No. 03-4363

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES BARBER,

Plaintiff-Appellee,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

Interlocutory Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania, entered on September 8, 2003, in Civil Action No. 03-3018

MOTION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEE JAMES BARBER FOR AFFIRMANCE

ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

Counsel for Amicus Curiae
United Policyholders

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Fed. R. App. P. 29(b), United Policyholders respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the Appellee's position in the above-captioned case as follows:

1. United Policyholders ("UP") is a non-profit charitable organization founded in 1991 and dedicated to education on insurance issues and consumer rights. The organization is tax-exempt under § 501(c)(3) of the Internal Revenue Code. United Policyholders is funded by donations and grants from individuals, businesses, and foundations.

2. UP's first initiative was to aid thousands of home and business owners whose properties were destroyed by a firestorm in Northern California. Through educational forums, workshops and printed materials, the organization helped the victims understand their policies and negotiate fair claim settlements. Since that time, UP has done similar work in hurricane, flood, wildfire and earthquake areas in New Mexico, Florida, Oklahoma, Texas, Michigan, Washington, Oregon and throughout California.

3. UP monitors legal and marketplace developments affecting the interests of all policyholders, including HMO subscribers. UP receives

frequent invitations to testify at legislative and other public hearings and to participate in regulatory proceedings on rate and policy issues.

4. UP advances policyholders' interests in courts throughout the country by filing *amicus curiae* briefs in cases involving important insurance principles. United Policyholders' *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999). UP was the only national consumer organization to submit an *amicus* brief in the landmark case of *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003). United Policyholders has filed *amicus* briefs on behalf of policyholders in over one hundred and thirty cases throughout the United States in the past six years. See www.unitedpolicyholders.org for a partial listing of the cases.

5. UP seeks to appear as *amicus curiae* to address certain issues presented in this case that are of significance beyond the application of law to the specific facts of this case. The issue before the Court -- the scope of ERISA preemption -- is and has been a fundamental issue of importance to United Policyholders for many years. UP seeks leave to file a brief *amicus curiae* because resolution of this issue will have a direct impact on the consumers it serves. Policyholders which it serves are continually faced with disadvantages, barriers, confusion, impediments and severe

consequences in connection with disability and health insurance claims as a result of the fact that they have been forced to proceed only through ERISA and have been unable to pursue state law insurance remedies. UP believes that the issue before the Court is of great importance and will have wide application to insureds throughout the Third Circuit and beyond and will directly impact consumers' ability to obtain insurance benefits due them and to compensate them for benefits wrongfully denied them.

6. UP believes that ERISA's statutory language and legislative history is clear and that it is of utmost importance that insureds be permitted to pursue those state remedies, such as the Pennsylvania Insurance Bad Faith Statute 42 Pa.S.C. § 8371, which will permit insureds to exercise the rights to which they are entitled when seeking to obtain insurance benefits that have been wrongfully denied or withheld.

7. Pursuant to Fed. R. App. P. 29(a), UP has requested the consent of the parties to this matter to file its brief *amicus curiae*. As of the filing of this brief, Appellant's counsel has refused to consent to the filing of this brief; Appellee's counsel has consented to the filing.

8. United Policyholders believes that the *amicus curiae* brief submitted with this motion will assist the Court in understanding the scope of ERISA preemption as enacted and as intended by Congress at the time of

its enactment and will serve as a useful supplement to the submissions presented by the parties.

WHEREFORE, United Policyholders respectfully requests this Court grant its motion for leave to file the attached brief as *amicus curiae*.

Dated: February 11, 2004

Respectfully submitted,

ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

Counsel for Amicus Curiae
United Policyholders

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2004, I caused two (2) copies of the foregoing Motion of United Policyholders for Leave to File *Amicus Curiae* Brief in Support of Appellee James Barber for Affirmance to be served by Federal Express for overnight delivery on the following counsel:

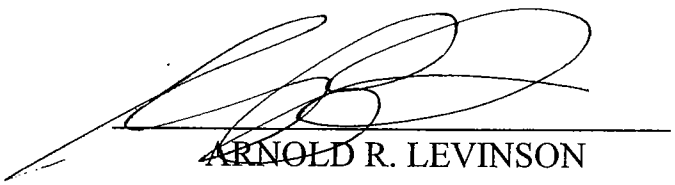
E. Thomas Henefer, Esq.
Kirk L. Wolgemuth, Esq.
STEVENS & LEE
111 North Sixth Street
P.O. Box 679
Reading, PA 19601
Counsel for Appellant

Joseph F. Roda, Esq.
Eric L. Keepers, Esq.
RODA & NAST, P.C.
801 Estelle Drive
Lancaster, PA 17601
Counsel for Appellee

Gerald B. Baldino, Jr., Esq.
SACCHETTA & BALDINO
308 East Second Street
Media, PA 19063
Counsel for Appellee

Glen D. Nager, Esq.
Jack W. Campbell, IV, Esq.
William K. Shirey, II, Esq.
JONES DAY
51 Louisiana Avenue, Northwest
Washington, DC 20001-2113
Counsel for Amicus Curiae, Chamber of Commerce

Stephen A. Bokat, Esq.
Robin S. Conrad, Esq.
Joshua A. Ulman, Esq.
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, Northwest
Washington, DC 20062
Counsel for Amicus Curiae, Chamber of Commerce



ARNOLD R. LEVINSON

No. 03-4363

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JAMES BARBER,

Plaintiff-Appellee,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

Interlocutory Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania, entered on September 8, 2003, in Civil Action No. 03-3018

AMICUS CURIAE BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE JAMES BARBER FOR AFFIRMANCE

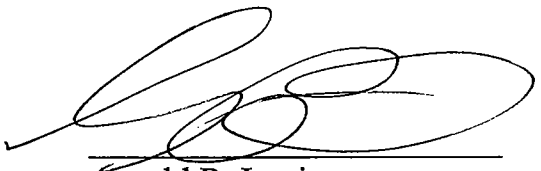
ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

Counsel for Amicus Curiae
United Policyholders

STATEMENT REGARDING CONSENT TO FILE *AMICUS* BRIEF

Counsel for appellee James Barber has consented to the filing of this *amicus* brief. Counsel for appellant Unum Life Insurance Company of America, however, has refused to consent. This brief is therefore accompanied by a Motion For Leave To File *Amicus Curiae* Brief, pursuant to Fed. R. App. P. 29(b).



