Chapter Two

ERISA PREEMPTION

In 1945, as a result of insurance industry lobbying, in concert, I am sure, with the usual 'campaign contribution' scenario, Congress enacted the McCarran-Ferguson Act. This act prevented the federal government from regulating insurance.

Today, believe it or not, out of the millions of words and pages of federal statutes, codes, guidelines, requirements, and standards - regulating everything from the size of mud flaps on trucks to the use of foul language on the radio – there is not a single provision, a single sentence, or a single word anywhere, that prohibits fraudulent business practices by insurance companies. As a result, insurance companies from Maine to California can scam policyholders with things like false coverage promises, outrageous claims denials, and intimidating policy cancellations without the slightest concern that federal insurance regulators might crack down on them. They won't. They can't. There are no federal insurance regulators. There are no federal insurance regulations.

Parenthetically, many observers argue persuasively that the lack of federal involvement in insurance regulation these days is not a bad thing. Why? Because given the current composition and orientation of Congress, if the federal government *were* to suddenly become involved, that would not likely be a good thing for consumers.

In any event, given the long-standing absence of federal oversight, the states had to step in. And so most states enacted what are called "unfair insurance practices acts"—legislation, modeled after uniform standards that made it illegal for insurance companies to do things such as:

- engaging in unreasonable delay in claims handling
- refusing to pay claims when liability is reasonably clear
- underpaying, terminating, or denying valid claims
- misrepresenting policy provisions
- concealing benefits from claimants and
- forcing policyholders to sue them in order to obtain benefits due.

In addition to having such regulations all states also have state insurance departments—agencies theoretically responsible for enforcing these and other insurance regulations.

States also have what are called common law protections. These are laws resulting from state appellate court Rulings on insurance cases arising within their boundaries.

In addition to the legal standards governing the *conduct* of insurers, there is the crucial issue of what *remedies* are available to an insured damaged by such conduct. In one state, a policyholder who has lost his home and been bankrupted by the fraudulent denial of a valid claim may only be able to recover contract damages (the amount of the benefits that were wrongfully withheld); in another state, that same person may be able to recover tort damages for *all* of the damage that resulted from the claim denial.

In considering this, one thing is certain. The body of law and the policyholder protections arising out of state legislation, insurance regulations and court rulings in a policyholder's state, constitute the only protections insureds have against fraudulent or unfair insurance practices. These protections can be enforced in either state or federal court, but the point is that the substantive law – the substantive rules - come only from state, not federal, law.

Enter ERISA

ERISA, an acronym for the Employee Retirement Income Security Act of 1974, is a federal law that was originally intended to protect the retirement benefits of employees against mergers, acquisitions, and other corporate activities that might otherwise have endangered such funds. The only original connection between ERISA and insurance was that it expressly *approved* of the use of state laws to regulate insurance practices.

That was the situation until the U.S. Supreme Court, in a case entitled *Pilot Life v. Dedeaux*, eliminated all of the state insurance laws and regulations mentioned above, saying that those laws were preempted by ERISA – a federal law.

The Supreme Court in *Pilot Life* sided with insurance industry lawyers ruling that any insurance regulations as to policies purchased in the workplace were to be governed exclusively by federal law. Thus, state laws, state insurance department rulings and state court decisions, are all eliminated as preempted by federal law—by ERISA.

What workplace insureds are left with is no state regulation and no federal regulation.

Without being overly dramatic, this basically gives insurance companies a license to steal. They can simply profile and target high-value claims and deny or underpay them with impunity. People with ERISA governed claims, involving everything from neck and spinal injuries to diabetes and heart conditions, are routinely sent long-winded letters from their insurance companies offering them from zero to a fraction of the benefits they are entitled to under their policies.

Why haven't Congress and the White House done something about this?

Good question. In 2006 I met with then Senator Barack Obama for close to an hour in his Senate office about this very topic. He got it. It was a big deal and it affected the millions of Americans and their families that got their health or long term disability insurance at work. Senator Obama agreed that ERISA Preemption needed to be reformed so that it deferred to state laws, rather than eliminating them.

He blamed the absence of ERISA reform on Republican control of the White House. And he gave me his word that if that situation changed the problem would be addressed.

The situation did change. And starting in 2008 I began an effort to remind President Obama of his commitment; sending letters and placing calls to key members in his Administration. So far, I have yet to receive a response.

Such is the Wonderland world of ERISA Preemption. And until we see meaningful ERISA reform, the one and only thing you can do to protect yourself from this potentially devastating nonsense is to avoid – at any cost - purchasing health or disability insurance through your workplace.