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Dear Fellow Attorney,

Back to the basics. Over 16 years after Pilot Life and 27 years after ERISA's effective date ERISA preemption and removal based on federal question jurisdiction still dominate the landscape. Due apparently to the Supreme Court's recent pronouncements that ERISA does not preempt medical malpractice claims against HMO's based on mixed eligibility and treatment decisions and abandoning the old test for the applicability of ERISA's "saving clause," the appellate courts over the last three months have both pulled up the draw bridge, repeatedly reversing denials of remand, and also found actions based on non-ERISA relationships among ERISA entities not defensively preempted by ERISA. The decisions are so uniform in tone over the range of appellate courts that it seems safe to call it a trend.

A silver lining? The 10th Circuit held that Colorado state law bad faith claims are preempted. Kidneigh v. UNUM Life Ins. Co., 2003 WL 22273320 (10th Cir. Oct. 3, 2003). Nothing new in that. The dissent, however, had the better of the argument in one potentially far-reaching respect. Although the dissent concurred that the Colorado bad faith claim was foreclosed by "conflict preemption," the bad faith was *not preempted by "direct preemption."* Because Colorado bad faith claims *conflict with* ERISA's remedial scheme by adding to the judicial remedies provided by ERISA, the court held that conflict preemption applies. Where the majority and the dissent part ways – and why this case is important – is over the issue of whether Colorado bad faith claims *substantially affect the risk pooling arrangement between the insurer and the insured, so as to fall under ERISA's "saving clause."* The new"risk pooling" test replaces the "saving clause" analysis based on the three McCarran-Ferguson factors. See Kentucky Ass'n. of Health Plans, Inc. v. Miller, – U.S.– , 123 S.Ct. 1471 (2003). The dissent asserts that bad faith *does* substantially affect that "risk pooling arrangement." According to the dissent, preemption results either from conflict preemption or "direct preemption," but only the one or the other type of preemption is necessary, not both.(The Colorado Trial Lawyers Association filed an amicus brief, so that it's a good bet that certiorari will be sought.)

"I hear you knocking, but you can't come in." In Ervast v. Flexible Products Co., 2003 WL 22203472 (11th Cir. Sept. 24, 2003) a former employee opted to "put" his ESOP shares and received a check for $448,648.10. Shortly after he liquidated his stock, however, Dow Chemical bought out his employer, resulting in higher values for shares in the ESOP. The former employee sued the former employer and individual defendants in state court in Fulton County, Georgia, alleging breach of fiduciary duty and negligence fo failure to disclose material information that would have affected his decision to liquidate his ESOP stock. The Eleventh Circuit held that both the relief Ervast sought and also the basis on which he sought it are not akin to the relief available under ERISA – nor was Ervast seeking to seeking to enforce his rights under the terms fo the ESOP, an ERISA plan. Rather, Ervast was merely suing the majority shareholders as a minority shareholder. Ervast was a plan participant and the former employer was the plan sponsor of the ESOP, but the breach of fiduciary duty claim was premised on the parties' roles of majority and minority shareholders. The Eleventh Circuit reversed the denial of Ervast's motion for remand and sent the case back to state court.

The Sixth Circuit reached the same result in Husvar v. Rapaport, 337 F.3d 603 (6th Cir. 2003). Husvar was a state class action by former employees against their former employer seeking compensation for the diminution in the value of the company stock used to fund their retirement plans. The Sixth Circuit reversed the trial court's denial of plaintiffs' motion to remand. The mere fact that the defendants' business decisions affected the stock value did not transform the state law claims into a federal ERISA action. The complaint alleged mismanagement of the company, which resulted in a dramatic decrease in the value of the company stock, which in turn happened to devalue the ESOP funded with the stock.

Medical malpractice stays in state court. The Eleventh Circuit reversed the denial of the insured's motion for remand of his state law medical malpractice action against an HMO. Land accused the HMO of failing both to diagnose his condition correctly and also to authorize the proper medical treatment. Land lost a finger due to an infection after an HMO nurse overruled the agreed upon treatment and had land sent home from the hospital where he had been admitted. Land v. CIGNA Healthcare of Florida, Inc., 339 F.3d 1286 (11th Cir. 2003). The Eleventh Circuit held that because Land's claims are tort, rather than contract, claims, they do not fall within the scope of ERISA's civil enforcement provisions. The Court specifically notes that it agrees with Cicio v. Does, 321 F.3d 83 (2d Cir. 2003). (In Cicio the Second Circuit took a stand against earlier decisions which had held that the mere presence of an administrative function, e. g., an eligibility-determination, was sufficient to invoke ERISA preemption and removal.)

