Nos. 14-1984 and 14-2302

In The United States Court Of Appeals For The Seventh Circuit

MARY C. FONTAINE

Plaintiff-Appellee

v.

METROPOLITAN LIFE INSURANCE COMPANY

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
NO. 1:12-CV-08738

The Honorable Joan B. Gottschall Presiding

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSINERS IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

[Parties Have Consented to Filing. Fed. R. App. P. 29(a)]

Jennifer M. McAdam (Counsel of Record)
National Association of Insurance Commissioners
1100 Walnut Street, Suite 1500
Kansas City, Missouri 64106
Telephone: 816.783.8878
E-mail: jmcadam@naic.org

Adam Oyebanji (Local Counsel)
Barack Ferrazzano Kirschbaum & Nagelberg LLP
200 West Madison Street, Suite 3900
Chicago, Illinois 60606
Telephone: 312.629.7378
E-mail: adam.oyebanji@bfkn.com

Attorneys for *Amicus Curiae*, National Association of Insurance Commissioners

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, *Amicus Curiae*, National Association of Insurance Commissioners ("NAIC") discloses the following:

1. The full name of every party that the attorney represents in the case:

   National Association of Insurance Commissioners

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

   Barack Ferrazzano Kirschbaum & Nagelberg LLP

3. If the party or *amicus* is a corporation:

   a. Identify all its parent corporations, if any:

      The National Association of Insurance Commissioners has no parent corporations.

   b. List any publicly held company that owns 10% or more of the party's or *amicus*' stock:

      The National Association of Insurance Commissioners, organized under the laws of the State of Delaware, is a non-profit corporation, operating under § 501(c)(3) of the Internal Revenue Code. As a non-profit corporation, the National Association of Insurance Commissioners has no stock; therefore, no publicly held company owns 10% or more of its stock.

CONSENT TO FILING *AMICUS* BRIEF

Counsel for Appellant and Appellee have consented to the filing of the NAIC's *amicus* brief in this case.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(C)(5)

Pursuant to Fed. R. App. P. 29(c)(5), (A) this *amicus* brief was not authored in whole or in part by either party's counsel; (B) neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

October 14, 2014
Date

/s/ Jennifer M. McAdam
Attorney for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE

FEDERAL STATUTES

STATE STATUTES

STATE REGULATIONS AND ADMINISTRATIVE AUTHORITY

OTHER AUTHORITY

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1871, the NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. The NAIC members, together with the centralized resources of the NAIC, form the national system of state-based insurance regulation in the U.S.

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as to assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In addition, the NAIC manages and coordinates the accreditation review of insurance departments as well as maintains regulatory and financial databases of insurance company financial data.

The interest of the NAIC in this case arises out of the regulatory responsibility vested in each commissioner over health insurance and disability income protection coverage. The

insurance commissioners of the various states are charged with the responsibility of regulating the business of insurance within their respective jurisdictions pursuant to the McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011 to 1015 (2012) ("McCarran-Ferguson Act"). The authority to regulate insurance issued in connection with employee welfare benefits plans is reserved to the states through the savings clause of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 to 1461 (2012) ("ERISA"). 29 U.S.C. § 1144(b)(2)(A) (2012).

The NAIC adopted the Prohibition on the Use of Discretionary Clauses Model Act, 1 NAIC *Model Laws, Regulations and Guidelines,* 42-1 to 42-6, 20XX WL 8342817 (2002, amended 2004) ("Discretionary Clause Model Act"), that bans discretionary clauses in health insurance and disability income protection coverage. The NAIC files this *amicus* brief to emphasize the need for sound regulation and judicial review when the benefit payor that is a health insurer makes its own determinations on benefit claims, and to confirm the power of state insurance commissioners to regulate this area. By having the power to prohibit discretionary clauses in insurance policies, state insurance regulators ensure that disputes concerning health insurance benefits and disability income protection coverage are resolved fairly, based on the evidence.

The NAIC endorses Argument Section I of Plaintiff-Appellee, Mary Fontaine's brief. We seek to aid the Court of Appeals by offering the legal and regulatory position and public policy perspectives of our association and NAIC member states.