Arnold R. Levinson

February 11, 2004

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements. The resolution of the issue presented in this case is of great importance to United Policyholders and its members because of its potential application to a wide range of laws affecting employees insured through an ERISA plan. This brief is authorized by the Executive Director of United Policyholders and is consistent with its purpose.

ARGUMENT

A. *All* Laws Which Regulate Insurance Are Saved From Preemption Pursuant To The Clear And Unambiguous Text of ERISA.

The Supreme Court has twice stated that *Pilot Life Ins. Co., v. Dedeaux,* 481 U.S. 41 (1987) does not resolve ERISA Section 502's impact on laws encompassed by the saving clause. "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.'" *Rush Prudential HMO Inc. v. Moran,* 536 U.S. 355, 377 (2002). "[This] case does not raise the question whether § 1132(a) provides the sole

launching ground for an ERISA enforcement action." *Unum Life Insurance Co. of Am. v. Ward*, 526 U.S. 358, 377 (1999). *Pilot Life's* holding was "in the context" of a law which was not saved from preemption. *Id.* at 377, n.7. Further, in *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25 (1983) the Supreme Court clearly held that "[the saving clause] makes clear that Congress *did not intend to preempt entirely every state cause of action relating to*" ERISA plans (emphasis added). In addition, the Solicitor General has specifically pointed out that the Section 502 implied preemption analysis in *Pilot Life* would not apply in a case where the state law remedy at issue was a state law regulating insurance. *Ward*, 526 U.S. 358, 377 n.7. Moreover, the limited application of *Pilot Life's* Section 502 implied preemption analysis is reflected in the Court's final sentence: ". . . [W]e conclude that Dedeaux's state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by [the saving clause] *and therefore* is pre-empted by [the preemption clause]." *Pilot Life*, 481 U.S. at 57 (emphasis added).

Critically, *Pilot Life*'s discussion of ERISA's exclusive remedies applies with perfect sense to state laws outside the saving clause. However, its application to state insurance laws that are saved from preemption is not

only illogical, but defies all of the basic rules of statutory construction and is in direct conflict with ERISA's legislative history.

ERISA was enacted as a pension reform bill intended to protect the retirement benefits of workers. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983); 29 U.S.C. § 1001(b). Protecting "the continued well-being and security of millions of employees and their dependents" was an express Congressional declaration of policy. 29 U.S.C. § 1001. ERISA comprehensively regulates pension plans. Importantly, ERISA does not comprehensively regulate the terms of nonpension employee benefit plans.[1]

ERISA's preemption clause, ERISA § 514(a), 29 U.S.C. § 1144(a), has been described as "expansive."[2] However, the saving clause is "phrased with similar breadth"[3] as the preemption clause.[4] A remedial provision is

---

[1] *See* Donald T. Bogan, *Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?* 74 Tul. L. Rev. 951 (2000) (hereafter, Bogan, *Protecting Patient Rights*).

[2] *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995); *Pilot Life,* 481 U.S. at 46.

[3] *Unum Life Ins. Co. of America v. Ward,* 526 U.S. 358, 363 (1999).

[4] *Ward,* 526 U.S. at 363 ("[P]re-emption is substantially qualified by an 'insurance saving clause,' . . . which broadly [saves state insurance laws]. . . ."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740-741 (1985) (". . . [W]hile the general pre-emption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation").

found in the same subchapter as the preemption and saving clauses. ERISA § 502, 29 U.S.C. §1102. Thus, on the face of the statute, all remedies available under ERISA would constitute the exclusive remedies, *unless a state remedial law was saved from preemption.* In that event, the saving clause provides that "*nothing* in this subchapter", which, by definition, includes Section 502's remedial provisions, "*shall* [preempt] . . . *any* . . . State [law which] regulates insurance." ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). (Emphasis added.) Accordingly, any state law that regulates insurance, regardless of whether it creates a remedy or not, is saved from preemption.

The Court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."[5] The Court must also presume that Congress did not intend to preempt areas of traditional State regulation.[6]

Not only is insurance an area of traditional State regulation, but Congress has specifically designated insurance as a special area of State regulation to be zealously protected from federal regulation. The McCarran-

---

[5] *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990).

[6] *See Travelers*, 514 U.S. at 655.

Ferguson Act provides that federal laws shall not be interpreted to supersede state laws regulating the business of insurance. 15 U.S.C. § 1012(b), *Humana, Inc. v. Forsyth,* 525 U.S. 299, 306 (1999). "Congress' 'primary concern' in enacting McCarran-Ferguson was to ensure the States' continued ability to regulate the business of insurance." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 n.21 (1985). And the ERISA saving clause was designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. *Id.; Ward,* 526 U.S. at 375 n.5. Moreover, "[t]here is no discussion in [the legislative] history [of ERISA] of the relationship between the general pre-emption clause and the saving clause, and indeed very little discussion of the saving clause at all." *Metropolitan Life*, 471 U.S. at 745. The Supreme Court therefore "decline[d] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself . . . If a state law 'regulates insurance,' . . . it is not pre-empted. Nothing in the language, structure, or legislative history of the Act supports a more narrow reading of the clause. . . ." *Id.* at 746-47.