And the beat goes on. Noting that a contract of insurance sold to a plan is not the plan itself, the Fourth Circuit held that an ERISA plan sponsor's state breach of contract claim related solely to the plan sponsor's own injuries and not to its fiduciary responsibilities to the plan or the plan's participants or beneficiaries, so that ERISA preemption did not occur. Snow Products Co. v. Physicians Health Plan, Inc., 338 F.3d 366 (4th Cir. 2003). The contract obligated the insurer to offer its services at stated prices for two years, but the insurer canceled the contract after only one year, causing the plan sponsor to incur greater expenses in replacing the contract for the second year.

Removal was inappropriate where a terminated employee sued her former employer under Maryland's wrongful discharge law, because none of the former employee's action were protected under ERISA's anti-retaliation provision. King v. Marriott Corp., 377 F.3d 421 (4th Cir. 2003). She alleged she was fired from complaining about and refusing to violate ERISA. A vital feature of complete preemption is a cause of action that replaces the preempted state cause of action, according to the Fourth Circuit. The U.S. Dept. of Justice argued for King.

A "saved" statute does give rise to a claim for relief. An ERISA plan participant *sued the HMO* under the Maryland HMO Act for reimbursement of the monies paid to the HMO pursuant to a subrogation provision in the policy, which was issued as an employee benefit plan. Singh v. Prudential Health Care Plan, Inc., 335 F.3d 278 (4th Cir. 2003). The Fourth Circuit held that the Maryland HMO Act was saved from preemption by ERISA's saving clause , and as a result the Maryland HMO Act modified the terms of the plan, so that the plaintiff's claim could be recharacterized as an ERISA benefit claim. Dismissal of the claim reversed.
This may be a sleeper. Note the contrast to the Tenth Circuit's Kidneigh case, above.

Removal does not mean preemption. A claim that falls within the scope of ERISA's civil remedies provisions may be subject to removal to federal court but still not be preempted (defensively) by ERISA. The Fifth Circuit abandoned its earlier two-step analysis, which required ordinary preemption as a predicate to removal and instead aligned itself with the Eleventh Circuit in holding that conflict preemption/ordinary preemption is not required for there to be federal question jurisdiction. Arana v. Ochsner Health Plan, 338 F.3d 433 (5th Cir. 2003). On the face of it, this may seem to make removal

easier to achieve, but it appears that as viewed by the Fifth Circuit it actually puts defensive preemption in doubt. (See, e.g., the result in Singh, above, where removal was proper but the claim was only converted to an ERISA claim and not subject to dismissal.)

No preemption of fraudulent inducement claim in the Fifth Circuit. Reaching a result different from the Eleventh Circuit's holding in Hall v. Blue Cross/Blue Shield of Ala., 134 F.3d 1063, 1064-1065 (11th Cir. 1998), the Fifth Circuit held that claims for fraudulent inducement against the agent and the owners of a self-funded ERISA plan that had little or no assets based on the defendants' having induced the plaintiffs to part with their Blue Cross/Blue Shield plan purportedly to purchase at lower rates what was misrepresented as health insurance. Hobson v. Robinson, 2003 WL 22183558 (5th Cir. Sept. 23, 2003). Hobson's claims do not require interpretation or administration of an ERISA plan. Rather, Hobson's claims are based on benefits given up (the Blue Cross plan). Note the trend. The Fifth Circuit is more liberal here than the Eleventh.

Likewise, a former executive's state-law breach of contract claim that his former employer significantly altered his duties and reduced his compensation was not preempted by ERISA, because the breach of contract claim had *only a peripheral connection to* his severance plan and might constitute breach of the employment contract with reference to a plan. Marks v. Newcourt Credit Group, Inc., 342 F.3d 444 (6th Cir. Sept. 4, 2003).

Facing the music under ERISA itself. A union could be liable for breach of fiduciary duty for failing to read the life insurance policy it offered to American Airlines' employees affected by changes in the life insurance being provided by the employer. Apparently catching the union unaware, the insurer of the policy the union offered terminated the policy after only three years. At a minimum the union had to read the policy and have a basic understanding of its most important provisions. Gregg v. Transportation Workers of America, 343 F.3d 833 (6th Cir. 2003).

Silence is golden, and therefore expensive. An employer who failed to provide information about conversion under a life insurance policy had to purchase an individual policy for the former employee, pay the maximum COBRA penalty for delay in providing COBRA notification and a substantial ERISA penalty for failing upon written request of the former employee's attorney for a copy of the summary plan description. Brown v. Aventis Pharmaceuticals, Inc., 341 F. 3d 822 (8th Cir. 2003).

Can't catch a break. Even though the deceased employee's expenses were reimbursed by her spouse's employer's plan, the Third Circuit *applied New Jersey's collateral source rule* and found that the employer had violated COBRA's notification requirement and was nevertheless responsible for the employee's medical expenses which were incurred after the termination of coverage under the deceased employee's plan. Emilien v. Stull Technologies Corp., 70 Fed. Appx. 635, 2003 WL 2167543 (3rd Cir. 2003), citing Nat'l. Health Plan v. St. Joseph's Hospital, 929 F.2d 1558, 1574-1575 (11th Cir. 1991).