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

JOEL ROSENBAUM	:	CIVIL ACTION
Plaintiff	:	
v.	:	
UNUM LIFE INSURANCE CO. OF AMERICA	:	NO. 01-6758
Defendant	:	

NEWCOMER, S.J. September , 2003

O P I N I O N

Presently before the Court is Defendant's Motion for Reconsideration of this Court's July 29, 2002, finding that Pennsylvania's bad faith statute for insurance claims, 42 Pa.C.S. § 8371 ("§ 8371"), survives express preemption by ERISA under ERISA's saving clause. In addition, the Defendant moves to dismiss Plaintiff's § 8371 claim by arguing that § 8371 conflicts with Congress' intent in drafting ERISA. For the reasons set forth below, this Court finds that 42 Pa.C.S. § 8371 survives both express and conflict preemption under ERISA.

BACKGROUND

On December 20, 2001, Plaintiff brought suit after the Defendant denied his claim for long-term disability insurance benefits under an employee benefit plan which is governed by the Employee Retirement Income Security Act ("ERISA"). The Defendant moved this Court to dismiss Plaintiff's bad faith claim brought under 42 Pa.C.S. § 8371 (Pennsylvania's bad faith statute for insurance claims), by arguing that such a claim is expressly preempted by ERISA. On July 29, 2002, this Court denied Defendant's Motion to Dismiss and found that ERISA's saving clause (29 U.S.C. § 1144(b)(2)(A)) shielded the state legislation from preemption. The Defendant subsequently filed the instant Motion to Reconsider. While Defendant's Motion was under consideration, the United States Supreme Court issued its holding in Kentucky Assoc. of Health Plans, Inc. v. Miller, 123 S.Ct. 1471 (2003), which dramatically changed the analysis for determining whether state legislation qualifies for exemption from express preemption under ERISA via ERISA's saving clause.

Both parties have submitted supplemental briefs addressing Miller's effect on the issue at hand.

DISCUSSION

The Defendant's Motion presents two distinct lines of argument concerning the viability of § 8371 as it pertains to ERISA related cases. First, the Defendant contends that ERISA expressly preempts § 8371 as it is subject to express preemption under ERISA and does not qualify under ERISA's saving clause. Second, the Defendant argues that even if not expressly preempted, § 8371 conflicts with Congress' intent in drafting ERISA and therefore is subject to conflict preemption. For the reasons set forth in the following, this Court is unable to agree with either of Defendant's arguments.

I. Reconsideration of McCarran-Ferguson

Federal Rule of Civil Procedure 60(b) permits courts to grant a motion for reconsideration for any number of reasons, including but not limited to correcting a clear error of law. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Hasco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1986).

A. Nature of This Review

While the instant Motion was filed as a "Motion for Reconsideration," recent events have significantly changed the nature of this review. Namely, the United States Supreme Court's decision in Kentucky Assoc. of Health Plans, Inc. v. Miller, 123 S.Ct. 1471 (2003), significantly altered the applicable test for determining whether state legislation qualifies for protection under ERISA's saving clause. As a result, the following analysis focuses not on a reconsideration of this Court's previous findings concerning the McCarran-Ferguson factors, but rather, on an initial application of the new Miller test. In addition, the Defendant's conflict preemption argument was not raised in its initial Motion to Dismiss and will, therefore, be considered for the first time here. Thus, but for one important point which warrants reconsideration, this Court will not reconsider its July 29, 2002, Opinion or the McCarran-Ferguson factors, both of which have been rendered moot by Miller.