Accordingly, the conclusion that a state law that falls within the saving clause is still preempted would require a clear and manifest

expression of Congressional intent.[7] Yet, there is nothing in either the statute or the legislative history of ERISA even to suggest such an intent, let alone a clear and manifest intention.

B. The Structure of ERISA, Including Section 502, Establishes That Congress Did Not Intend To Preempt State Remedial Laws That Are Saved From Preemption.

In *Pilot Life*, the Court founded its exclusive remedy conclusion on two factors: (1) the structure of ERISA itself and (2) ERISA's legislative history and, in particular, reference in that history to the preemptive scope of Section 301 of the Labor-Management Relations Act of 1947 ("LMRA")[8] Regarding the structure of ERISA, the Court held that the ERISA remedies represented a comprehensive enforcement scheme, which, in light of ERISA's broad preemption clause, was intended to be exclusive. The Court determined that parties were not "free to obtain remedies under state law that Congress rejected in ERISA." *Pilot Life,* 481 U.S. at 54.

It is certainly true that Section 502 contains a comprehensive enforcement scheme. However, the saving clause is a fundamental element of that comprehensive scheme. One cannot merely presume that because Section 502 is comprehensive, that it was intended to prevail over the saving

---

[7] *Id.* at 746-47.

[8] *Pilot Life*, 481 U.S 41.

clause in the event of a conflict. Surely Congress was aware that, in order to accomplish such a result, it only need have included in the saving clause language, for example, providing that all such laws were saved "except laws providing remedies other than those set forth in Section 502." Or it could simply have prefaced the saving clause with, "except as provided in Section 502." If there was such a clear and manifest intent of Congress to have Section 502 trump Section 514, it is hard to fathom why Congress did not include such an easy clause in the language of the statute itself.

We must also ask ourselves the question, "If we presume that Congress intended to save from preemption all laws regulating insurance – even laws providing additional remedies – could Congress have expressed its intent more clearly than it did in the statute itself?" The short answer is that it would be hard to imagine language that was more explicit.

While Appellant and supporting *amicus* repeatedly claim that a conflict would exist between ERISA (and its desire for uniformity and low cost benefit plans) and any state insurance law remedy, this is simply not the case. The statute itself provides that this "conflict" is resolved by application of the saving clause. Moreover, ERISA specifically contemplates that disuniformities for national insurance plans will

necessarily occur as a result of the saving clause. *Ward*, 526 U.S. at 376, n.6.

What Appellant and *amicus* repeatedly ignore is that Congress intended uniformity *with regard to pension plans*, not insurance welfare plans for which regulation was saved for the states. Thus, any conflict analysis must be directed at whether the laws in question are in conflict with ERISA's *pension* concerns. Thus, the *Pilot Life* discussion naturally applies directly to generally applicable state law remedies, or more importantly, to laws affecting pension benefits. However, the same is not true of laws which fall within the specific Congressionally-carved exception, which saves laws regulating insurance. Congress did not "reject" remedies specifically provided for within the confines of the saving clause. On the contrary, such laws were specifically saved, not rejected.

The Solicitor General, upon whom the Supreme Court relied in *Pilot Life,* has made this precise point. In his *amicus* brief to the Court in *Ward*, he wrote,

> We recognize that *Pilot Life* has been read to preclude even state law causes of action arising under laws that "regulate[ ] insurance." That portion of *Pilot Life's* rationale is, however, in significant tension with the text of the insurance savings provision and was unnecessary to *Pilot Life* 's holding that the law at issue there was not in

any event an insurance regulation within the meaning of that provision.

* * *

We do not question [the exclusive remedy] reasoning in *Pilot Life* as a general matter. Unquestionably, "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA." [Citations omitted.] And it is certainly true that, outside the context of state laws that "regulate insurance" within the meaning of the ERISA insurance savings clause, that exclusivity of the Section 502 civil enforcement provisions also appropriately informs the Court's understanding of the scope of ERISA preemption where a plaintiff brings a cause of action under state law that "relates to" an ERISA plan. [Citation omitted.] Congress, in short, clearly intended the remedial provisions of ERISA to be exclusive of any generally applicable state-law remedies related to ERISA plans. [Citations omitted.]

It does not follow, however, that ERISA Section 502 should inform the preemption inquiry to the same extent with respect to a state-law cause of action or remedy that specifically "regulates insurance" as it does with respect to one of general applicability. In that situation, Congress has saved state substantive law, and it is not clear why Congress would have wanted to foreclose all access to state-created remedies or sanctions to enforce that substantive law, *see, e.g., Metropolitan Life*, 471 U.S. at 734 (suit by state Attorney General against insurer of ERISA plans to enforce provision of state insurance law), especially where the causes of action provided under Section 502 itself are not suited to that purpose.

The savings clause states that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. 1144(b)(2)(A) (emphasis added). "[T]his subchapter" includes Section 502, which has been construed to provide exclusive remedies under ERISA, as well as the preemption provision itself, Section 514(a). Accordingly, the savings clause by its terms directs that nothing in Section 502, which concerns causes of action and remedies under ERISA, shall be "construed" to relieve or exempt any person from "any law" of a State that regulates insurance. Thus, the insurance savings clause, on its face, saves state law conferring causes of action or affecting remedies that regulate insurance, just as it does state-mandated benefits laws and other prescriptive measures that do so.

This Court gave effect to the facially unrestricted scope of the insurance savings clause in *Metropolitan Life*, when it "declin[ed] to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it," and concluded that "[i]f a state law 'regulates insurance,' as mandated-benefit laws do, it is not preempted." 471 U.S. at 746; *cf. Pilot Life*, 481 U.S. at 56-57 (*Metropolitan Life* clearly "rejected an interpretation of the [insurance] saving clause . . . that saved from preemption 'only state regulations unrelated to the substantive provisions of ERISA' "). In addition, the force of the savings provision's express terms is reinforced by the Court's frequent recognition -- particularly in recent cases -- that ERISA's preemption provisions must be read against the background of the "assumption that the 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." [Citations omitted.]