II. SUMMARY OF THE ARGUMENT

This case will be determined by the standard of review applied. A denial of ERISA benefits is reviewed *de novo* unless the plan gives the administrator or fiduciary discretionary authority to determine benefits or to construe the contractual terms. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). When a plan provides the administrator with discretionary authority, the court applies an arbitrary and capricious standard of review. *Hess v. Reg-Ellen Mach. Tool Corp. Emp. Stock Ownership Plan*, 502 F.3d 725, 727 (7th Cir. 2007). This Court will decide whether the District Court correctly held that Section 2001.3 of Title 50 of the Illinois Administrative Code applies to nullify the discretionary clause at issue here, requiring a *de novo* review of MetLife's denial of Fontaine's benefit claim. Ill. Admin. Code tit. 50, § 2001.3 (2014). The NAIC believes this holding is correct.

The arguments raised by MetLife on appeal raise several issues that are of general and national concern to the membership of the NAIC:

1. NAIC members are charged with protecting insurance consumers. By prohibiting discretionary clauses in insurance policies, the NAIC and its members are protecting the reasonable expectations of consumers by ensuring that their health insurance benefits are contractually guaranteed.
2. The power of the Director of the Illinois Department of Insurance (or any other NAIC member who chooses to exercise this authority) to disapprove discretionary clauses in insurance policies is not preempted under ERISA § 514(a), but rather is saved from preemption under the test enumerated in *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003), because Section 2001.3 is (a)

specifically directed at insurance companies, and (b) substantially affects the risk pooling between the insurer and insured.

3. It is evident from the plain language of Section 2001.3, which is substantially similar to the Discretionary Clauses Model Act, that it applies to nullify the discretionary clause at issue in this case.

III. ARGUMENT

A. PURPOSE OF SECTION 2001.3

States have been regulating the business of insurance since 1851, when New Hampshire became the first state to establish a department of insurance. *See* N.H. Ins. Dep't, http://www.nh.gov/insurance/aboutus/index.htm (last visited September 18, 2014). In enacting the McCarran Ferguson Act in 1945, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Insurance Commissioners oversee the affairs of the insurance industry and are charged with regulating the business of insurance. In Illinois, "[t]he Director is charged with the rights, powers and duties appertaining to the enforcement and execution of all the insurance laws of this State." 215 Ill. Comp. Stat. 5/401 (2014). The Director has "the power . . . to make reasonable rules and regulations as may be necessary for making effective such laws[.]" *Id.* at § 401(a). This includes the Director's power to withhold approval of a policy that contains inequitable provisions. 215 Ill. Comp. Stat. 5/143 (2014).[1] The Director of the Illinois Department of Insurance has determined that discretionary clauses are one such inequitable provision.

[1] The Director's power to withhold approval of a policy containing inequitable provisions pursuant to Section 143, is applicable to group accident and health insurance policies, like the one at issue in this case, via Sections 355 and 367(2) of the Illinois Compiled Statutes, respectively. 215 Ill. Comp. Stat. 5/355 (2014) ("No policy of insurance against loss or damage from the sickness, or from the bodily injury or death of the insured by accident . . . shall be [] issued or delivered until the Director shall have approved such policy pursuant to the provisions of Section 143"); 215 Ill. Comp. Stat. 5/367(2) (2014) ("No policy of group accident and health insurance may be issued or delivered in this State unless a copy of the form thereof shall have been filed with the department and approved by it in accordance with Section 355[.]").

The Illinois Department of Insurance has promulgated a regulation titled, Discretionary Clauses Prohibited, which reads:

> 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.

Ill. Admin. Code tit. 50, § 2001.3. This regulation ensures that health care and disability insurance contracts are construed consistently with all other types of insurance policies, which require "any ambiguity in an insurance policy [to] be construed in favor of coverage for the insured." *Hoglund v. State Farm Mut. Auto. Ins. Co.*, 592 N.E.2d 1031, 1035 (Ill. 1992).

As enunciated by the Illinois Department of Insurance, the purpose of the regulation is to:

> [P]rohibit all such policies from containing language reserving sole discretion to interpret policy provisions with the insurer. The legal effect of discretionary clauses is to change the standard for judicial review of benefit determinations from one of reasonableness to arbitrary and capricious. By prohibiting such clauses, the amendments aid the consumer by ensuring that benefit determinations are made under the reasonableness standard.

29 Ill. Reg. 10172, *Notice of Adopted Amendments* (July 15, 2005). Adopted in 2005, Illinois' regulation is nearly identical to the language found in Section 4 of the NAIC's Discretionary Clauses Model Act.

B. DISCRETIONARY CLAUSES MODEL ACT

The state insurance commissioners who make up the membership of the NAIC are charged with the responsibility to facilitate the fair and equitable treatment of insurance consumers in their states. The NAIC has a rich history and tradition of consumer protection, and as the primary regulators of insurance, the commissioners are in the best position to understand

and evaluate the risks that are associated with insurance transactions and take appropriate actions to mitigate these dangers.

