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SERVICES

Case No. (District Court CV-01-J-783-S)

“CARL D. PALMORE,
Plaintiff
v.
FIRST UNUM, et al.,
Defendants.”

Certification of Questions Pursuant to Rule 18, Alabama Rules of Appellate Procedure from the United States District Court, Northern District of Alabama

“THE HEALTH INSURANCE ASSOCIATION OF AMERICA, THE AMERICAN ASSOCIATION OF HEALTH PLANS, THE AMERICAN BENEFITS COUNCIL, AND THE ASSOCIATION OF ALABAMA LIFE INSURANCE COMPANIES
BRIEF OF
AMICI CURIAE IN SUPPORT OF DEFENDANTS”

Filed-March 22, 2002

TABLE OF AUTHORITIES

“Cases

Boggs v. Boggs, 520 U.S. 833 (1997)
Bryant v. Commonwealth Life Ins. Co., 767 F. Supp. 1120 (S.D. Ala. 1991)
Butero v. Royal Maccabees Life Insurance Company, 174 F.3d 1207 (11th Cir. 1999)
Corporate Health Ins., Inc. v. Texas Dept. of Ins., 215 F.3d 526 (5 Cir. 2000)
Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938)
Gilbert v. Alta Health & Life Ins. Co., 276 F.3d 1292 (11th Cir. 2001)passim
Hall v. Blue Cross/Blue Shield, 134 F.3d 1063 (11th Cir. 1998)
Hanna v. Plumer, 380 U.S. 460 (1965)
Hill v. Blue Cross Blue Shield of Alabama, 117 F. Supp. 2d 1209 (N.D. Ala. 2000)
Ingersoll-Rand Company v. McClendon, 498 U.S. 133
John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank, 510 U.S. 86 (1993)
Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir. 1988)
King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948)

Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724 (1985)
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)
S.E.C. v. Variable Annuity Life Insurance Co., 359 U.S. 65 (1959)
Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982)
United of Omaha v. Business Men's Assurance Co., 104 F.3d 1034 (8th Cir. 1997)
Unum Life Ins. Co. v. Ward, 526 U.S. 358 (1999)passim
Walker v. Southern Co. Services, Inc., 279 F.3d 1289 (11th Cir. 2002)15
Weems v. Jefferson-Pilot Life Ins. Co., Inc., 663 So.2d 905 (Ala. 1995)
Whitt v. Sherman Int'l Corp., 147 F.3d 1325 (11th Cir. 1998)3

Statutes

15 U.S.C. _ 1011(b)
28 U.S.C. _ 1652
29 U.S.C. _ 1001, et seq
29 U.S.C. _ 1144(a)
29 U.S.C. _ 1144(a)(2)(B)
29 U.S.C. _ 1144(b)(2)
29 U.S.C. _ 1104, 1109, 1132
Ala. Code _ 27-12-24
Ala. R. App. P. 18(a)

“

ISSUE PRESENTED

Whether, because under Rule 18 of the Alabama Rules of Appellate Procedure and applicable case law, the answers to the certified questions are not determinative of any cause before a federal court, this Court should withdraw its acceptance of the questions whether the Alabama tort of bad faith, as codified in section 27-12-24 of the Alabama insurance code, and as previously existed before its codification, is a law that (a) is limited solely to insurers; and (b) constitutes a regulation of the insurance industry under Alabama law, which questions were certified to this Court by the United States District Court for the Northern District of Alabama.

“INTEREST OF

THE HEALTH INSURANCE ASSOCIATION OF AMERICA,
THE AMERICAN ASSOCIATION OF HEALTH PLANS,
THE AMERICAN BENEFITS COUNCIL AND THE ASSOCIATION OF ALABAMA LIFE INSURANCE COMPANIES”

The Health Insurance Association of America (HIAA), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is an advocate for the private, market-based health insurance system. Its more than 260 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 115 million Americans. HIAA develops and advocates federal and state policies that build upon the health care system's quality, affordability, accessibility, and responsiveness.

The American Association of Health Plans, Inc. (AAHP) is the national association for the managed health care community. Its membership includes health maintenance organizations (HMOs), preferred provider organizations (PPOs), third party health benefit administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1000 managed health care organizations serving nearly 140 million Americans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

The American Benefits Council (the Council) is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include many employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 260 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

“The Association of Alabama Life Insurance Companies (AALIC) is an association of life insurance companies, domiciled in the State of Alabama or having significant interests in the insurance industry affairs of the State of Alabama, which serves the basic life and health insurance needs of the general public through various distribution methods.