Br. of United States as *Amicus Curiae* in *Ward*, No. 97-1868 (November 1998) at 7, 20-25 (footnotes omitted).

Moreover, a further look into the structure of ERISA's remedial provisions discloses powerful evidence that Congress did *not* intend the remedial provisions to prevail over the saving clause.

The dispute here – and in nearly all the matters impacted by *Pilot Life* – are, at bottom, insurance disputes between insureds and his/her insurance company (or HMO). Logic would dictate that such disputes be resolved in a lawsuit between an insured and the insurer. However, ERISA's remedial provision is not set up that way. A third party is inexplicably inserted into the middle of the dispute. This is the ERISA plan itself. ERISA requires that an action to recover benefits must be brought against the plan as an entity. "Any money judgment . . . against an employee benefit plan shall be enforceable *only against the plan* as an entity and shall not be enforceable against any other person. . . ." 29 U.S.C § 1132(d)(2) (emphasis added). Thus, ERISA does not permit a suit against the insurer, which owes the benefits. "ERISA permits suits to recover benefits only against the Plan as an entity." *Everhart v. Allmerica Financial Life Ins. Co.,* 275 F.3d 751, 754

(9th Cir. 2001), *cert. denied,* 536 U.S. 958 (2002); *Garratt v. Knowles*, 245 F.3d 941, 949 (7th Cir. 2001). Accordingly, insurers have repeatedly been dismissed from ERISA actions as improper parties.[9]

In the context of a welfare benefit plan in which the only benefit is the purchase of insurance, such a procedure makes no sense in a dispute between an insured and an insurer. A suit against the plan is, at best, a very odd procedure. The plan is not really an entity at all. It is a creation of ERISA and may exist without any documentation, any employees, any office or any funds.[10] It can be created as a matter of law without the expressed intention or documentation of anyone[11]. Why would Congress insist that an action for insurance benefits must be filed against an entity, which exists in name only, but, in reality, has no assets or personnel? Indeed, in these circumstances, all of the claims decisions are delegated by

---

[9] *See, e.g., Everhart v. Allmerica Financial Life Ins. Co.,* 275 F.3d 751, 754 (9th Cir. 2001), *cert denied,* 536 U.S. 958 (2002); *Gibson v. Prudential Ins. Co. of N. Am.,* 915 F.2d 414, 417 (9th Cir. 1990); *Suntrust Bank v. Aetna Life Ins. Co.*, 251 F.Supp.2d 1282, 1293 (E.D. Va. 2003); *Roeder v. Chemrex, Inc.,* 863 F.Supp. 817, 828 (E.D. Wis. 1994).

[10] *See, e.g., Gaylor v. John Hancock Mutual Life Ins. Co.,* 112 F.3d 460, 463-65 (10th Cir. 1997) (ERISA plan determined from surrounding circumstances); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1213-15 (11th Cir. 1999) (same); *Donovan v. Dillingham* 688 F. 2d 1367, 1373 (11th Cir. 1982) (written plan not necessary to establish ERISA plan).

[11] *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1352 (9th Cir. 1984).

contract to the insurance company and thus an action by the claimant against the insurer is the obvious manner of resolving such disputes. The "plan" really has no role whatsoever in resolution of the dispute. Yet, under ERISA's structure, in order to obtain benefits, an insured must proceed against the plan and, presumably, if a judgment is entered against the plan, force a second action by the plan against the insurer to obtain the amount of the judgment from the insurer. This is a highly cumbersome and illogical method of obtaining insurance benefits. It is hard to imagine why Congress would impose such a burdensome procedure on a claim that is between an insured and an insurer.[12]

An action solely against the plan does make sense in the case of pension plans and self-funded insurance plans, which are not subject to ERISA's saving clause. These plans are subject to ERISA's substantive provisions regarding vesting and financing. An action directly against such

---

[12] While insurers are not generally administrators as defined by ERISA (29 U.S.C. § 1002(16)(A)(i)), some courts have still suggested that an insurer may be sued if the claimant can establish that the insurer was the administrator. *See Moran,* 536 U.S. at 363, n.3; *Everhart v. Allmerica Financial Life Ins. Co.,* 275 F.3d 751, 754 (9th Cir. 2001), *cert. denied,* 536 U.S. 958 (2002). Nonetheless, it is highly improbable that the drafters of ERISA would have left an insured's right to sue an insurer dependent on the question of whether the insurer functioned as an administrator -- an issue the appellate courts still have not resolved or clarified nearly 30 years after ERISA was enacted.

plans makes sense because those plans actually have funds and personnel administering those funds. Thus, ERISA's requirement that a monetary award can only be satisfied against the plan, thereby immunizing the administrators from personal liability, makes perfect sense. However, ERISA provides no substantive protections for welfare plans. It, therefore, made sense for Congress to permit these substantive protections to be enforced in state actions directly against insurers through the saving clause. Similarly, there is no reason for Congress to have left substantive regulations to the states, but preempted the states' procedures to enforce those rights.

ERISA was intended to "safeguard employees from the abuse and mismanagement of *funds* that had been accumulated to finance various types of employee benefits." *Massachusetts v. Morash,* 490 U.S. 107, 113 (1989) (emphasis added). Congress was concerned with the need of *employers* to be able to rely on uniform laws, rather than individual state laws. *Moran,* 536 U.S. at 378-79. Once again, this has applicability to funded plans, but not to disputes among third party insurers and insureds. That liability does not rest with the employer, but with the insurer.