The NAIC originally passed the Discretionary Clauses Model Act in 2002 prohibiting the use of discretionary clauses in health insurance policies. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 4, 12-13 (2002); *see also* 2002 NAIC Proc. 1st Qtr. p. 7, 2002 WL 32591532. Among the reasons cited were that the NAIC membership believed that discretionary clauses in insurance contracts are considered to be inequitable, deceptive and misleading to consumers. *See* 2 Proc. of the Nat'l Ass'n of Ins. Comm'rs 17 (2002); *see also* 2002 NAIC Proc. 2nd Qtr. p. 10, 2002 WL 3270063 (noting issues in technical amendment and project history).

In 2004, the NAIC extended this prohibition to disability insurance.[2] *See* 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 57 (2004); *see also* 2004 NAIC Proc. 4th Qtr. p. 56, 2004 WL 3671315. Twenty-three states have adopted some type of prohibition against discretionary clauses in either health (sometimes called "disability" or "accident and sickness" coverage in insurance codes) or disability income insurance policies.[3]

---

[2] During the time that the NAIC membership was discussing expanding the scope of the Discretionary Clauses Model Act, NAIC member states were conducting a multistate market conduct examination focusing on Unum/Provident Corporation ("Unum"), regarding its handling of disability claims. *See* Report of the Targeted Multistate Disability Income Market Conduct Examination (Feb. 29, 2004), *available at* http://maine.gov/pfr/insurance/unum/Unum_Multistate_ExamReport.htm (last visited September 26, 2014) ("Unum Multistate Examination Report"). Resulting in a settlement of more than $120 million dollars and a $15 million fine, the Unum Multistate Examination Report has been referred to as one of the most significant multistate insurance regulatory actions in NAIC history and stands as a startling example of what can occur when an insurance company takes advantage of ERISA and uses discretionary clauses as a shield to protect the nonpayment of legitimate claims. *See* Joint Press Release, Multi-State Settlement Addresses Concerns Regarding Unum-Provident Claims Handling (Nov. 19, 2004), *available at* http://benefitslink.com/pr/detail.php?id=38471#.VCYYY1ewWRU (last visited September 26, 2014).

[3] *See* Cal. Ins. Code § 10110.6 (West 2014); Colo. Rev. Stat. § 10-3-1116 (2014); Md. Code Ann., Ins. § 12-211 (West 2014); Me. Rev. Stat. tit. 24-A § 4303 (2014); Minn. Stat. § 62Q.107 (2014); R.I. Gen. Laws §§ 27-18-79; 27-20.1-21; 27-34.2-22 (2014); Vt. Stat. Ann. tit. 8, § 4062f (2014); Wyo. Stat. Ann. §§ 26-13-302; 26-13-303; 26-13-304 (2014); *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 849 (9th Cir. 2009) (upholding the Montana Insurance Commissioner's practice of refusing to approve

The NAIC's members develop model laws and regulations to serve as standards for the promulgation of insurance laws and regulations in individual states. Consistent with its mission, the NAIC helps its members and their respective insurance departments explain the function and significance of NAIC model laws and regulations to legislatures, courts, other divisions of the executive branch, industry, consumers and the general public. The public policy behind the NAIC's Discretionary Clauses Model Act is clearly stated in Section 2. Purpose and Intent:

> The purpose of this Act is to assure that health insurance benefits and disability income protection coverage are contractually guaranteed, and to avoid the conflict of interest that occurs when the carrier responsible for providing benefits has discretionary authority to decide what benefits are due.

1 NAIC *Model Laws, Regulations and Guidelines*, 42-1 to 42-6, 20XX WL 8342817 (2002, amended 2004); *see also* 2004 NAIC Proc. 3rd Qtr. p. 668, 2004 WL 3650374.

