). Under the deemer clause, "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it." Id. Because the Plan at issue here is insured by MetLife, and the State seeks to regulate how MetLife operates as an insurer (i.e., without the benefit of deferential review), the deemer clause is irrelevant.

C. The Regulation is Consistent with ERISA's Exclusive Enforcement and Remedial Scheme

MetLife next argues (Br. at 35-36) that section 2001.3 is preempted because it substantively conflicts with ERISA. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (even if a state law is otherwise saved as a law regulating insurance,

it may still be preempted if it "conflict[s] with a substantive provision of ERISA"). While state insurance laws that create "alternate remedies" or enforcement mechanisms for ERISA violations are preempted (despite being saved as regulating insurance), Rush Prudential, 536 U.S. at 377-78, the law here does not create any additional remedies and is being enforced in this case in the normal manner in a suit for benefits under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Rush Prudential, 536 U.S. at 379-80 (state regulatory schedule that required independent review of claims "provides no new cause of action under state law and authorizes no new form of ultimate relief" and thus did not conflict with ERISA); UNUM, 526 U.S. at 374-77 (rejecting insurer's argument that ERISA preempts state insurance laws "altering the . . . provisions of the insurance contract"); Metro. Life, 471 U.S. at 739-47 (giving effect to state law mandating mental health coverage which was otherwise not required).

As the government argued in its brief in the Supreme Court in Rush Prudential, the "state mandated benefit laws saved under Metropolitan Life do not conflict with Section 502(a) of ERISA because the mandated benefit is incorporated into the insurance policy purchased by the ERISA plan (and therefore into the plan itself)" and the "requirement can then be enforced in a suit by the participant or beneficiary under Section 502(a)(1)(B) 'to recover benefits due under the terms of the plan' or to 'enforce his rights under the terms of the plan.'" Brief of

the United States as Amicus Curiae, 2001 WL 1480556, at *20 (filed Nov. 7, 2001); see also Plumb v. Fluid Pump Serv., Inc., 124 F.3d 849, 861 (7th Cir. 1997) (Illinois insurance law limiting the scope of pre-existing condition clauses in insurance contracts superseded contrary provisions in the insurance contract and was incorporated in the plan as a matter of law). The same is true of the Illinois law here, which simply reads the grant of discretion out of the governing agreement and allows normal ERISA enforcement of the plan stripped of the impermissible grant of discretionary authority. Thus, as in UNUM, the state law "complements rather than contradicts ERISA." UNUM, 526 U.S. at 377.

MetLife further contends (Br. at 31) that Conkright v. Frommert, 559 U.S. 506 (2010), establishes a substantive rule requiring that any grant of fiduciary discretion in an ERISA plan be given effect. This assertion is specious. Conkright has nothing to do with preemption, and did not covertly overrule existing Supreme Court precedent bearing directly on the savings clause, such as Rush Prudential.

In that case, the Supreme Court rejected a similar argument that a state independent review law conflicted with ERISA by eliminating the deferential standard of review of a benefit decision made under a grant of discretion. Rush Prudential, 536 U.S. at 385. The Supreme Court saw no conflict between that state law and ERISA's text, which "provides nothing about the standard" of review. Id. The Court thus read ERISA "to require a uniform judicial regime of categories of

relief and standards of primary conduct, not a uniformly lenient regime of reviewing benefits determinations." Id. (citing Pilot Life, 481 U.S. at 56).

Moreover, the Court in Rush Prudential pointed out that "[n]ot only is there no ERISA provision directly providing a lenient standard for judicial review of benefit denials, but there is no requirement necessarily entailing such an effect even indirectly." 536 U.S. at 385. Although the Court recognized that "the default rule of de novo review could be replaced by deferential review if the ERISA plan itself" so provided, it noted that "[n]othing in ERISA, however, requires that [plan benefit decisions] be so discretionary in the first place." Id. Thus, the Court found no conflict with ERISA in a law constraining an insurer's ability to contract for deferential review, concluding that although a state law imposing independent review of claims "undeniably eliminates whatever may have remained of a plan sponsor's option to minimize scrutiny of benefit denials, this effect of eliminating an insurer's autonomy to guarantee terms congenial to its own interests is the stuff of garden variety insurance regulation through the imposition of standard policy terms." Rush Prudential, 536 U.S. at 387.

Nothing in Conkright is to the contrary. Conkright dealt not with preemption or the ability of states to regulate insurance, but with the effect of a valid plan provision granting discretion on the review of a second interpretation by a plan fiduciary. 559 U.S. at 512-13. For this reason, the decision neither cited

Rush Prudential nor purported to overrule or limit the holding of that case, or other cases addressing ERISA's insurance savings clause. The Conkright decision simply cannot plausibly be read to control whether a state insurance law restricting discretion-conferring clauses is saved from ERISA preemption. See Zaccone, 2013 WL 1849515, at *4-5 (Conkright inapplicable to saving clause analysis); Novak, 956 F. Supp. 2d at 910 (same).

States such as Illinois, in their roles as insurance regulators, have decided to protect citizens of their state from discretionary clauses in insurance documents that the states find "encourage misrepresentation" or "unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." 215 Ill. Comp. Stat. § 5/143. Illinois has made a policy decision that discretionary clauses harm its citizens' ability to get the full health insurance protection for which they contracted. Rather than preempt this policy decision, ERISA's insurance savings clause expressly preserves the sovereignty of states in their traditional role as insurance regulators.

CONCLUSION

For the foregoing reasons, the Secretary requests that the Court affirm the district court's ruling that the Illinois regulation is saved from preemption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robin Springberg Parry, attorney for amicus Secretary of Labor, hereby certify that on October 15, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Robin Springberg Parry
Robin Springberg Parry
Attorney for Amicus
Secretary of Labor

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