STATEMENT OF FACTS”

“In the federal trial court, plaintiff seeks to recover benefits under a disability program covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA) 29 U.S.C. 1001, et seq. Benefits under the disability plan are funded by an insurance policy issued by defendant, First Unum. In addition to a cause of action under ERISA, the plaintiff also seeks punitive damages for Unum’s alleged bad faith failure to pay under Alabama law. For purposes of this brief, Amicus Curiae HIAA, AAHP and the Council adopt and incorporate the statement of facts in the Defendant’s brief to this Court.

SUMMARY OF ARGUMENT”

ERISA comprehensively regulates, among other things, employee welfare benefit plans that ‘through the purchase of insurance or otherwise’ provide medical, surgical or hospital care or benefits in the event of sickness, accident, disability or death. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987). To this end, the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. _ 1001, et seq. establishes uniform standards for administering ERISA-covered employee benefit plans as well as remedies and mechanisms to enforce those standards. ERISA __ 404, 409, 502.

In addition, ERISA expressly preempts any and all State laws insofar as they may now or hereafter relate to any employee benefit plan covered by Title I of ERISA. ERISA _ 514(a). This express preemption does not extend to state laws regulating the business of insurance. ERISA _ 514(b)(2). Broader conflicts preemption, however, preempts even state insurance law if the law conflicts with ERISA’s exclusive enforcement scheme. *Pilot Life*, at 54.

The questions certified to this Court form part of the inquiry required to determine whether the Alabama tort of bad faith is preempted by ERISA. However, this case requires the federal trial court to apply a federal test, not to apply state law. Moreover, regardless of how this Court answers the certified questions, the Alabama tort at issue would nevertheless be preempted under broader conflicts preemption long-recognized by the Supreme Court because it interferes with ERISA’s exclusive enforcement scheme. Thus, the Court’s decisions on the certified questions will not resolve the matter pending before the federal trial court. The Court therefore should withdraw its acceptance of the certified questions.

ARGUMENT

I. The question certified by the federal trial court presents a question of federal law, rather than state law. The question therefore does not present an issue of Alabama law that is determinative of the cause before the federal court within the meaning of Alabama Rules of Appellate Procedure 18(a). This court should therefore decline to expend its resources to answer a question that will not resolve the matter pending before the federal court.

Since 1938, the Supreme Court of the United States has consistently ruled that when a federal court is obliged to decide a claim for relief arising under state law, the federal court is bound to apply the law of the state, as interpreted by the Supreme Court of the concerned state. *Erie Railroad Company v. Tompkins*, 304 U.S. 64, 78 (1938). When federal courts exercise jurisdiction to decide state claims, most often under the federal courts’ grant of diversity jurisdiction, the federal courts sit, in effect, as state courts. They are bound by the decisions of the state’s Supreme Court in the same way that the lower courts of the state are bound. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948). This rule governing the federal courts, which is embodied in the Federal Rules Decision Act, is a fundamental element of this country’s legal system, which recognizes that the Constitution apportions specific areas of responsibility to the federal government and leaves all other matters of law to the jurisdiction of the states.

When the federal courts decide questions of federal law, however, they are not bound by decisions of the state courts. Rather, the federal courts are obliged to apply federal statutes and the decisions of federal courts interpreting those statutes. *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965).

Consistent with this fundamental principle of divided responsibility between the federal and state legal systems, the Alabama Rules of Court authorize federal courts to certify to this Court a question of law [w]hen it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State . . . Ala. R. App. P. 18(a) (emphasis added). By its terms, Rule 18 recognizes that this Court should address questions certified to it by the federal courts only when those questions present an unresolved issue of Alabama law that will be determinative of the outcome of the action pending before the

federal court sitting as a state court. Rule 18 does not, by its terms, contemplate that this Court should issue advisory opinions on questions of law that neither arise under the law of Alabama nor are determinative of the cause pending before the federal court.

The question certified to this Court by the United States District Court for the Northern District of Alabama does not satisfy the requirements of Rule 18(a). It does not present a question of state law. Instead, it presents a question of federal law — the interpretation of the scope and effect of section 514(a)(2)(B) of ERISA. 29 U.S.C. § 1144(a)(2)(B). The Court's opinion on this question of federal law would not be binding on the federal court and will therefore not be determinative of the cause pending before the federal court.