---

disability policies containing discretionary clauses); *Am. Council of Life Insurers v. Ross*, 558 F.3d 600, 609 (6th Cir. 2009) (upholding Michigan's regulation banning discretionary clauses in disability insurance policies); 054-00-101 Ark. Code R. § 4 (2014); Idaho Admin. Code r. 18.01.29.011 (2014); Ill. Admin. Code tit. 50, § 2001.3 (2014); Mich. Admin. Code r. 500.2202 (2014); N.J Admin. Code § 11:4-58.3 (2014); S.D. Admin. R. 20:06:52:02 (2014); 28 Tex. Admin. Code § 3.1203 (2014); Wash. Admin. Code § 284-44-015 (2014); Utah Admin. Code r. § R590-218-5 (2014); Memorandum 2004-13H, *Discretionary clauses in HMSA's agreement for group health plan and guide to benefits* (Haw. Dep't of Ins. Dec. 8, 2004), *available at* http://files.hawaii.gov/dcca/ins/commissioners _memo/commissioners _memorandum_2004/ins_commissioners_memorandum_13h.pdf (last visited October 8, 2014); Bulletin 103, *Full and Final Discretion Clauses in Group Health Contracts*, (Ind. Dep't of Ins. May 8, 2001), *available at* http://www.in.gov/idoi/files/Bulletin_103.pdf (last visited Oct. 8, 2014); Advisory Opinion 2010-01, *Discretionary Clauses*, (Ky. Dep't of Ins. March 9, 2010), *available at* http://insurance.ky.gov/ Documents/discrclausesadvopin2010_01.pdf (last visited Oct. 8, 2014); Circular Letter 2006-14, *Discretionary Clauses in Accident and Health (including Disability Income) Insurance Policies, Life Insurance Policies, Annuity Contracts and Subscriber Contracts* (N.Y. Dep't of Ins. June 29, 2006), *available at* http://www.dfs.ny.gov/insurance/circltr/2006/cl2006_14.pdf (last visited Oct. 8, 2014); Bulletin 2002-7, *Discretionary Clauses Prohibited*, (Utah Dep't of Ins. July 29, 2002), *available at* https://insurance.utah.gov/legal-resources/bulletins/documents/2002-7.pdf (last visited Oct. 8, 2014); *Standard Provisions for Long and Short Term Disability Group or Individual*, Checklist (Or. Ins. Div. rev. July 2013), *available at* http://www.oregon.gov/dcbs/insurance/insurers/rates- forms/Documents /2447.pdf (last visited Oct. 8, 2014); *See also* Bulletin HC-67, *Use of Discretionary Clauses* (Conn. Dep't of Ins. March 19, 2008) (explaining that Dep't will monitor inappropriate use of discretionary clauses), *available at* http://www.ct.gov/cid/lib/cid/BullHC-67.pdf (last visited Oct. 8, 2014).

The U.S. Congress charged state insurance departments with great responsibility in enacting the McCarran-Ferguson Act by reserving to the states the authority to regulate the business of insurance. 15 U.S.C. § 1012(b). NAIC members have acted accordingly in adopting the Discretionary Clauses Model Act, which protects the reasonable expectations of insurance consumers by prohibiting the use of discretionary clauses in insurance policies.

C. ERISA PREEMPTION ANALYSIS

1. The ERISA savings clause saves Section 2001.3 from federal preemption.

ERISA sets the federal regulatory standard for health and disability benefit plans, and ERISA § 514(a) provides that it "shall supersede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA also contains a "savings clause" under ERISA § 514(b)(2)(A), stating that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any [s]tate which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). "[T]he historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 841 (9th Cir. 2009), *cert. denied sub nom., Standard Ins. Co. v. Lindeen*, 560 U.S. 904 (2010) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 365 (2002)).

In *Miller*, the Supreme Court clarified the appropriate test for determining whether a state statute regulates insurance for ERISA purposes. *Miller*, 538 U.S. at 341-42. Specifically, the Court held "that 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," and second, "the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.*

Both the Sixth and Ninth Circuits have held that a state's prohibition of discretionary clauses is saved from federal preemption. *Morrison*, 584 F.3d at 845 (addressing the Montana Insurance Commissioner's practice of refusing to approve disability policies containing discretionary clauses); *Am. Council of Life Insurers v. Ross*, 558 F.3d 600, 607 (6th Cir. 2009) (addressing Michigan's regulation banning discretionary clauses in disability insurance policies). Applying the same analysis, a number of district courts within the Seventh Circuit have found that Section 2001.3, specifically, is saved from federal preemption.[4]

MetLife argues that Section 2001.3 does not meet the first prong of the *Miller* test because it is not specifically directed to entities engaged in insurance but also impacts plan sponsors and administrators and targets all ERISA plan documents, not just the insurance policy that funds the plan. Appellant's Open. Br. at 33. This argument was first rejected by the *Miller* Court itself and has been subsequently rejected by courts analyzing Section 2001.3 and similar prohibitions on discretionary clauses. *See, e.g.*, *Miller*, 538 U.S. at 336 (rejecting the argument that "the AWP laws equally prevent *providers* from entering into limited network contracts with *insurers*, just as they prevent insurers from creating exclusive networks in the first place.");