B. Revisiting McCarran-Ferguson

This Court's July 29, 2002, holding found that § 8371 qualified for ERISA's saving clause as it satisfied two of the three McCarran-Ferguson factors. In the wake of that decision, at least nine Eastern District Judges issued decisions to the contrary. Hill v. Thomas Jefferson Univ.Hospital, Inc., No. 02-7837, slip op. (E.D.Pa. Feb 6, 2003)(Fullam, J.); Eighmy v. Henry Francis DuPont Winterthur Museum, Inc. Long Term Disability Plan, No. 02-7136, (E.D.Pa. Dec. 17, 2002)(O'Neill, J.); Stevens v. Standard Ins. Co., No. 02-6597, slip op. (E.D.Pa. Dec. 4, 2002) (McLaughlin, J.); Thompson v. UNUM Provident Corp., No. 02-4593, slip op. (E.D.Pa. Nov. 13, 2002)(Padova, J.); Bell v. UNUM Provident Corp., 222 F.Supp. 2d 692 (E.D.Pa. Sept 19, 2002)(Baylson, J.); Smith v. Continental Casualty Co., No. 02-1915, 2002 U.S. Dist. LEXIS 18312 (E.D.Pa. Sept. 16, 2002)(Waldman, J.); Kirkhoff v. Lincoln Technical Institute, Inc., 221 F.Supp. 2d 572 (E.D.Pa. Sept. 6, 2002)(Bartle, J.). These decisions were, for the most part, based directly or indirectly on the reasoning as set forth in Sprecher v. Aetna U.S. Healthcare, Inc., No. 02-CV-00580, 2002 US Dist. LEXIS 15571

(E.D.Pa. Aug. 19, 2002), a decision rendered by my esteemed colleague, Judge Ronald L. Buckwalter.

In Sprecher, Judge Buckwalter found that § 8371 failed to meet the second McCarran-Ferguson factor (that the state law play an integral role in the insurance policy) because it did not "alter the terms of the contract between the insurer and the insured." Id. at *15. Judge Buckwalter based his finding on the fact that "[i]nsurer's (sic) have the obligation to act in good faith." Id. at *15. From this premise, Judge Buckwalter concluded that § 8371 merely adds a remedy for a breach of this obligation and "does not have the effect of creating a new, mandatory contract term." Id. In addition, he explained that the remedies offered by § 8371 add a deterrence to insurers not to act in bad-faith, but "[t]he deterrence, however, does not change the bargain between the insurer and the insured that the insurer will act in good faith." Id. This logic was echoed as a basis for similar findings throughout many of the subsequent decisions rendered in the Eastern District. Bell v. UNUM Provident Corp., 222 F.Supp. 2d 692 (E.D.Pa. Sept 19, 2002)(Baylson,J.) ("Essentially for the reasons adopted by Judge Buckwalter in

Sprecher....”); Kirkhoff v. Lincoln Technical Institute, Inc., 221 F. Supp. 2d 572 (E.D.Pa. Sept. 6, 2002)(Bartle, J.)(“However, as to the second McCarran-Ferguson factor we find the reasoning in Sprecher persuasive that the bad faith statute does not constitute an integral part of the relationship between the insurer and insured.”); Thompson v. UNUM Provident Corp., No. 02-4593, slip op. (E.D.Pa. Nov. 13, 2002)(Padova, J.)(“The Sprecher, Kirkhuff and Bell courts each found that ERISA preempts Pennsylvania’s bad faith insurance statute...because insurers have a duty of good faith with respect to policy holders regardless of the bad faith statute...the Court adopts the reasoning of Sprecher, Kirkhuff and Bell....”).

The concern with findings based on this reasoning is that they fail to consider two important realities which pertain to § 8371's effect on the policy relationship between the insurer and the insured. First, Judge Buckwalter’s analysis correctly notes that an insurer in Pennsylvania has the “obligation to act in good faith.” However, missing from this analysis is the fact, as noted by the Third Circuit, that “there is no common law remedy for bad faith in the handling of insurance claims under

Pennsylvania law."[1] Keefe v. Prudential Property and Casualty Ins. Co., 203 F.3d 218, 224 (3d. Cir. 2000). While other related causes of action do exist in the Pennsylvania common law (e.g., breach of contract, fiduciary duty or contractual duty of good faith), the truth of the matter is that without its own cause of action, this "obligation to act in good faith" amounts to nothing more than a toothless requirement. Given this realization, in 1990, the Pennsylvania legislature attempted to remedy this inadequacy by enacting § 8371. Polselli v. Nationwide Mutual Fire Ins. Co., 126 F.3d 524, 529 (3d. Cir. 1997). Therefore, to suggest that § 8371 does little to change the contractual relationship between the parties with respect to the duty that an insurer act in good faith is not entirely consistent with the practicality of that obligation under the Pennsylvania common law.