Moreover, the Supreme Court has repeatedly made clear that insurance enforcement mechanisms and laws regulating claims practices are at the core of McCarran-Ferguson and thus ERISA's saving clause. *Ward,*

526 U.S. at 374 n.5 ("laws regulating claims practices . . . [are included] in catalogue of state laws that regulate insurance."); *Metropolitan Life,* 471 U.S. at 744 (type of state regulation encompassed by McCarran-Ferguson, includes "enforcement"). Indeed, Appellant and supporting *amicus* concede that the law at issue here fits the test of *Kentucky Association of Health Plans Inc. v. Miller,* 538 U.S. 329, 123 S.Ct. 1471 (2003). They complain unanimously and vociferously that permitting Barber's claims here will drive up premium costs to employers. In *Miller* the Court found it obvious that the notice-prejudice rule discussed in *Ward* fell within the saving clause because it "dictated to the insurance company the conditions under which it must pay for the risk it has assumed." *Id.* at 1478 n.3. Manifestly, if the subject law would allegedly drive up premium costs, it affects the conditions under which an insurer must pay for the risk it has assumed. More fundamentally, it clearly dictates conditions under which payment must be made -- i.e., when good faith requires it. As Judge Becker explains it, without a law requiring insurers to pay claims in good faith, ERISA "creates a 'race to the bottom' in which . . . the most profitable HMO's [or insurers] will be those that deny claims most frequently." *DiFelice v. Aetna U.S. Healthcare,* 346 F.3d 442, 462 (3rd Cir. 2003) (Becker, J., concurring).

Thus, a careful look at the structure of the remedial provisions of ERISA shows, if anything, that the act was intended to be enforced exactly as written -- i.e., that all state laws regulating insurance, including remedial laws, are saved from preemption. This is entirely consistent with ERISA's purpose. ERISA imposes substantive regulations on, and provides direct actions against, funded plans. Yet, it does not provide substantive regulations against unfunded welfare plans and thus permits direct state actions against the parties ultimately responsible for the payment of benefits. This is also consistent with the long-standing principles of field preemption, whereby Congress does not intend to completely preempt a field without inserting substantive federal regulations in place of the existing state regulations.

C. Nothing In The Legislative History Supports A Conclusion That Congress Intended To Preempt State Remedial Laws That Are Saved From Preemption.

In *Pilot Life* the Court noted that the Conference Report's reference to the LMRA reflected Congress' intent to compare ERISA's preemptive effect with the powerful preemptive force of Section 301 of the LMRA. 481 U.S. at 55. Once again, this may apply with regard to laws of general applicability or laws relating to funded pension benefits; however, it has no bearing with respect to a law that falls within the saving clause. The LMRA

has no saving clause and thus is not comparable legislation when addressing a law that is specifically saved from preemption.

> *. . . § 514 (b)(2)(A) of ERISA [the savings clause] makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans.* With important, but express limitations, it states that 'nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.' *In contrast,* § 301(a) of the LMRA applies to all 'suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations.'

Franchise Tax Board, 463 U.S. at 25 (emphasis added).

Even the *Pilot Life* decision makes this clear. In citing to the legislative history, the Court quoted Senator Williams as follows: *"[W]ith the narrow exceptions specified in the bill,* the substantive and enforcement provisions of the conference substitute are intended to preempt the field. . . ." 481 U.S. at 46 (emphasis added). Manifestly, the saving clause is the principal exception.[13] Moreover, Senator Williams' statement, as well as those of the other sponsors of the bill, were made in the context of the

[13] Reference in Senator Williams' remarks to the "narrow" exception is "far too frail [to] support" a restricted reading of the saving clause. *Metropolitan Life,* 471 U.S. at 746.

intended purpose of the Act as pension reform legislation.[14] Once again, the Solicitor General is in agreement with this view. He concluded his discussion in his *Ward* brief by pointing out that the reference in *Pilot Life* to legislative history relating to the LMRA "does not bear directly on the preemption of a state-law cause of action or remedy that 'regulates insurance.' That is because LMRA Section 301 does not contain any statutory exception analogous to ERISA's insurance savings provision." *Ward* Br. at 25.

D. Recent Court Opinions Challenge The *Pilot Life* Dicta And Reflect On The Tragic Consequences Of Its Slavish Application.

Many Courts have recognized that slavish compliance with *Pilot Life's* dicta has led to repeated expressions of angst among courts faced with its tragic inequities and senseless logic. *See Bast v. Prudential Ins. Co.,* 150 F.3d 1003, 1005 (9th Cir. 1998), *cert. denied,* 120 S.Ct. 170 (1999) ("Although this case presents a tragic set of facts, the district court properly concluded that under existing law the Basts are left without a remedy"); *Cannon v. Group Health Serv. of Okla., Inc.,* 77 F.3d 1270, 1271 (10th Cir.

---

[14] While these comments are persuasive in the context of a law of general application, they are "of little help in analyzing § 514(b)(2)(A) for . . . the saving clause is broad on its face and specific in its reference." *Metropolitan Life,* 471 U.S. at 746 n.24.

1996) (Regretting the lack of a remedy given the tragic circumstances of this case and the seemingly needless loss of life that resulted); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1338 (5th Cir. 1992) ("The result ERISA compels us to reach means the Corcorans have no remedy, state or federal, for what may have been a serious mistake"); *Andrews-Clarke v. Travelers Ins. Co.*, 984 F.Supp. 49, 52-53 (D. Mass. 1997) ("The tragic events set forth in Diane Andrews-Clarke's Complaint cry out for relief . . . . Under traditional notions of justice, the harms alleged . . . should entitle [her] to some legal remedy. . . . Nevertheless, this Court had no choice but to pluck [her] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of Travelers . . . , to slam the courthouse doors in her face and leave her without any remedy. . . . [ERISA] has gone conspicuously awry from its original intent . . . . Does anyone care? Do you?" (footnotes omitted); *see also* Bogan, *Protecting Patient Rights*, *supra* note 1, at 996-1002.