[4] *Novak v. Life Ins. Co. of N. Am.*, 956 F. Supp. 2d 900, 911 (N.D. Ill. 2013) (Kendall, J.); *Schlattman v. United of Omaha Life Ins. Co.*, No. 12 C 7847, 2013 WL 3147368, at *5 (N.D. Ill. June 19, 2013) (Aspen, J.); *Zaccone v. Standard Life Ins. Co.*, No. 10 CV 00033, 2013 WL 1849515, at *5 (N.D. Ill. May 1, 2013) (Cole, MJ.), *claim denied following application of de novo review by Zaccone v. Standard Life Ins. Co.*, 10 CV 00033, 2014 WL 1758412 (N.D. Ill. May 2, 2014); *Borich v. Life Ins. Co. of N. Am.*, No. 12 C 734, 2013 WL 1788478, at *4 (N.D. Ill. Apr. 25, 2013) (Tharp, J.); *Ehas v. Life Ins. Co. of N. Am.*, No. 12 C 3537, 2012 WL 5989215, at *10 (N.D. Ill. Nov. 29, 2012) (St. Eve, J.); *Zuckerman v. United of Omaha Life Ins. Co.*, No. 09 C 04819, 2012 WL 3903780, at *7 (N.D. Ill. Sept. 6, 2012) (Tharp, J.); *Curtis v. Hartford Life & Accident Ins. Co.*, No. 11 C 2448, 2012 WL 138608, at *10 (N.D. Ill. Jan. 18, 2012) (Gilbert, MJ.), *claim granted following application of de novo review by Curtis v. Hartford Life & Accident Ins. Co.*, 11 C 2448, 2014 WL 4185233 (N.D. Ill. Aug. 20, 2014); *Ball v. Standard Ins. Co.*, No. 09 C 3668, 2011 WL 759952, at *4–7 (N.D. Ill. Feb. 23, 2011) (Keys, MJ.), *claim denied following application of de novo review by Ball v. Standard Ins. Co.*, 09 C 3668, 2012 WL 2115484 (N.D. Ill. June 7, 2012); *Cf. Difatta Baxter, Int'l, Inc.*, No. 12 C 5023, 2013 WL 157952, *3 (N.D. Ill. Jan. 15, 2013) (Feinerman, J.) ("the holding rests solely on the ground that Defendants forfeited their preemption argument by failing to develop it.").

Morrison, 584 F.3d at 842 ("ERISA plans are a form of insurance, and the practice regulates insurance companies by limiting what they can and cannot include in their insurance policies."); *Ross*, 558 F.3d at 606 ("[R]egulations directed toward certain entities that also happen to disable other entities from engaging in the regulated behavior will not remove such regulations from the scope of ERISA's savings clause."); *Novak*, 956 F. Supp. 2d at 908 ("The fact that the regulation also imposes limitations on Plan fiduciaries does not change the outcome of the analysis."). MetLife has cited no authority contradicting this widely-held application of the savings clause.[5]

MetLife argues that Section 2001.3 fails to meet the second prong of the *Miller* test because it does not "substantially affect the risk pooling arrangement between the insurer and the insured." Appellant's Open. Br. at 33 (quoting *Miller*, 538 U.S. at 341-42). For this contention, MetLife argues that because Section 2001.3 does not operate in the same way as the state laws saved from preemption in the two Supreme Court cases it cites; therefore Section 2001.3 cannot also be saved from preemption. Appellant's Open. Br. at 34 (citing *Unum Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985). With this argument, MetLife has committed the logical fallacy of denying the antecedent. *See, e.g.*, *TorPharm, Inc. v. Ranbaxy Pharms., Inc.*, 336 F.3d 1322, 1329 n.7 (Fed. Cir. 2003) (explaining that "denying the antecedent" is "[a]n invalid argument of the general form: If p, then q. Not p. Therefore, not q."). Just because Section 2001.3 is not identical to the laws at issue in the two Supreme Court cases it cites, does not mean that it cannot also be saved from preemption. In fact, in one of the cases cited by MetLife on this point, the Supreme Court held that "the saving clause appears broadly to preserve the States' lawmaking power over much of the same

[5] MetLife erroneously interjects a flawed "deemer clause" analysis into its argument. But whether ERISA's "deemer clause" (§ 514(b)(2)(B)) applies to preempt a state law that would otherwise be saved from preemption is best analyzed once the savings clause question is answered. *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) ("Unless the statute is excluded from the reach of the saving clause by virtue of the deemer clause, therefore, it is not pre-empted.").

regulation [that had been removed by the preemption clause]." *Metro. Life Ins. Co. v. Mass.*, 471 U.S. at 740-41. In finding that the law at issue in that case was saved, the Court explained that "[t]he presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope." *Id.* at 741.

