

**FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JOHN W. DISHMAN,
Plaintiff-Appellee-
Cross-Appellant,

Nos. 99-55963
99-56077

v.

D.C. No.
CV-96-00015-JSL

UNUM LIFE INSURANCE
COMPANY OF AMERICA; THE ADAMS,
DUQUE & HAZELTINE LONG TERM
DISABILITY INCOME PLAN,
Defendants-Appellants-
Cross-Appellees.

ORDER AND
OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
February 13, 2001--Pasadena, California

Filed October 17, 2001

Before: Robert R. Beezer, Thomas G. Nelson, and
Marsha S. Berzon, Circuit Judges.

Opinion by Judge T.G. Nelson

COUNSEL

Lesley C. Green and Russell G. Petti, Bannan, Green & Frank, Los Angeles, California, for defendants/appellants UNUM Life Insurance Company of America and The Adams, Duque & Hazeltine Long Term Disability Income Plan.

Thomas E. Shardlow and Patricia G. Vick, Law Offices of Shardlow & Vick, Pasadena, California, for appellee/cross-appellant John Dishman.

14709

Henry Solano, Marc I. Machiz, and Marcia Bove, Department of Labor, Washington, D.C., for amicus curiae United States.

ORDER

The Opinion filed May 8, 2001, is withdrawn. A revised Opinion has been filed in its place.

With the amendments made in the revised Opinion, the panel has voted unanimously to deny the petition for rehearing. Judge T.G. Nelson and Judge Berzon deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judges has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

OPINION

T.G. NELSON, Circuit Judge:

UNUM Life Insurance Company of America ("UNUM") appeals a bench trial judgment and consequent attorneys' fee award in favor of John Dishman, an ERISA plan participant and benefits claimant. On cross-appeal, Dishman asserts that the district court erroneously dismissed as preempted his state law tort claim. We affirm in part and reverse in part.

I. FACTS AND PROCEEDINGS BELOW

John Dishman was Executive Director of the Adams, Duque & Hazeltine law firm ("AD&H") from 1986 until July

1993, when he resigned complaining of debilitating migraine headaches. He successfully applied for long-term disability benefits from UNUM, the insurance company from which AD&H had purchased a long-term disability insurance policy. UNUM began paying Dishman \$11,500 monthly in November 1993.

After granting Dishman's claim for disability benefits, UNUM sought and obtained two reports from Dishman's neurologist confirming the severity of Dishman's condition, which had afflicted him since childhood. Moreover, the vocational expert UNUM retained to evaluate Dishman recommended settlement because (1) Dishman's medical record "strongly established" the presence and duration of his condition; (2) Dishman had gone to great lengths to remedy it; (3) Dishman had made "numerous attempts to overcome his disability and improve his work capacity" without avail; and (4) "further medical information was unlikely to render information useful to his claim." Despite this recommendation, in April 1995 UNUM assigned Dishman's claim to its "Complex Claim Unit" because the claim's reserve was \$497,154, and it had exhausted risk management tools at the time.

Within the Complex Claim Unit, UNUM assigned Dishman's claim to Frankie Puthoff, who initiated an investigation. Puthoff hired several private investigative agencies to do a "work and sports check" on Dishman, and asked him to submit to two "Independent Medical Evaluations" ("IMEs"), one with a neurologist and another with a forensic psychiatrist.

Neither of those IMEs ever came to pass. One of the "work and sports checks" Puthoff ordered returned ambiguous information suggesting that Dishman might be employed by Semiotix, Inc., a Denver, Colorado, company. The report, which allegedly resulted from an investigator's impersonation of a bank lender, did not indicate the amount Dishman was being paid, or whether any payments were the result of Dishman's ownership of a minority interest in the business. Nonetheless,

on the strength of that report and another indicating that Dishman had traveled to Denver three times and was Chairman of the Board of Semiotix, Puthoff telephoned Dishman on July 18, 1995, and informed him that she was terminating his benefits and cancelling the appointments with the neurologist¹ and psychiatrist. Prior to this call, Dishman had no knowledge that UNUM was investigating his claim or giving any thought to stopping benefits payments to him.