As Judge Becker notes, courts have had to "struggle mightily to maintain fidelity to ERISA's expansive" preemption while maintaining at least a semblance of protection for insureds. *DiFelice*, 346 F.3d at 454. Prominent judges have recently joined Judge Newcomer in recognizing that the analysis in *Pilot Life* is simply illogical when applied to laws which are

saved from preemption. *See Id.* at 453 (Becker, J. concurring) ("broad preemptive scope is sensible with regard to pension plans, . . . However, to me, it makes much less sense with respect to welfare plans."); *see also Cicio v. Does,* 321 F.3d 83, 106 (2d Cir. 2003), (Calabresi, J. dissenting) (referring to Supreme Court's "Trail of Errors").

Finally, the Supreme Court itself has repeatedly noted that its initial take on ERISA preemption has not always been accurate. *See Miller,* 123 S. Ct. at 1478-79 (making a clean break from past criteria defining regulation of insurance); *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.,* 519 U.S. 316, 335 (1997) (ERISA prior preemption criteria "in effect been abandoned" as "a project doomed to failure" (Scalia, J., concurring)); *N.Y. State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.,* 514 U.S. 645, 655 (1995) (prior attempts at construing the phrase "relate to" in preemption clause "does not give us much help . . . ").

E. ERISA's Legislative History Is Unequivocal In Disclosing That The Act Was Intended To Regulate Pension Benefits And Was Not Intended To Impact The Field of Insurance.[15]

ERISA was a massive legislative undertaking. *Pilot Life,* 481 U.S. at 44. Yet, the briefing regarding the legislative history before the Court in *Pilot Life* was nearly non-existent. The Court relied on the last two pages of the Solicitor General's short brief supporting the grant of certiorari. *Id.* at 52. However, none of the other briefs in the case discussed the legislative history at all. Thus, no one sought to assist the Court in presenting the lengthy legislative history, which conflicts with that presented in the Solicitor General's original brief. Moreover, as noted above, the Solicitor General has since changed his view on the proper interpretation of ERISA's legislative history. When one views that history in context, it is plain that

---

[15] *See generally* Subcomm. on Labor of the Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 (Comm. Print 1976) [hereinafter "Legislative History"]; Special Comm. on Aging, U.S. Senate, 98th Cong., The Employment Retirement Income Security Act of 1974: The First Decade 1-25 (Comm. Print 1984) [hereinafter "The First Decade"].

The legislative history discussed herein is carefully and extensively set forth in greater detail in Bogan, *Protecting Patient Rights, supra,* 74 Tul. L. Rev. 951; *see also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427, 437-457 (1987).

there is nothing in that history to support an implied Congressional intent which is contrary to the plain words of the statute itself.

ERISA was the direct outgrowth of the explosion in private pension plans during the middle of the last century. The number of employees covered by such plans grew from approximately 4 million in 1940 to over 30 million by 1973.[16] The estimated assets held by such plans during this same period grew from $2.4 billion to $150 billion.[17] With this explosive growth came a similarly expansive growth in the abuses of such funds.[18] In addition, the enormous accumulation of such funds exerted a major impact

---

[16] *See* S. Rep. No. 93-127, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4839-40, and in 1 Legislative History, *supra* note 15, at 589.

[17] *See* H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4641, and in 2 Legislative History, *supra* note 15, at 2350; The First Decade, *supra* note 15, at 5; James D. Hutchinson & David M. Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. Chi. L. Rev. 23, 24 (1978).

[18] *See* 120 Cong. Rec. 29,934 (1974), *reprinted in* 3 Legislative History, *supra* note 15, at 4748 (statement of Sen. Javits); The First Decade, *supra* note 15, at 6 n.22 (citing congressional hearings on abuse in pension plan administrations); *see also* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, *supra* note 15, at 443-45 (referring to the many abuses in employee pension plans listed in ERISA's legislative history).

on the country's financial markets.[19] This explosion occurred without the benefit of any effective federal or state regulation.[20]

In 1954, at the request of President Eisenhower, Congress undertook an extensive study of the private pension industry.[21] This study disclosed abuses, including incompetent management of pension funds, looting, embezzlement, kickbacks, excessive administration costs and imprudent investment practices.[22] In response, Congress enacted the Welfare and Pension Plans Disclosure Act ("WPPDA") in 1958.[23] This law merely required the disclosure of certain financial information to the employees and did not provide any meaningful regulation of the funds themselves.[24]

---

[19] *Id*; H.R. Rep. No. 93-533, at 3, *reprinted in* 1974 U.S.C.C.A.N. at 4641, and in 2 Legislative History, *supra* note 15, at 2350.

[20] *See* note 17 *supra*.

[21] *See* S. Rep. No. 85-1440, at 2-11 (1958), *reprinted in* 1958 U.S.C.C.A.N. at 4137.

[22] *Id.* at 4137-47.

[23] Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974).

[24] *See* H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 15, at 2351; *Malone v. White Motor Corp.,* 435 U.S. 497, 507 (1978) (plurality opinion).

This legislation was wholly ineffective.[25] Consequently, in 1962 President Kennedy appointed a special task force to study the problem.[26] The task force concluded that further federal regulation of private pension plans to include mandatory minimum vesting and funding requirements was necessary and that further study was required on other issues.[27] Significantly, the task force specifically did not investigate or consider any reforms of nonpension plans, such as health insurance plans.[28] In response

---

[25] *See* S. Rep. No. 93-127, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4841; H.R. Rep. No. 93-533, at 4, *reprinted in* 1974 U.S.C.C.A.N. at 4642, and in 2 Legislative History, *supra* note 15, at 2351.