[1] This Court is mindful of the recent Pennsylvania Supreme Court decision in Birth Center v. St. Paul Companies, Inc., 567 Pa. 386 (2001), which extended Pennsylvania's common law to include claims for bad faith in the context of insurers' failure to use good faith in settling cases filed against the insured. Birth Center has yet to be extended to include bad faith claims on behalf of an insured against an insurer for failure to process a claim in good faith, a scenario specifically addressed by the Pennsylvania Supreme Court in D'Ambrosio v. Pennsylvania National Mutual Casualty Ins. Co., 494 Pa. 501 (1981), when it found that an "[i]nsured was not entitled to supplement remedies in Unfair Insurance Practices Act by an action in trespass to obtain damages...and punitive damages because of insurer's alleged 'bad faith' conduct in denying claim."

Second, A bad faith cause of action under § 8371 is "separate and distinct from [the] underlying contract cause of action...." Id. at 529; citing March v. Paradise Mut. Ins. Co., 435 Pa.Super. 597 (1994). Section 8371's "separate and distinct" status effectively rewrites important provisions contained in the policy between the insured and insurer. For example, a policy may provide for an applicable statute of limitations for claims against the insurer. As Judge Gawthorop noted in Margolies v. State Farm Fire and Cas. Co., 819 F.Supp. 637, 642 (E.D.Pa. 1992), "even if plaintiffs' breach of contract claim were barred by the policy's limitation provision, the § 8371 bad faith claim would survive since it is independent of the underlying claim." Such a characteristic is not exclusive to limitations periods, but rather, would also apply in cases where an insurer inserts language in a policy which excludes punitive damages, limits attorney fees or interest. Needless to say, such a policy might even contain a clause prohibiting claims for bad faith. Section 8371 effectively overrides such language by effectively supplementing the policy with its provisions to create new mandatory contract terms. In doing so, § 8371 changes the bargain between the insurer and the insured, thereby effectuating a shift in the risk as allocated in the policy.

These two points were not addressed in Sprecher or by any of the courts adopting the Sprecher rationale. I present them not in a futile effort to satisfy the second factor of McCarran-Ferguson, but rather for two separate reasons. First, to clarify legal precedent which may become relevant and, therefore, applied in other contexts in the future; and, second, because this analysis becomes relevant later in assessing whether § 8371 satisfies the second prong of the Miller test.

II. Express Preemption and ERISA's Saving Clause

Concerned with the prospect of limiting the states' rights or ability to regulate insurance, Congress drafted a saving clause which exempts from ERISA's preemptive powers "any law of any State which regulates insurance." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The Supreme Court has recently set forth a new two part test which replaces the McCarran-Ferguson three-prong approach in determining whether a state law "regulates insurance," and is, therefore, exempt from

ERISA's preemptive effect. The two part Miller test requires that state legislation: (1) "be specifically directed toward entities engaged in insurance;" and (2) "substantially affect the risk pooling arrangement between the insurer and the insured." Miller 123 S.Ct. at 1479. The following analysis examines whether § 8371 meets these requisites.

A. Specifically Directed Towards Entities Engaged in Insurance

The first step under the Miller test is an inquiry as to whether § 8371 is "specifically directed towards entities engaged in insurance." Id. There is little doubt that such an inquiry must be answered in the affirmative. One need look no further than the statute itself to discover that this is the case. First, the statute is entitled, "[a]ctions on insurance policies." In addition, the statute's first sentence specifically limits the provision's scope to insurers: "[i]n an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured...." 42 Pa.C.S. § 8371 (emphasis added). Finally, each of the remedies offered under § 8371 are awarded or assessed "against the insurer." Section 8371 is clearly directed towards entities engaged in insurance.