Dishman informed Puthoff that he was not employed by Semiotix and that her information was incorrect. Upon learning this, Puthoff told Dishman she was going to "suspend" his benefits rather than deny his claim and that he was to provide her with a statement explaining his relationship with Semiotix, his travel to Colorado, and his investment in any other business, as well as copies of his and Semiotix' 1993 and 1994 tax returns. Notably, the AD&H policy contains no provision for "suspension" of benefits.

UNUM suspended Dishman's benefits without receiving any medical opinion that Dishman was no longer disabled, or that the activities it thought he might be engaged in indicated that he was capable of performing his "own occupation," as his policy required. UNUM made no effort to ascertain whether any money Dishman might have received from Semiotix was sufficient to require a reduction in benefits payment under the terms of the contract. UNUM, moreover, received two additional investigative reports after July 18, 1995, stating that Dishman was not an employee of Semiotix. Nevertheless, UNUM did not reinstate Dishman's benefits.

After Dishman retained an attorney, a series of correspondence ensued. Highlights of this correspondence include the following facts: (1) Dishman proposed that he be examined by a neutral neurologist, but UNUM declined; (2) UNUM ultimately abandoned its request for Dishman's tax returns

¹ The appointment with the neurologist was scheduled for that day.

and replaced it with a demand for Dishman to arrange for a "forensic certified public accounting firm" to visit Semiotix and "review any documents they deem necessary;" (3) UNUM told Dishman that if he was "unwilling or unable" to cooperate with this unrestricted audit, his file would be "closed"; (4) despite the fact that AD&H's policy contained no mental disability exclusion applicable to Dishman, UNUM insisted that Dishman be evaluated by a "forensic psychiatrist" and proffered several conflicting justifications for this requirement; and (5) Dishman's first request for a copy of UNUM's claim procedure was ignored, and his second request was met with the unequivocal response from UNUM, "UNUM does not have a Claims Procedure with regard to the suspension or termination of benefits."

Upon being told that he had no administrative recourse, Dishman filed the instant suit. In addition to his claims relating to nonpayment of disability benefits, Dishman's complaint alleged that UNUM was vicariously liable for the tortious invasion of privacy perpetrated by the several investigative firms it hired. In February 1996, the district court dismissed this state law claim without a hearing, presumably because it thought the claim was preempted by ERISA. A bench trial on UNUM's "suspension" of benefits ensued, with the result that Dishman prevailed on all his claims.

UNUM appealed the bench trial judgment and fee award, and Dishman cross-appealed the dismissal of his state law cause of action. In a previous memorandum disposition, we held that neither order was an appealable final order because the district court included a line in each to the effect that it might amend or amplify the orders at a later date. On Dishman's motion, the district court issued a "Modified Judgment and Order" on April 20, 1999, that removed that line from the judgment resulting from the trial. On January 29, 2001, pursuant to our suggestion, the court excised the same line from the order dismissing Dishman's invasion of privacy claim. Now

that both orders are final, we have jurisdiction to consider the parties' claims on appeal.

II. ERISA PREEMPTION OF STATE LAW CLAIM

In addition to a host of claims under ERISA, Dishman alleged that under California law UNUM was vicariously liable for the tortious invasion of privacy committed by the investigative firms it hired.² Dishman alleged, *inter alia*, that an investigator retained by UNUM elicited information about his employment status by falsely claiming to be a bank loan officer endeavoring to verify information he had supplied; that investigators elicited personal information about him from neighbors and acquaintances by representing that he had volunteered to coach a basketball team; that investigators sought and obtained personal credit card information and travel itineraries by impersonating him; that investigators falsely identified themselves when caught photographing his residence; and that investigators repeatedly called his residence and either hung up or else dunned the person answering for information about him. UNUM did not contest the fact that Dishman stated a claim against it under California law. Rather, it argued that, regardless, Dishman's state law claim was preempted by ERISA. The district court apparently agreed, as it granted UNUM's motion to dismiss this claim.³

It is with great trepidation that we tread into the field of ERISA preemption. As we noted in Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson,⁴ "[d]eveloping a rule to

² Throughout the briefing on appeal and below, the parties refer to his claim as Dishman's fourth claim for relief. This appears to be an erroneous transposition of Roman numerals. The original complaint reveals that the state law tort claim was Dishman's sixth claim for relief.

³ The order granting UNUM's motion to dismiss provides no reason for the dismissal.