"The requirement that insurance regulations substantially affect risk pooling ensures that the regulations are targeted at insurance practices, not merely at insurance companies." *Morrison*, 584 F.3d at 844 (citing *Miller*, 538 U.S. at 338). In *Miller*, the Court determined that to "substantially affect the risk pooling arrangement between the insurer and the insured" the law did not need to "alter or control the actual terms of insurance policies" but could merely "alter the scope of permissible bargains between insurers and insureds." *Miller*, 538 U.S. at 338-39.

Both the Sixth and Ninth Circuits have found that the prohibition of discretionary clauses "alters the scope of permissible bargains between insurers and insureds." *Morrison*, 584 F.3d at 844-45 ("Montana insureds may no longer agree to a discretionary clause in exchange for a more affordable premium. The scope of permissible bargains between insurers and insureds has thus narrowed."); *Ross*, 558 F.3d at 607 (quoting *Ward*, 526 U.S. at 374-75 ("By changing the terms of enforceable insurance contracts, the Commissioner has "alter[ed] the scope of permissible bargains between insurers and insureds."). In *Ross*, the Sixth Circuit explained that another reason the state's prohibition of discretionary clauses was saved was because "[p]rohibiting plan administrators from exercising discretionary authority in this manner 'dictates to the insurance company the conditions under which it must pay for the risk it has assumed.'" *Ross*, 558 F.3d at 607 (quoting *Miller*, 538 U.S. at 339 n.3).

MetLife also states that "Section 2001.3 dictates the standard of judicial review applied by federal courts at the time of judgment" and, "[t]hus, the regulation does not significantly

affect the risk pooling arrangement." Appellant's Open. Br. at 34. But this argument was also rejected by the Sixth Circuit in *Ross*. *Ross*, 558 F.3d at 606. The *Ross* Court explained that the *Miller* test "does not contain any timing element. . . . Nor has the Supreme Court inquired into the timing of the "substantial [e]ffect" on the "risk-pooling arrangement" in its analysis." *Id.* (citing *Miller*, 538 U.S at 338-39).

Most courts addressing ERISA preemption stop their analysis at this point since there is typically no disagreement as to whether ERISA's deemer clause, § 514(b)(2)(B), applies. This is a straightforward issue that does not apply in this case but will be addressed since MetLife erroneously refers to it throughout its brief. Appellant's Open. Br. at 25-26, 28, 33. ERISA's deemer clause simply provides that states may not "deem" self-funded plans to be insurers. 29 U.S.C. § 1144 (b)(2)(B). "[T]he deemer clause makes clear that 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." *Holliday*, 498 U.S. at 64-65. Here, there is no debate—the Plan at issue was insured by MetLife. *See, e.g.*, Appellant's Ex. A, at p.1 (Certificate of Insurance). Therefore, the deemer clause has no application.

2. Section 2001.3 does not thwart Congressional objectives.

Because there are no cases supporting its position that a state's prohibition of discretionary clauses is preempted by ERISA, MetLife focuses the bulk of its argument on policy reasons that Section 2001.3 should be preempted by ERISA. Appellant's Open. Br. at 34-39. Specifically, MetLife discusses a 2010 Supreme Court case, *Conkright v. Frommert*, 559 U.S. 506 (2010), which was decided after the Sixth and Ninth Circuits decided *Ross* and *Morrison*, respectively. But despite MetLife's attempts to argue otherwise, *Conkright* is not relevant here.

As the district court in *Novak* stated, "*Conkright* did not address, discuss, or mention, much less overturn, the Sixth and Ninth Circuit's decisions in *Morrison* and *Ross*. Indeed the issue of preemption was not even in play." *Novak*, 956 F. Supp. 2d at 910. "At issue in *Conkright* was whether a federal court may strip an administrator of its discretionary authority on an 'ad-hoc basis,' not whether state regulatory bodies are precluded from regulating insurance by promulgating rules restricting deference-conferring clauses that otherwise clearly fall within the ambit of ERISA's savings clause." *Id*.