The Defendant's assertion that § 8371 fails Miller because it regulates insurers as opposed to insurance is unpersuasive. In Miller, Justice Scalia considers a scenario whereby Kentucky's Any Willing Provider Law regulates the conduct of insurance providers with regard to third-party providers. Miller 123 S.Ct. at 1477. In doing so, Justice Scalia concludes that the law "'regulates' insurance by imposing conditions on the right to engage in the business of insurance." Id. The instant case presents a similar situation whereby § 8371 imposes industry-wide conditions regulating insurers' conduct in the normal operation of the business of insurance. Therefore, the first prong of the Miller test is satisfied. The question now becomes whether § 8371 substantially affects the risk pooling arrangement between the insurer and insured.

B. Substantially Affect the Risk Pooling Arrangement

1. McCarran-Ferguson vs. Miller

The second part of the Miller test examines whether the state law "substantially affect[s] the risk pooling arrangement between the insurer and the insured." Miller, 123 S.Ct. at 1479. It is critically important to note that this test differs significantly from the first of the now defunct McCarran-Ferguson factors which asks "whether the [law] has the effect of transferring or spreading a policyholder's risk." Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). In the Miller Opinion, Justice Scalia carefully differentiates the second prong of the Miller test from the first McCarran-Ferguson factor in no uncertain terms. "[The Miller] test requires only that the state law substantially affect the risk pooling arrangement between the insurer and insured; it does not require that the state law actually spread risk." Miller, 123 S.Ct. at n.3, 1478.

2. Morales-Ceballos & McGuigan

It appears as though this crucial differentiation was overlooked by the Defendant, who incorrectly argues that § 8371 must spread risk to satisfy Miller, as well as by two of my esteemed colleagues. Diego Morales-Ceballos v. First UNUM Life Ins. Co. of America, No. 03-925, slip op. (E.D.Pa. May 27, 2003)(J.M. Kelly, J.); McGuigan v. Reliance Standard Life Ins. Co., 256 F.Supp.2d 345 (E.D.Pa. 2003)(R.F. Kelly, J.). In Morales-Ceballos, Judge James McGirr Kelly correctly recites the second prong of the Miller test. However, in application, he relies entirely on Tutolo v. Independence Blue Cross, 1999 U.S. Dist. LEXIS 6335, an § 8371 ERISA preemption case decided using the McCarran-Ferguson factors, "[i]n Tutolo, we determined that '[t]he bad faith law does not serve to transfer or spread the policy holder's risk; it provides the policy holder with a remedy against the insurer'…for these reasons, we likewise find that Pennsylvania's bad faith statute does not substantially affect the risk pooling arrangement…." Morales-Ceballos, No.03-925, slip op. at 6. Similarly, in McGuigan, Judge Robert F. Kelly correctly recites Miller's second prong and then cites Pilot Life[2], a case where the Supreme Court applied the McCarran-Ferguson factors and found that the state law in question did not

[2] Judge Kelly suggests that the Mississippi bad faith law considered in Pilot Life is "just like Section 8371," in that "it allowed an ERISA plan participant whose claim was improperly processed to seek punitive damages." McGuigan, 256 F.Supp.2d at 348. It should be noted, however, that there were significant differences between the Mississippi bad faith law in question in Pilot Life and § 8371, including, but not limited to the fact that the Mississippi law arises out of the common law and was not limited to the insurance industry, but rather applied generally to all contracts. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 49 (1987).

"effect a spreading of policyholder risk." McGuigan, 256 F.Supp.2d at 348. After restating the Pilot Life Opinion as it pertains to spreading of risk, Judge Kelly concludes, "[t]herefore, for the same reasons as those given in Pilot Life, I find that Section 8371 does not substantially affect the risk pooling arrangement between the insurer and the insured…" Id. While both of these cases correctly recite the second prong of the Miller test, neither actually applies the standard as presented by Miller. Rather, both revert to the very different standard provided in the first of the McCarran-Ferguson factors. We now turn to an analysis of § 8371 using the Miller test's second prong.