⁴ 201 F.3d 1212, 1216 (9th Cir. 2000), as amended by 208 F.3d 1170 (9th Cir. 2000).

identify whether ERISA preempts a given state law . . . has bedeviled the Supreme Court."⁵ In 1997, Justice Scalia frankly observed that the fourteen ERISA preemption cases the Supreme Court had taken to that point "ha[d] not succeeded in bringing clarity to the law."⁶ Regrettably, neither have the three preemption cases that the Court has taken since.⁷ However, because a majority of the Court remains unwilling to embrace the solution advocated by the minority, ⁸ the amorphous contours of the preemption doctrine present a problem with which we must deal head-on.

The problem is this: 29 U.S.C. § 1144(a) states that ERISA "shall supersede any and all state laws insofar as they . . . relate to any employee benefit plan." The question thus becomes, what does "relate to" mean? In 1983, the Court announced that "[a] law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan."⁹ Twelve years' experience with that standard, however, convinced the Court that it created as many problems as it solved. In New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., the Court announced that "[f]or the same reasons that infinite relations cannot be the measure

⁵ Id.

⁶ California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 335 (1997) (Scalia, J., with whom Justice Ginsburg joined, concurring).

⁷ See, e.g., DeBuono v. NYSA-ILA Med. and Clinical Servs. Fund, 520 U.S. 806 (1997); Boggs v. Boggs, 520 U.S. 833 (1997); Egelhoff v. Egelhoff, _____ U.S. _____, 121 S. Ct. 1322, 1330-31 (2001) (Scalia, J. with whom Justice Ginsburg joined, concurring) ("I remain unsure (as I think the lower courts and everyone else will be) as to what else triggers the 'relate to' provision I persist in the view that we can bring some coherence to this area").

⁸ In Egelhoff, Justices Scalia, Ginsburg, Breyer and Stevens indicated a willingness to bring coherence to preemption jurisprudence by clarifying that normal conflict preemption and field preemption principles apply. 121 S. Ct. at 1330-31.

⁹ Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983).

of pre-emption, neither can infinite connections."¹⁰ "Uncritical literalism"¹¹ is not the answer; rather, "to determine whether a state law has the forbidden connection [to an ERISA plan], we look to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans."¹²

Congress crafted ERISA's preemption provision

to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.¹³

As the Supreme Court explained in Travelers, "[t]he basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."¹⁴ For this reason, the Court explained that it has had no trouble holding that ERISA preempts "state laws that mandate[] employee benefit structures or their administration," or that "provid[e] alternative enforcement mechanisms."¹⁵

¹⁰ 514 U.S. 645, 656 (1995); see also Egelhoff, 121 S. Ct. at 1327 ("[T]he term 'relate to' cannot be taken to extend to the furthest stretch of its indeterminacy, or else for all practical purposes pre-emption would never run its course.") (internal quotation marks and citation omitted).

¹¹ Travelers, 514 U.S. at 656.

¹² Egelhoff, 121 S. Ct. at 1327 (quoting Dillingham, 519 U.S. at 325).

¹³ Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990).

¹⁴ Travelers, 514 U.S. at 657.

¹⁵ Id. at 658. As we noted in Rutledge, "[s]ince the Supreme Court decided Travelers, we have formulated several different, though compati-

In Travelers, the Court cited New York's Human Rights Law as a classic example of the former.¹⁶ That comprehensive anti-discrimination law, which the Court found preempted in Shaw v. Delta Air Lines, Inc.,¹⁷ required ERISA plan administrators in New York to extend the same benefits to persons disabled by pregnancy as to those disabled by other causes during a period of time when federal law did not so require.¹⁸ As the Travelers Court explained, New York's mandates affecting coverage "could have been honored only by varying the subjects of a plan's benefits whenever New York law might have applied, or by requiring every plan to provide all beneficiaries with a benefit demanded by New York law."¹⁹ As further examples of laws preempted under this same rationale, the Travelers Court cited the Pennsylvania law at issue in FMC Corp. v. Holliday,²⁰ which required plan providers to calculate benefit levels in Pennsylvania differently than elsewhere, and the New Jersey law at issue in Alessi v. Raybestos-

ble, tests in an effort to follow the Supreme Court in fulfilling the statutory mandate of broad preemption without intruding upon state laws beyond the intention of Congress and the objectives of ERISA." Rutledge, 201 F.3d at 1217. We decline to apply any of those tests here, however, for two reasons. First, we note that the Supreme Court's recent cases have eschewed such multi-factor tests in favor of a more holistic analysis guided by congressional intent. See, e.g., Egelhoff, 121 S. Ct. 1322 (2001). Second, though perhaps useful tools in other contexts, these tests are of marginal utility, where, as here, the question boils down to whether state tort law "relates to" an ERISA plan. Our efforts, like the Supreme Court's, have not succeeded in making this inquiry a precise one.