In *Zaccone*, the district court held that *Conkright's* discussion of judicial deference "does not mean the Court was signaling a retreat from *Firestone*." *Zaccone*, 2013 WL 1849515, at *4. "In *Firestone's* framework, deferential review is *exceptional*[.]" *Comrie v. IPSCO, Inc.*, 636 F.3d 839, 842 (7th Cir. 2011). "Since *de novo* review remains the default standard of review, it is difficult to imagine how a state law requiring that level of review would conflict with [Section 2001.3]." *Zaccone*, 2013 WL 1849515, at *5 (citing *Ross*, 558 F. 3d at 608).

This Court should follow the reasoning of *Novak* and *Zaccone* and "decline[] the Defendants' invitation to take *Conkright*—a case that had nothing to do with preemption, insurance regulation, or ERISA's savings clause—and stretch its holding to effectively preclude any state law restricting the grant of discretionary authority to an administrator." *Novak*, 956 F. Supp. 2d at 910 (citing *Zaccone*, 2013 WL 1849515, at *5 ("*Conkright* does not alter the analyses in *Ross* and *Morrison* or require the conclusion that Section 2001.3 is outside ERISA's savings clause and has been preempted by ERISA.")).

D. APPLICATION OF SECTION 2001.3

1. The discretionary clause is found within a "policy, contract, certificate, endorsement, rider application or agreement", thus is subject to Section 2001.3.

The Seventh Circuit has proclaimed that "litigation under ERISA by plan participants seeking benefits should be conducted just like contract litigation, for the plan and any insurance policy are contracts." *Krolnik v. Prudential Ins. Co. of Am.*, 570 F.3d 841, 843 (7th Cir. 2009) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989)); *see also Herzberger v. Standard Ins. Co.*, 205 F.3d 327, 330 (7th Cir. 2000) (citations omitted) ("[a]n ERISA plan is a contract[.]").

Assuming, *arguendo*, that the discretionary clause at issue here is part of the ERISA Plan, contrary to MetLife's assertion,[6] a number of district courts "have rejected the argument that § 2001.3 does not apply by virtue of the fact that the language conferring discretion appears only in the plan document and not in the insurance policy itself." *Novak*, 956 F. Supp. 2d at 906 (citing *Borich*, 2013 WL 1788478, at *4 ("to hold [that the regulation cannot apply to Plan documents] would be both contrary to the plain language of the regulation and the clear import of the language .... The regulation's bar on insurer interpretive discretion would be meaningless ... if it could be avoided by the expedient [sic] of entering into a separate agreement, outside the insurance policy, that provides the same discretion that § 2001.3 takes away"); *Difatta*, 2013 WL 157952, at *3 (holding that Section 2001.3 barred a grant of discretion to the LTD insurer despite the fact that the discretionary language appeared in the master plan document and not the insurance policy); *Ehas*, 2012 WL 5989215, at *5–7 (holding that Section 2001.3 applied despite

[6] MetLife asserts that "The cases that have interpreted § 2001.3 including those that the District Court relied upon are distinguishable. In each, unlike here, the discretionary authority was set forth in the insurance policy." (citations omitted). Appellant's Open. Br. at 26 n.9. This is a factually inaccurate statement, as noted by the case law cited above.

the fact that the insurance policy contained no language granting discretion to LINA because another plan document—the appointment of claims review fiduciary—did contain a clause stating that LINA would have discretion to interpret the insurance policy)).

In *Ehas*, for example, "[t]he court reasoned that allowing disability insurers to circumvent the Illinois regulation by placing the discretionary clause in a plan document rather than in the insurance policy would "'elevate form over substance.'" *Novak*, 956 F. Supp. 2d at 906 (citing *Ehas*, 2012 WL 5989215, at *6)). The reasoning in *Ehas* and the other cases addressing this issue is supported by this Court's admonishment in *Herzberger* that "if the employer is going to reserve a broad, unchanneled discretion to deny claims, the employees should be told about this, and told clearly." *Herzberger*, 205 F.3d at 332-33.

This reasoning is also supported by the "four corners" rule of contract law. *See, e.g., Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 884 (Ill. 1999) (citation omitted). The discretionary clause at issue here gives MetLife "discretionary authority to interpret the terms of the Plan and to determine eligibility for and entitlement to Plan benefits[.]" But what are the "terms of the Plan" if not the terms of the insurance policy? And what are "Plan benefits" if not insurance benefits? MetLife is asserting that the discretionary clause affords it authority to interpret the terms of the insurance policy and to determine insurance benefits but it cannot do so in a document that is not an amendment to and part of the insurance policy or contract. *Id.* An agreement, when reduced to writing speaks for itself. *Id.* (quoting *Western Ill. Oil Co. v. Thompson*, 186 N.E.2d 285, 291 (Ill. 1962)). "It is not to be changed by extrinsic evidence." *Id.* The discretionary clause is either part of the insurance policy and, therefore, subject to Section 2001.3 or it is not part of the insurance policy and, therefore, cannot alter its terms.