Section 514(a) of ERISA provides that [e]xcept as provided in subsection (b) of this section, the provisions of this title . . . 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). ERISA's express preemption provision is subject to the insurance savings clause exception set out in section 514(b)(2)(A), which provides that . . . nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

The question therefore presented by the plaintiff's claim in the federal action is whether Alabama's tort of bad faith, as codified in Ala. Code § 27-12-24, is a law of [this] State which regulates insurance within the meaning of ERISA § 514(b)(2)(A). On its face, this question is inherently a question of federal law because it necessarily involves the interpretation of ERISA's insurance savings clause. In other words, the question for decision by the federal court is whether Alabama's tort of bad faith is a law which regulates insurance as that term is used in federal law. To answer that question of federal law, any court presented with the question must necessarily apply the tests developed under two federal statutes — the McCarran-Ferguson Act, 15 U.S.C. § 1011, and ERISA itself.

The McCarran-Ferguson Act provides in part that, with certain exceptions, [n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . 15 U.S.C. § 1011(b). To determine whether a particular state law or practice is a law regulating the business of insurance, the federal courts have developed a three-part test that asks first, whether the practice has the effect of transferring or spreading a policy-holder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). Significantly, there is no doubt that when the federal courts apply this test to a particular state law or practice, they are engaged in ruling on a federal question.

We deal, however, with federal statutes where the words insurance and annuity are federal terms. . . . It is apparent that there is no uniformity in the rulings of the States on the nature of these annuity contracts. In any event how the States may have ruled is not decisive. For, as we have said, the meaning of insurance or annuity under these Federal Acts is a federal question.

"S.E.C. v. Variable Annuity Life Insurance Co., 359 U.S. 65, 69 (1959).

Similarly, both federal and state courts use this same three-part federal test to determine whether a particular state law is saved from preemption under ERISA's savings clause. E.g., *Unum Life Ins. Co. v. Ward*, 526 U.S. 358, 367 (1999); *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 743 (1985). Indeed, as the federal trial court that certified the question to this Court acknowledged, this same McCarran-Ferguson Act test was employed by the U.S. Court of Appeals for the Eleventh Circuit in *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001) to conclude, for the third time, that the Alabama tort of bad faith is preempted under ERISA. Certification of Question Pursuant to Rule 18, Alabama Rules of Appellate Procedure at 4-5. This Court has also applied the federal test. See *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So.2d 905 (Ala. 1995)."

The federal trial court evidently believes that the 11th Circuit has erred in repeatedly reaching this conclusion. By seeking this Court's assistance under Rule 18, however, the federal trial court itself committed clear error by construing the question of ERISA preemption before it as a question of state, rather than federal law. Contrary to the trial court's belief, any decision by this Court respecting the question certified to it would not be determinative of the cause pending before the trial court. However this Court might rule, whether employing the McCarran-Ferguson Act test or employing any relevant principle of state law, the federal courts will not be bound by the decision. Rather, the federal courts will necessarily apply the federal test prescribed by the U.S. Supreme Court to rule on the question. This Court should, therefore, refrain from ruling on the certified question because it plainly does not satisfy the criteria of Rule 18.

"II. This Court's ruling on the certified question would not be determinative of the cause before the federal trial court because United States Supreme Court precedent requires that even if the Alabama law is saved from express preemption, it is preempted under federal conflict preemption principles.

Even assuming that this Court's answer to the certified question would lead the federal trial court to conclude, based on the federal savings clause test, that the Alabama tort of bad faith failure to pay is saved from ERISA preemption, the federal trial court would still

be required to examine whether the law is preempted based on general federal principles of conflict preemption. And the federal trial court would conclude that the state law is preempted.”

State laws that are saved from preemption under section 514(b) of ERISA are nevertheless preempted if they conflict with ERISA’s exclusive enforcement and regulatory schemes. Notwithstanding ERISA’s express preemption provision, if state law conflicts with the provisions of ERISA or operates to frustrate its objects, the state law is preempted. *Boggs v. Boggs*, 520 U.S. 833, 841 (1997). Accord *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 99 (1993) (under ERISA, state law governing insurance generally is not displaced, but ‘where [that] law stands as an obstacle to the accomplishment of the full purposes and objects of Congress,’ federal preemption occurs.); *Pilot Life*, 481 U.S. at 57; *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 143-44 (1990) (even without ERISA’s express preemption provision, state law that conflicts with ERISA would be preempted).