¹⁶ Travelers, 514 U.S. at 657.

¹⁷ 463 U.S. 85 (1983).

¹⁸ Congress subsequently enacted the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1976 ed., Supp. V), which eradicated the theretofore lawful practice of discrimination based on pregnancy by making it clear that discrimination based on pregnancy was discrimination based on sex. Shaw, 463 U.S. at 89.

¹⁹ Travelers, 514 U.S. at 657.

²⁰ 498 U.S. 52 (1990).

Manhattan, Inc.,²¹ which, by prohibiting plans from setting workers' compensation payments off against employees' retirement benefits or pensions, effectively precluded them from using a method of calculating benefits permitted by federal law.²² The fatal flaw in both laws was that they required deviation from the norm; to comply with them, plans necessarily had to vary their administration of benefits state by state.

More recently, the Supreme Court found that a Washington statute that provided for automatic revocation, upon divorce, of any designation of a spouse as a beneficiary of a non-probate asset posed the same problem.²³ The revocation statute, the Court explained, "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status."²⁴ "Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been 'revoked' by operation of law."²⁵ Because the statute "governs the payment of benefits, a central matter of plan administration," and thereby "interferes with nationally uniform plan administration,"²⁶ the Court found the Washington law preempted.

California's common law tort remedy for an "unreasonably intrusive" investigation that amounts to an invasion of privacy²⁷ bears scant resemblance to the laws the Supreme Court

²¹ 451 U.S. 504 (1981).

²² Travelers, 514 U.S. at 657-58.

²³ Egelhoff, 121 S. Ct. at 1327.

²⁴ Id.

²⁵ Id. at *5.

²⁶ Id. at *4.

²⁷ Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1275 (9th Cir. 1990) ("California recognizes the tort of 'unreasonably intrusive' investigation as an invasion of privacy."); Noble v. Sears, Roebuck and Co., 109 Cal. Rptr. 269, 272 (Ct. App. 1973); Cain v. State Farm Mut. Auto. Ins. Co., 132 Cal. Rptr. 860, 862 (Ct. App. 1976).

has found violative of this first principle. By no stretch of the imagination can it be said to "mandate employee benefit structures or their administration" as the laws at issue in Shaw and Egelhoff did. This tort remedy, moreover, is entirely unlike the Pennsylvania law in Holliday or the New Jersey law found preempted in Alessi. Making ERISA administrators liable for investigations perpetrated by their agents " `which would be objectionable or offensive to the reasonable man' "28 simply cannot be said to interfere with nationally uniform plan administration in the manner or to the extent these laws did.

Travelers also pointed out, however, that state laws may be preempted for another reason: they may provide "alternative enforcement mechanisms" that relate to ERISA plans.²⁹ By "alternative enforcement mechanisms," the Supreme Court was alluding specifically to cases like Ingersoll-Rand Co. v. McClendon,³⁰ in which a former employee brought a wrongful discharge cause of action alleging that his employer discharged him to avoid vesting of ERISA benefits. ³¹ It is clear, however, that ERISA "supplant[s] a variety of state law causes of action for the wrongful denial of benefits."³² As the Supreme Court held in Pilot Life Insurance Co. v. Dedeaux,³³ these include claims for tortious breach of contract, breach of fiduciary duty, and fraud in the inducement.³⁴ Claimants simply cannot obtain relief by dressing up an ERISA benefits claim in the garb of a state law tort.

²⁸ Noble, 109 Cal. Rptr. at 272 (quoting William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 390-91 (1960)).

²⁹ Travelers, 514 U.S. at 658.

³⁰ 498 U.S. 133 (1990).

³¹ Travelers, 514 U.S. at 658.

³² James F. Jordan, et al., Handbook on ERISA Litigation § 2.06[A] (2000 Supplement).

³³ 481 U.S. 41 (1987).

³⁴ Id. at 47-48.