2. Section 2001.3 applies when a Plan Administrator grants discretionary authority to a fiduciary.

For the same reason, MetLife's argument that Section 2001.3 does not apply because the Plan was offered by Mayer Brown, and not MetLife, is also without merit. As discussed above, the discretionary clause, if operable at all, is part of the insurance policy, which was issued by MetLife to Mayer Brown. Even assuming that the discretionary clause at issue here is part of the Plan, Mayer Brown, as Plan Sponsor, cannot grant discretion to MetLife, as fiduciary.

The discretionary clause at issue in *Novak* involved the same set of facts that MetLife asserts are relevant here. In *Novak*, the Plan, offered by the employer, granted "LINA, as the 'Claims Administrator' and fiduciary of the LTD program", discretionary authority to determine claims and appeals. *Novak*, 956 F. Supp. 2d at 903-04. The court found that "In this case, § 2001.3 prohibits employers from delegating discretionary authority to a fiduciary in a trust instrument that governs a plan." *Id.* at 907. Furthermore, MetLife's reliance on ERISA's deemer clause is again misplaced as explained *supra* Sec. III.C.1., at p. 13.

3. Section 2001.3 applies to grants of discretion to make benefit determinations as well as to interpret the terms of the insurance contract.

The Supreme Court has acknowledged that there is no distinction between contract interpretation and benefit determination, holding that "[t]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Firestone*, 489 U.S. at 115.

Courts interpreting Section 2001.3 have held that it applies to prohibit not only discretion to interpret the terms of the insurance contract but also to make benefit determinations. *See e.g.*, *Zaccone*, 2013 WL 1849515, at *10; *Ball*, 2011 WL 759952, at *7. This is clear from the plain language of the regulation, which prohibits discretionary authority "to interpret the terms of the

contract, ***or to provide standards of interpretation or review that are inconsistent with the laws of this State***." Section 2001.3 (emphasis added). "If Section 2001.3 was only intended to prohibit a clause investing an administrator with discretion to interpret contract terms, it would not have contained the additional clause quoted above." *Zaccone*, 2013 WL 1849515, at *10. The meaning has been further explained by the Department of Insurance in its *Notice of Adopted Amendments*:

> The legal effect of discretionary clauses is to change the standard for judicial review of benefit determinations from one of reasonableness to arbitrary and capricious. By prohibiting such clauses, the amendments aid the consumer by ensuring that benefit determinations are made under the reasonableness standard.

29 Ill. Reg. 10172. Therefore, "a clause that invests discretion in an administrator to create standards of interpretation and review would be inconsistent with [Section 2001.3] since, as we have shown, benefits decisions and interpretation of contract terms are inextricably linked—at least in most cases. *Zaccone*, 2013 WL 1849515, at *10.

IV. CONCLUSION

The NAIC requests that this Court uphold the decision of the District Court and affirm that the Illinois Department of Insurance has the power under the authority of Section 2001.3 to disapprove the use of discretionary clauses found in insurance policies like the one issued by MetLife. Additionally, the NAIC requests that this Court affirmatively find that the power to disapprove the use of discretionary clauses is not preempted under ERISA § 514(a), but instead is saved from preemption under ERISA § 514(b)(2)(A). Further, the NAIC requests that this Court find that Section 2001.3 applies to nullify the discretionary clause at issue in this case. Finally, the NAIC requests that this Court acknowledge and confirm the NAIC's interest in protecting the reasonable expectations of insurance consumers under its Discretionary Clauses Model Act by affirming the decision of the District Court.

Respectfully Submitted,
NATIONAL ASSOCIATION
OF INSURANCE COMMISSIONERS

BY: /s/ Jennifer M. McAdam
JENNIFER M. MCADAM
1100 Walnut, Suite 1500
Kansas City, MO 64113
Telephone: (816) 783-8878
Fax: (816) 460-7633

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIR. R. 32

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains approximately 6,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman font in the body and 11-point font in the footnotes.

October 14, 2014
Date

/s/ Jennifer M. McAdam
Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2014, I electronically filed the foregoing Brief of *Amicus Curiae,* National Association of Insurance Commissioners, in Support of Appellee 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.

October 14, 2014
Date

/s/ Jennifer M. McAdam
Attorney for *Amicus Curiae*