[26] *See* President's Comm. on Corporate Pension Funds and Other Private Retirement and Welfare Programs, Public Policy and Private Pension Programs: A Report to the President on Private Employee Retirement Plans, at vii-viii (1965) [hereinafter "President's Committee Report"]; *see also* The First Decade, *supra* note 15, at 8-10 (describing the formation of the committee and its findings).

[27] *Id.*

[28] *See* President's Committee Report, *supra* note 26, at iv ("Although the area of investigation assigned to the Committee included welfare plans as well as retirement programs, the President's memorandum specifically raised questions about issues which arise primarily from retirement plans. Other types of welfare plans, such as health and insurance plans, make important contributions to the economic security of American workers; they do not, however, have the impact of pension plans on accumulation of savings, labor mobility, and similar matters touched upon by the President. Consequently, the Committee has confined its efforts to an inquiry into private employee retirement plans (i.e., excluding plans for self-employed persons) without any extensive study of other types of welfare plans.").

to these concerns, New York Senator Jacob Javits introduced legislation in 1967 to create federal funding and participation requirements for private pension plans.[29] This led to further Congressional investigations and eventually ERISA. In 1970, the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare began a three-year study "undertaken to ascertain the need for statutory protections for workers' pension programs and to formulate appropriate corrective legislation."[30] Like the previous investigations, the subcommittee's hearings disclosed a morass of abusive practices resulting in the loss of retirement benefits to employees as the result of inadequate funding, mismanagement and unreasonable vesting requirements.[31] It agreed with President Kennedy's task force and recommended comprehensive regulation of the pension

---

[29] *See* 113 Cong. Rec. 4650-53 (1967) (statement of Sen. Javits); *see also* 120 Cong. Rec. 29,933-34 (1974), *reprinted in* 3 Legislative History, *supra* note 15, at 4748 (remarks of Sen. Javits) (recounting his continued efforts to reform the private pension and welfare system).

[30] *See* S. Rep. No. 92-634, at 1 (1972); *see also* 119 Cong. Rec. 30,003 (1973), *reprinted in* 2 Legislative History, *supra* note 15, at 1598 (statement of Sen. Williams).

[31] *See* H.R. Rep. No. 93-533, at 5-8 (1973), *reprinted in* 1974 U.S.C.C.A.N. at 4639, 4643-46, and in 2 Legislative History, *supra* note 15, at 2355.

industry.[32] Shortly thereafter, Senator Javits introduced Senate Bill 4. It stated, "[t]he purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems which have been determined by the Senate Subcommittee's comprehensive study of such plans."[33] A corresponding House bill was also introduced.[34]

These bills were sent to their appropriate committees, which issued their own reports. Each of these reports concerned themselves solely with abuses in and the consequent need for regulation of private pension plans.[35] The Senate Committee on Labor and Public Welfare report states:

> The provisions of S.4 are addressed to the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement from working lives. It responds by

---

[32] *See* 120 Cong. Rec. 29,935-44 (1974), *reprinted in* 3 Legislative History, *supra* note 15, at 4748 (remarks of Sen. Javits).

[33] S.4, 93d Cong. (1973); *see* S. Rep. No. 93-127 (1973), at 1, *reprinted in* 1974 U.S.C.C.A.N. at 4838, and in 1 Legislative History, *supra* note 15, at 587.

[34] *See* H.R. 2, 93d Cong. (1973), *reprinted in* 1 Legislative History, *supra* note 15, at 3.

[35] *See* S. Rep. No. 93-127, at 1-36, *reprinted in* 1974 U.S.C.C.A.N. at 4838-89, and in 1 Legislative History, *supra* note 15, at 587-622; H.R. Rep. No. 93-533, at 1-28, *reprinted in* 1974 U.S.C.C.A.N. at 4639-70, and in 2 Legislative History, *supra* note 15, at 2348-75; 120 Cong. Rec. 29,933-35 (1974), *reprinted in* 3 Legislative History, *supra* note 15, at 4746-51 (remarks of Sen. Javits).

> mandating protective measures and prescribing minimum standards for promised benefits. The purpose of S.4 is to prescribe legislative remedies for the various deficiencies existing in the private pension plan systems. . . .[36]

The report states that "[t]he principal issues affecting the vital and basic needs for legislative reform involve consideration of the essential elements of pensions: (1) 'vesting,' (2) 'funding,' (3) 'reinsurance,' (4) 'portability' and (5) 'fiduciary responsibility and disclosure.'"[37] Similarly, the House Committee on Education and Labor report states that the "primary purpose of the bill is the protection of individual pension rights" and that the legislation was designed to: (1) establish minimum fiduciary standards for retirement plans, (2) provide for enforcement and public disclosure of finances, (3) improve the equitable character and soundness of private pension plans by requiring (a) appropriate vesting and (b) minimum funding standards, and (4) guarantee the adequacy of the plan's assets prior to termination.[38]

---

[36] S. Rep. No. 93-127, at 1, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 15, at 587.

[37] S. Rep. No. 93-127, at 8-11, *reprinted in* 1974 U.S.C.C.A.N. at 4844-77, and in 1 Legislative History, *supra* note 15, at 594-97 (emphasis omitted).

[38] H.R. Rep. No. 93-533, at 1, 17-18, *reprinted in* 1974 U.S.C.C.A.N. at 4655-56, and in 2 Legislative History, *supra* note 15, at 2348, 2364-65.

ERISA's legislative history is unequivocal that it was intended as a pension reform bill. In describing ERISA, Senator Javits said, "[T]he pension reform bill is the greatest development in the life of the American worker since social security. For the first time in our history most workers will be able to truly retire at retirement age and live decently on their social security and private pensions."[39] Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, described his committee's study which led to ERISA. "This study clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized."[40] In the House, one of the principal proponents, Representative Dent, described ERISA's purpose in this way: "[W]e started out with only one aim in view and that was to give a pension participant his entitlements under the contract of the pension plan he belonged to."[41] The record is filled with tragic examples of workers deprived of pension benefits after 30, 40 and 50 years of employment because they were a few days short of vesting before retiring, the company

---

[39] Legislative History, *supra* note 15, at 4747 (Remarks of Sen. Javits).