The Alabama state law at issue purports to provide an additional remedy to the exclusive enforcement scheme under section 502 of ERISA and therefore is preempted under the Supreme Court’s conflict preemption analysis.

In *Pilot Life*, the Court held that a Mississippi common law claim of bad faith against an insurer for failure to pay benefits under an ERISA plan was preempted by ERISA because it related to an ERISA plan and was not saved from preemption as a law regulating insurance. *Pilot Life*, 481 U.S. at 55. Although the Court in *Pilot Life* found the state law at issue did not regulate insurance as described in the savings clause, it did not end its inquiry with the savings clause analysis. Instead, the Court further examined the language and structure of the civil enforcement provisions and the statute’s legislative history, in which Congress declared that ERISA should have the same preemptive force as the Labor Management Relations Act, and concluded — The deliberate care with which ERISA’s civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA’s civil enforcement remedies were intended to be exclusive.

Id. at 54.

Importantly, *Pilot Life* was not the Supreme Court’s first major savings clause case. Two years before *Pilot Life*, the Court found that the savings clause saved a state law that required that health insurance policies provide mental health benefits. *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985). Significantly, the state mandated benefits law did not provide a new or different remedy for ERISA plan participants. Mindful of its decision in *Metropolitan Life*, the Court in *Pilot Life* made abundantly clear that even a law purporting to regulate insurance would be preempted if the law provided any type of remedy that conflicts with ERISA’s detailed enforcement scheme. *Pilot Life*, 481 U.S. at 57.

The Supreme Court reinforced its determination that ERISA provides the exclusive set of remedies in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), decided on the same day as *Pilot Life*. In *Taylor*, the court found that a complaint filed in state court alleging, on its face, only state law causes of action was properly removable to federal court under the doctrine of complete preemption. It found applicable the rule that Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. *Id.* at 63. Thus, any suit attempting to state a state law cause of action is purely a creature of federal law notwithstanding the fact that state law would provide a cause of action in the absence of [federal law]. *Id.* at 64. The *Taylor* decision rests on the same fundamental conclusion as *Pilot Life* — that ERISA’s remedies are so comprehensive that Congress’s intent to provide an exclusively federal set of remedies is manifest. See also *Ingersoll-Rand Co.*, 498 U.S. at 143 (applying *Pilot Life* and *Taylor*, the Court finds that even without express preemption under section 514(a), state law cause of action would be preempted because it conflicts with the exclusive remedies provided under section 502 of ERISA).

In its recent decision in *Gilbert v. Alta Health & Life Ins. Co.*, 276 F.3d 1292 (11th Cir. 2001), the Eleventh Circuit thoroughly and precisely addressed the issue of whether Alabama’s bad faith failure to pay tort is preempted by ERISA. The court, following *Pilot Life*, focused on the conflict preemption issue. The court noted the careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans that resulted in the ERISA enforcement scheme. *Id.* at 1296 (quoting *Pilot Life* at 54). The court further observed that the balance reached under ERISA would be undermined if remedies purposely limited by ERISA were available under state law. *Id.* (quoting *Pilot Life* at 54). Like the Mississippi law at issue in *Pilot Life*, the court concluded that Alabama’s bad faith failure to pay law seeks a remedy for improper processing of claims that goes beyond the remedies and causes of actions authorized by ERISA. As in *Pilot Life*, the most important consideration here is the clear expression of congressional intent that ERISA’s civil enforcement scheme be exclusive. *Id.* (internal citations and quotations omitted). Accord *Butero v. Royal Maccabees Life Insurance Company*, 174 F.3d 1207, 1215 (11th Cir. 1999) (state law bad faith refusal to pay claim was preempted because of the super preemptive effect of section 502.); *Whitt v. Sherman Int’l Corp.*, 147 F.3d 1325, 1329 (11th Cir. 1998) (ERISA provides the exclusive remedy for the recovery of benefits under an ERISA plan); *Hall v. Blue Cross/Blue Shield*, 134 F.3d 1063, 1065 (11th Cir. 1998) (same).