3. Analysis under the Miller test

In explaining the risk pooling standard, Justice Scalia applies the second prong of the Miller test to an old case. In UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358 (1999), the Supreme Court considered California's "notice-prejudice" rule which provided that California insurers could not avoid liability on the basis of an untimely filing of a claim, unless the insurer shows that it suffered actual prejudice from the delay. Id. at

359. The Ward Court held that “the notice-prejudice rule does not spread the policyholder’s risk within the meaning of the first McCarran-Ferguson factor.” Miller, 123 S.Ct. at n.3, 1478.

quoting Ward, 526 U.S. 358. Justice Scalia goes on to explain, “[the Miller test] requires only that the state law substantially affect the risk pooling arrangement between the insurer and insured; it does not require that the state law actually spread risk.” Id. “The notice prejudice rule governs whether or not an insurance company must cover claims submitted late, which dictates to the insurance company the conditions under which it must pay for the risk that it has assumed. This certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and insured.” Id.

Just as California’s notice-prejudice rule substantially affects the allocation of risk between an insurer and an insured by limiting an insurer’s ability to deflect risk, § 8371 does the same. A quick look at the risk equation between an insurer and an insured prior to, and just after, § 8371's enactment shows a significant shift of risk from the insured to the insurer in two ways.

First, inherent in any risk pooling arrangement between an insurer and an insured is the insured's risk that the insurer will deny a claim in bad faith. § 8371 effectively alters this arrangement by dissuading insurers from denying claims in bad faith. Some may argue that remedies are already available in order to accomplish the same. However, in reality, these remedies (i.e., compensatory damages) do little to persuade an insurer against denying a claim in bad faith. In addition, the compensatory remedies available offer insurers little incentive to settle bad faith lawsuits as their liability is somewhat limited and they are able to benefit by holding onto the funds in dispute until judgment is rendered at little or no additional cost. As mentioned earlier, this is precisely why the Pennsylvania Legislature drafted § 8371.

Second, and perhaps most significantly, just as the California notice-prejudice rule dictated terms between insurers and insureds which prevented insurers from deflecting risk in the policy, § 8371 accomplishes the same. As explained earlier, the separate and distinct status of § 8371 enables it to have the effect of altering policy provisions. Therefore, risk deflection provisions used by an insurer to create limitations on claims and damages are effectively nullified by § 8371. There can be little dispute that, in this regard, § 8371 substantially affects the risk pooling arrangement between the insurer and the insured.

III. Conflict Preemption

In its Motion for Judgment on the Pleadings, the Defendant raises the issue of conflict preemption. Specifically, the Defendant argues that Congress intended to limit the remedies available under ERISA to those specifically enumerated in ERISA'S § 502(a), 29 U.S.C. § 1132(a), where there is no mention of punitive damages. Therefore, the Defendant asserts, even if § 8371 qualifies under the Miller test for ERISA's saving clause, permitting a plaintiff to proceed with an ERISA related bad faith claim under § 8371 would undermine Congress' intent in drafting ERISA, and should therefore be preempted under the theory of conflict preemption.

In support of its argument, the Defendant relies primarily on two cases, Pilot Life Ins. Co. v. Dedeaux, 481 U.S.

41 (1987), and Rush Prudential HMO, Inc. v. Moran, 122 S.Ct. 2151 (2002), where the Supreme Court suggests that because Congress failed to include certain remedies in ERISA's remedial scheme (ERISA § 502(a), 29 U.S.C. § 1132(a)), such remedies were specifically excluded. The Pilot Life Court explained, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA....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." Pilot Life, 481 U.S. at 45. The Rush Court goes one step further. Without wholly embracing the dicta of Pilot Life, the Rush Court holds "[a]lthough we have yet to encounter a forced choice between the congressional policies of exclusively federal remedies and the 'reservation of the business of insurance to the States' we have anticipated such a conflict, with the state insurance regulation losing out if it allows plan

participants ‘to obtain remedies that Congress rejected in ERISA.” Rush, 122 S.Ct. at 2165.

The Pilot Life and Rush holdings are unpersuasive for several reasons. First, unlike the case at hand, the Pilot Life Court considered a Mississippi common law which failed to qualify for protection under ERISA’s saving clause. Second, the portions of these Opinions addressing conflict preemption are dicta and are therefore not binding on this Court’s evaluation of the instant Motion. That being said, this Court acknowledges that the Defendant, as well as other Eastern District Judges, have relied upon this dicta in their consideration of whether § 8371 is preempted by ERISA. It is for this reason that this Court will more fully explore the validity of Pilot Life and Rush as they pertain to the conflict preemption issue explained above.