[40] Legislative History, *supra* note 15, at 4733 (Remarks of Sen. Williams).

[41] Legislative History, *supra* note 15, at 4665 (Remarks of Rep. Dent).

was sold or went bankrupt, or because the employer could not afford to pay the promised retirement benefits.[42]

What is clear from this long and extensive legislative history and the statute itself is that the exclusive concern of Congress in passing ERISA was to address abuses in the pension field. It is a "comprehensive and reticulated statute,"[43] only with respect to pension plans. Not a single insurance concern is expressed anywhere in the legislative history and it is virtually devoid of meaningful regulation of insurers or insurance "plans." As one commentator who has extensively reviewed ERISA's legislative history reports,

> . . . ERISA's legislative history is remarkable . . . for what it does not contain. ERISA's legislative history provides no evidence that Congress seriously investigated, studied, or debated any issues or concerns with nonpension employee benefit plans.
>
> * * *

---

[42] See, e.g., Legislative History *supra* note 15, at 4749-50 (Remarks of Sen. Javits on "Why Pension Reform Is Needed"), (4791-96) (Remarks of Sen. Bentson), (4664-65) (Remarks of Rep. Thompson), (4710) (Remarks of Rep. McClory); *Interim Report of Activities of the Private Welfare and Pension Plan Study, Subcommittee On Labor of the Committee on Labor and Public Welfare*, S. Rep. No. 92-634, 92d Cong., 2d Sess. (1972) at 67-90.

[43] *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

> There is no documentation anywhere in ERISA's legislative history of any study or investigation of the history or growth of nonpension benefit plans, or of any specific concern with the management of nonpension plan assets. Further, ERISA's legislative history fails to disclose any concerted investigation of any complaints about nonpension benefits, such as inadequate health care, accident, death or disability coverage, or problems with health, life, or disability benefits claims. In short, Congress just was not dealing with nonpension benefit plans when it enacted ERISA.

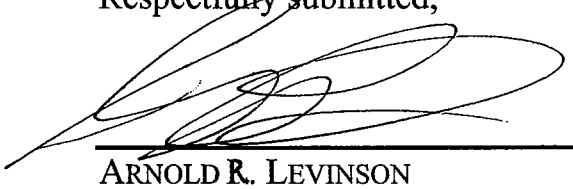
Bogan, *Protecting Patient Rights, supra,* note 1 at 972, 976-77.

CONCLUSION

For the reasons set forth above, the district court's order of September 8, 2003, should be affirmed.

Dated: February 11, 2004

Respectfully submitted,



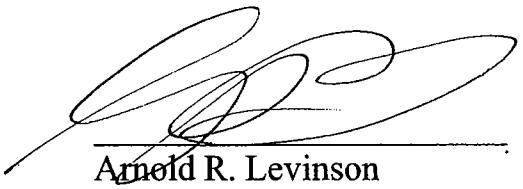
ARNOLD R. LEVINSON
PILLSBURY & LEVINSON, LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 433-8000

AMY BACH
BACH LAW OFFICE
42 Miller Avenue
Mill Valley, CA 94941
(415) 381-7627

Counsel for Amicus Curiae United Policyholders

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit L.A.R. 46.1, I certify that I have filed an application for admission to become a member of the bar of this Court.



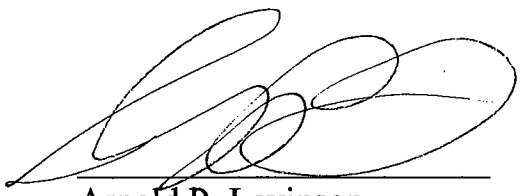
Arnold R. Levinson

February 11, 2004

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,945 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 10.1.1 for Macintosh in 14-point Times New Roman font.



Arnold R. Levinson

Counsel for Amicus Curiae United Policyholders

February 11, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on February 11, 2004, I caused two (2) copies of the foregoing *Amicus Curiae* Brief of the United Policyholders in Support of Appellee James Barber for Affirmance to be served by Federal Express overnight delivery on the following counsel:

E. Thomas Henefer, Esq.
Kirk L. Wolgemuth, Esq.
STEVENS & LEE
111 North Sixth Street
P.O. Box 679
Reading, PA 19601
Counsel for Appellant

Joseph F. Roda, Esq.
Eric L. Keepers, Esq.
RODA & NAST, P.C.
801 Estelle Drive
Lancaster, PA 17601
Counsel for Appellee

Gerald B. Baldino, Jr., Esq.
SACCHETTA & BALDINO
308 East Second Street
Media, PA 19063
Counsel for Appellee

Glen D. Nager, Esq.
Jack W. Campbell, IV, Esq.
William K. Shirey, II, Esq.
JONES DAY
51 Louisiana Avenue, Northwest
Washington, DC 20001-2113
Counsel for Amicus Curiae, Chamber of Commerce

Stephen A. Bokat, Esq.
Robin S. Conrad, Esq.
Joshua A. Ulman, Esq.
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, Northwest
Washington, DC 20062
Counsel for Amicus Curiae, Chamber of Commerce

In compliance with Fed. R. App. P. 25(d)(2) and L.A.R. 31.1, I further certify that on February 11, 2004, the original plus ten copies of the *Amicus Curiae* Brief of the United Policyholders in Support of Appellee James Barber for Affirmance was sent via Federal Express for overnight delivery to the Clerk of the Court, United States Court of Appeals for the Third Circuit.

ARNOLD R. LEVINSON