Other Courts of Appeals have reached the same conclusion. In *Corporate Health*, for example, the Fifth Circuit considered, in part, whether the Texas HMO law's external review requirement was preempted by ERISA. The Texas law provided for a mechanism by which participants can seek independent review of health care determinations to decide whether the determinations were appropriate and medically necessary. The court determined that the law related to ERISA plans, and that the law regulated insurance as described in the savings clause. *Corporate Health Ins., Inc. v. Texas Dept. of Ins.*, 215 F.3d 526, 538 (5th Cir. 2000). The court determined, however, that the savings clause was not the end of the preemption analysis because even if the provisions would otherwise be saved, they may nonetheless be preempted if they conflict with a substantive provision of ERISA. *Id.* Recognizing that ERISA's enforcement scheme was intended to supplant both directly conflicting remedial schemes and also state law remedies providing alternatives to the remedies available under ERISA section 502, the court found that the independent review provisions at issue in that case created an alternative mechanism through which participants could seek payment of plan benefits. *Id.* at 539. Thus, the independent review provisions conflict with ERISA's exclusive remedy and cannot be saved by the savings clause. *Id.* Accord *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 494 (9th Cir. 1988) (court assumes, without deciding that claims based on statutory prohibitions on unfair insurance practices are saved, yet finds inescapable the conclusion that the claims are preempted because to allow them would violate Congress's intent that ERISA's civil enforcement provisions provide exclusive remedies for participants); *United of Omaha v. Business Men's Assurance Co.*, 104 F.3d 1034, 1039-42 (8th Cir. 1997) (proper preemption analysis includes examination of ERISA section 514 and then consideration of whether law conflicts with ERISA).

Several district courts in the Eleventh Circuit have mistakenly relied on *Unum Life Ins. Co. v. Ward*, 526 U.S. 358 (1999), as overturning the Supreme Court's settled ERISA conflict preemption principles. E.g., *Hill v. Blue Cross Blue Shield of Alabama*, 117 F. Supp. 2d 1209 (N.D. Ala. 2000). These cases misinterpreted *Ward*.

Ward involved a plan participant's action under ERISA section 502(a)(1)(B) to recover benefits from an insured health plan. *Ward*, at 377. The plaintiff argued that, under California's notice-prejudice rule, *Unum* would have to demonstrate actual prejudice before rejecting the participant's late-filed claim. *Unum* argued that the notice prejudice rule was preempted under section 514 of ERISA, and even if saved as state insurance law, was nevertheless preempted because the rule conflicted with ERISA section 502's exclusive remedial scheme.

"The Supreme Court concluded that California's notice-prejudice rule regulated insurance and was saved from preemption by the savings clause. *Id.* at 364. In doing so, the Court applied the settled principle that state laws that fall within the savings clause are nonetheless subject to more general preemption principles. While the Court found that the notice-prejudice rule was not in conflict with section 502(a), the Court made it clear that —

the issue [of exclusive remedies] is not implicated here. *Ward* sued under _ 502(a)(1)(B) 'to recover benefits due . . . under the terms of his plan.' The notice-prejudice rule supplied the relevant rule of decision for *Ward's* _ 502(a) suit. The case therefore does not raise the question whether _ 502(a) provides the sole launching ground for an ERISA enforcement action."

Unum, 526 U.S. at 376-77 (emphasis added). Simply put, the Court did not implicitly overrule its prior decisions that ERISA provides an exclusive set of remedies for employee benefit plans. It narrowly held that a rule of decision supplied by state insurance law could be applied to decide an issue that arose in an action for benefits under ERISA section 502(a)(1)(B).

The Eleventh Circuit recently reached this conclusion in *Walker v. Southern Co. Services, Inc.*, 279 F.3d 1289 (11th Cir. 2002) (holding that *Ward* did not mandate replacement of the federal preemption test articulated in *Metropolitan Life*). See also *Gilbert* at 1300-01 (finding nothing in *Ward* in conflict with *Pilot Life*, and noting that the footnotes upon which the *Hill* court relied were mere dicta).

Based on this analysis, the Alabama tort of bad faith failure to pay an insurance claim is preempted by ERISA because it conflicts with ERISA's exclusive remedial scheme. This result will not be altered or informed by this Court's answer to the certified question. Therefore, in accordance with Rule 18 of the Alabama Rules of Appellate Procedure, this Court should withdraw its acceptance of the question certified by the federal trial court.

CONCLUSION

Based on the foregoing, amicus curiae, Health Insurance Association of America, American Association of Health Plans and the American Benefits Council, respectfully submit that this Court should withdraw its acceptance of the question certified to it by the United States District Court for the Southern District