It is respectfully submitted that the Pilot Life and Rush Courts’ determination of Congressional intent with regard to ERISA’s stated remedies under § 502(a) is flawed in three important respects. First, as the Supreme Court itself has stated, “cannons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there....When the words of a statute are unambiguous, then this first cannon is also the last....” Connecticut National Bank v. Germain, 503 U.S. 249 (1992). Rather than simply accepting that Congress said what it meant in drafting ERISA, the Pilot Life and Rush Courts seem to have adopted and applied the cannon of construction known as expressio unius est exclusio alterius, or, the inclusion of one implies the exclusion of the other. Blacks Law Dictionary, Seventh Ed. In doing so, the Courts determined that because Congress did not expressly include punitive damages as a remedy under ERISA’ remedial scheme (§ 502(a)), Congress never meant for punitive damages to be allowed as a remedy under ERISA or under a state law which survived ERISA preemption. This leads us to our second point.

Application of Congress’ implied intent, as elicited by using the expressio unius cannon in Pilot Life and Rush, directly contradicts Congress’ express intent found in plain language of

ERISA itself. In drafting ERISA, Congress created a saving clause which exempts “any law of any State which regulates insurance” from ERISA’s preemptive effect. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). Other than the obvious requirement that the law must regulate insurance, Congress placed no other requisites or restrictions on the laws saved from preemption under ERISA’s saving clause. In this regard, Congress’ intent was clear, it wanted all state laws which regulate insurance to be exempt from preemption under ERISA. The Pilot Life and Rush holdings present an implied Congressional intent which flatly contradicts this express intent. Rather than allowing any state law which “regulates insurance” to survive ERISA preemption, this implied intent adds an additional requirement, that is, the law must not offer a remedy which is not listed under § 502(a). The problem with such a requirement is that the Courts have taken an implied intent, which was derived by questionable means, and have interpreted that implied intent to overrule Congress’ express intent, as reflected in the saving clause. The problem is highlighted by applying the same form of interpretation used by the Pilot Life and Rush Courts (expressio unius) in deriving

Congress' implied intent in § 502(a) to the saving clause itself. The saving clause exempts "any law or any State which regulates insurance" from preemption. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). It does not contain any other restrictions on which laws qualify for exemption. Therefore, under an expressio unius analysis, Congress impliedly meant to exclude from consideration any other requisites for state laws to qualify for the saving clause. The requirement that a state statute not add to those remedies provided by § 502(a) is another restriction on the application of the saving clause. As demonstrated above, adding such a requirement violates the express intent of Congress as well as the implied intent when using the form of interpretation used by the Pilot Life and Rush Courts.

Finally, the Pilot Life and Rush Opinions disregard the fundamental presumption against implied preemption. "[T]he historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995). Here, the clear and manifest purpose of Congress was memorialized in the saving clause, which provides for state regulation to be excluded from preemption under ERISA when it "regulates insurance." To find to the contrary would supplant Congress' express intent and, in the process, would violate the spirit of the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S.CONST. AMEND. X

CONCLUSION

In conclusion, this Court finds that § 8371 satisfies the two prong Miller test, thereby qualifying for exemption from express preemption under ERISA. In addition, § 8371 is not subject to conflict preemption under ERISA. Defendant's Motion is denied.

AN APPROPRIATE ORDER WILL FOLLOW.

Clarence C. Newcomer, S.J.

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JOEL ROSENBAUM	:	CIVIL ACTION
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v.	:	
UNUM LIFE INSURANCE CO. OF AMERICA	:	NO. 01-6758
Defendant	:	

<u>O R D E R</u>

AND NOW, this   day of September, 2003, upon consideration of Defendant's Motion to Reconsider, Plaintiff's response as well as the parties' various supplemental briefs, it is hereby ORDERED that said motion is DENIED for the reasons set forth in the accompanying Opinion. Because this matter satisfies the requisites giving rise to an interlocutory appeal, leave to fie such an appeal is given provided that such an appeal is filed no later than September 30, 2003.

AND SO IT IS ORDERED.

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Clarence C. Newcomer, S.J.