

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN NORRIS : CIVIL ACTION  
 :  
 v. :  
 :  
 CONTINENTAL CASUALTY COMPANY : No. 00-1723

**ORDER-MEMORANDUM**

AND NOW, this 29th day of June, 2000, the motion of defendant Continental Casualty Company to dismiss Counts I-V of the complaint is granted. Fed. R. Civ. P. 12(b)(6).<sup>1</sup> Defendant's motion to strike the jury demand is granted. Defendant's motion to dismiss claims for compensatory, consequential, treble, and punitive damages is denied as moot.

On April 3, 2000, defendant removed this action from the Court of Common Pleas of Philadelphia County, Pa. based on diversity jurisdiction. The complaint consists of six claims<sup>2</sup> arising out of defendant's denial of long-term disability benefits to plaintiff, Brian Norris, under an insurance policy provided by his employer.

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<sup>1</sup> Under Fed. R. Civ. P. 12(b)(6), the complaint's allegations are accepted as true, all reasonable inferences are drawn in the light most favorable to the plaintiffs, and dismissal is appropriate only if it appears that plaintiffs could prove no set of facts that would entitle them to relief. See Port Authority of New York and New Jersey v. Arcadian Corp., No. 98-5045, 1999 WL 624590, at \*4 (3d Cir. Aug. 18, 1999).

<sup>2</sup> Count I — declaratory judgment; Count II — breach of insurance contract; Count III — fraud and misrepresentation; Count IV — Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. C.S. §§ 201-2, 201-3; Count V — bad faith, 42 Pa. C.S. § 8371; and Count VI — ERISA.

Defendant moves to dismiss Counts I–V based on ERISA pre-emption. 29 U.S.C. § 1144. It is not disputed that the bulk of plaintiff’s claims relate to the denial of benefits under an ERISA plan. However, he contends that Count V — bad faith — is not pre-empted because it is based on a state statute that regulates insurance, which brings it within the “insurance saving clause,” 29 U.S.C. § 1144(b)(2)(A).<sup>3</sup> Unum Life Ins. Co. of America v. Ward, 526 U.S. 358, 363, 119 S. Ct. 1380, 1384, 143 L. Ed.2d 462 (1999).

There are two types of ERISA preemption — complete preemption under § 502(a) and express preemption under § 514(a). 29 U.S.C. §§ 1132(a), 1144(a). Our Court of Appeals recently outlined the differences. See In re U.S. Healthcare, 193 F.3d 151, 160 (3d Cir. 1999). Complete pre-emption works to “convert” the state causes of action into ERISA claims. Express pre-emption, “a substantive concept governing applicable law,” id., displaces state law claims and subjects them to dismissal. Id. (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739, 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985)). Count I (declaratory judgment) is completely pre-empted<sup>4</sup> and is, therefore, dismissed. Counts II (breach of contract), III (fraud and misrepresentation), IV (consumer protection),

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<sup>3</sup> The “saving clause” states: “Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.” 29 U.S.C. § 1144(b)(2)(A).

<sup>4</sup> ERISA provides a declaratory judgment remedy. 29 U.S.C. § 1132(a)(1)(B).

and V (bad faith) are expressly pre-empted because they are not within one of the ERISA statutory civil remedies, 29 U.S.C. § 1132(a), and must be dismissed with prejudice.

Plaintiff urges reversing the trend toward “broad pre-emption” that serves to eliminate state causes of action, citing Unum Life Ins. Co. of America v. Ward, 526 U.S. at 375, 119 S. Ct. at 1390 (state “notice and prejudice” requirement regulates insurance and not pre-empted by ERISA). In this Circuit,<sup>5</sup> however, there is strong support to the contrary. See Cannon v. The Vanguard Group, Inc., Civ. A. No. 96-5495, 1998 WL 512935, at \*3 (E.D. Pa. Aug. 18, 1998)(collecting Third Circuit cases that find Pennsylvania’s bad faith insurance statute pre-empted); Northwestern Institute of Psychiatry v. The Travelers Ins. Company, Civ. A. No. 92-1520, 1992 WL 331521, at \*3-4 (E.D. Pa. Nov. 3, 1992)(collecting cases in other Circuits to the same effect).

In Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed.2d 39 (1987), the Court held Mississippi’s common law bad faith cause of action to be pre-empted by ERISA. To determine what state laws “regulate insurance” within the meaning of the statute requires a “common sense” analysis, guided by the meaning of “business of insurance” borrowed from the McCarrren-

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<sup>5</sup> Our Court of Appeals has not spoken to this precise issue; nevertheless, it upheld, without comment, a finding that Pennsylvania’s bad faith insurance statute is pre-empted by ERISA. Garner v. Capital Blue Cross, 859 F. Supp. 145, 149 (E.D. Pa. 1994), *aff’d*, 52 F.3d 314 (3d Cir. Mar. 15, 1995)(Table), *cert. denied*, 516 U.S. 870, 116 S. Ct. 189, 133 L. Ed.2d 126 (Oct. 2, 1995).

Ferguson Act, 15 U.S.C. § 1011,<sup>6</sup> along with congressional intent. Pilot Life Ins. Co., 481 U.S. at 50-57.

Plaintiff argues that Unum Life Ins. Co. of America, 526 U.S. at 374-375, leads to a different result. Pl.'s mem. at 2. However, Unum applied the same analysis as articulated in Pilot Life Ins. to California's notice-prejudice rule (insurer required to show prejudice by delay of claim to avoid liability). Unum did not alter or undermine Pilot Life. A thorough and persuasive analysis of ERISA pre-emption of Pennsylvania's bad faith insurance statute under the Pilot Life test is delineated in Ruth v. Unum Life Ins. Co. of America, Civ. A. No. 94-3969, 1994 WL 481246, at \*3-6 (E.D. Pa. Sept. 6, 1994) and is adopted here.

There is no right to jury trial under ERISA's civil enforcement provisions. Pane v. RCA Corp., 868 F.2d 631, 636 (3d Cir. 1989). In addition, compensatory, treble, consequential, and punitive damages are not available. Count VI, the ERISA claim, 29 U.S.C. § 1132(a)(1)(B), is the sole remaining claim and is limited to remedies within the statute. See Holmes v. Pension Plan of

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<sup>6</sup> Three McCarren-Ferguson factors serve as "guideposts" to determine whether a state law "regulates insurance":

[F]irst, whether the practice has the effect of transferring or spreading a policyholder'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.

Unum Life Ins. Co. of America, 526 U.S. at 367-68, 119 S. Ct. at 1386 (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-49, 107 S. Ct. 1549, 95 L. Ed.2d 39 (1987) and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743, 105 S. Ct. 2380, 85 L. Ed.2d 728 (1985)).

Bethlehem Steel Corporation, Nos. 99-1620, 99-1619, 2000 WL 666074, at \*7 (3d Cir. May 23, 2000)(“[T]he purpose of granting equitable relief under ERISA is simply to place ‘the plaintiff in the position he or she would have occupied but for the defendant’s wrongdoing.’”)(quoting Ford v. Uniroyal Pension Plan, 154 F.3d 613, 619 (6th Cir.1998)).

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Edmund V. Ludwig, J.