No. 08-35246

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

STANDARD INSURANCE COMPANY,

Plaintiff-Appellant,

v.

JOHN MORRISON, State Auditor, ex officio
Commissioner of Insurance,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana, Helena Division
The Honorable Donald W. Molloy
Case No. 06-CV-00047-DWM

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae*, National Association of Insurance Commissioners ("NAIC") is a non-profit corporation organized under the laws of the State of Delaware. The NAIC operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

CONSENT TO FILING AMICUS BRIEF

Counsel for Appellant and Appellee have consented to the filing of the NAIC's *amicus* brief in this case.

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Insurance Commissioners ("NAIC") is a non-profit corporation whose membership consists of the principal insurance regulatory officials of the fifty states, the District of Columbia, and the territories and insular possessions of the United States. Founded in 1871, it is the nation's oldest association of state government officials. The NAIC represents the coordinated and considered views of the state government officials that regulate the insurance industry and enforce the insurance laws of the country.

The NAIC's purpose is to provide its members with a national forum enabling them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers and actuarial guidelines that promote and establish uniform regulatory policy. Their overriding objectives are to protect consumers as well as assist in maintaining the financial stability of the insurance industry.

The NAIC performs numerous crucial services on behalf of state governments including: developing and publishing model laws, regulations, bulletins, financial and accounting standards, white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds

of state and federal laws assign duties to the NAIC and incorporate NAIC standards, models and other publications. In addition, the NAIC manages and coordinates the accreditation review of insurance departments as well as maintains regulatory and financial databases of insurance company financial data.

The interest of the NAIC in this case arises out of the regulatory responsibility vested in each commissioner to prescribe the form, terms and conditions of insurance policies, including the power to mandate the disapproval of discretionary clauses in policies of insurance issued in a state. The insurance commissioners of the various states are charged by state and federal law with the responsibility of regulating the business of insurance within their respective jurisdictions pursuant to the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011, *et seq*. ("McCarran-Ferguson Act"), and state insurance laws. The authority to regulate insurance issued in connection with employee welfare benefits plans is reserved to the states through the savings clause of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001(b), *et seq.* ("ERISA"). 29 U.S.C. § 1144(b)(2)(A).

The NAIC adopted the Prohibition on the Use of Discretionary Clauses Model Act ("Discretionary Clauses Model Act"), that bans discretionary clauses in health insurance and disability income protection

coverage. *See* 1 NAIC *Model Laws, Regulations and Guidelines*, 42-1 to 42-6 (2002, amended 2004); *see also* 2004 NAIC Proc. 3RD Qtr. P. 668, 2004 WL 3650374. The Executive Committee of the NAIC voted to file this *amicus* brief to emphasize the need for sound regulation and judicial review when the benefit payor makes its own determinations on benefit claims, and to confirm the power of state insurance commissioners to regulate in this area. By having the power to prohibit discretionary clauses in insurance policies, state insurance regulators assure that disputes concerning health insurance benefits and disability income protection coverage are resolved fairly, based on the evidence.

The NAIC endorses the brief of Defendant-Appellee John Morrison, Montana State Auditor, Commissioner of Insurance and Securities, and his legal arguments. We seek to aid the Court of Appeals by offering the legal position and public policy perspectives of our national association and NAIC member states.

II. SUMMARY OF ARGUMENT

The District Court correctly held that Commissioner Morrison had the power to disapprove the use of discretionary clauses found in insurance policies issued by Plaintiff-Appellant Standard Life Insurance Company ("Standard") under the authority of Mont. Code Ann. § 33-1-502(2). The arguments raised by Standard on appeal raise several issues that are of general and national concern to the membership of the NAIC:

1. The power of Commissioner Morrison (or any other NAIC member who chooses to exercise this authority) to disapprove discretionary clauses in insurance policies is not preempted under ERISA § 514(a), but rather is saved from preemption under the test enumerated in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329 (2003), because Commissioner Morrison's actions are (a) specifically directed at insurance companies, and (b) substantially affect the risk pooling between the insurer and the insured.

2. Commissioner Morrison's disapproval of discretionary clauses is not preempted under ERISA § 502(a), because discretionary clauses are clearly not civil enforcement remedies protected under ERISA.

3. The intent of Commissioner Morrison's actions and of the NAIC's in approving the Discretionary Clauses Model Act is that the reasonable expectations of the insurance consumer must be protected under an objective, contract-based standard for claims, which falls under the duties and powers of state insurance commissioners.

4. The 2004 NAIC Multistate Market Conduct Examination conducted with respect to disability claims handled by UnumProvident Corporation ("Unum"), in which Unum agreed to a $140 million settlement and a $15 million penalty, is an example of what can occur when an insurance company takes advantage of ERISA preemption to use discretionary clauses as a shield for the nonpayment of claims.

III. ARGUMENT

A. INTRODUCTION

States have been regulating the business of insurance since 1851, when New Hampshire became the first state to establish a department of insurance. *See* www.nh.gov/insurance/aboutus/index.htm (last visited Aug. 25, 2008). In enacting the McCarran-Ferguson Act in 1945, Congress affirmed the primacy of the states in the regulation of the business of insurance. Insurance Commissioners oversee the affairs of the insurance industry and are charged with regulating the business of insurance. "The insurance commissioner's powers are extensive and include the power to grant, revoke, renew, or suspend licenses, to regulate insurance rates, **and to prescribe the form, terms, and conditions of an insurance policy.**" Eileen Swarbrick, HOLMES' APPLEMAN ON INS. 2d, Chapt. 170 (2005) (emphasis added).

The case before the Court arises from the valid exercise by Commissioner Morrison of his power to prescribe the form, terms and conditions of an insurance policy; i.e., to mandate the disapproval of discretionary clauses in policies of insurance issued in Montana. A "discretionary clause" is defined under Section 4 of the NAIC's Discretionary Clauses Model Act to mean a "provision purporting to reserve

discretion to the insurer to interpret the terms of the contract, or to provide standards of interpretation or review that are inconsistent with the laws of this state." 1 NAIC *Model Laws, Regulations and Guidelines*, 42-1 to 42-6 (2002, amended 2004); *see also* 2004 NAIC Proc. 3RD Qtr. p. 668, 2004 WL 3650374. Commissioner Morrison disapproved the use of discretionary clauses found in Standard's insurance policies under the authority of Mont. Code Ann. § 33-1-502(2), which permits the commissioner to disapprove policies that contain inconsistent, ambiguous or misleading clauses or exceptions and conditions which deceptively affect the risk.

Standard makes the dual arguments that the exercise by Commissioner Morrison of his powers to disapprove discretionary clauses in insurance policies is preempted under ERISA, because (1) it impermissibly interferes with ERISA's civil enforcement scheme under ERISA § 502(a) (29 U.S.C. § 1132(a)); and (2) the exercise of this power by Commissioner Morrison is not saved from preemption under ERISA § 514(b)(2)(A) (29 U.S.C. § 1144(b)(2)(A)). It is the position of the NAIC that the power of Commissioner Morrison (or any other NAIC member who chooses to exercise this authority) to disapprove discretionary clauses in insurance policies is not preempted under ERISA, but rather is saved from preemption under the test enumerated in *Kentucky Ass'n of Health Plans, Inc. v. Miller*,

538 U.S. 329 (2003), because Commissioner Morrison's actions are (1) specifically directed at insurance companies, and (2) they substantially affect the risk pooling between the insurer and the insured. It is further the NAIC's position that Standard's reliance on ERISA § 502(a) is misplaced, because discretionary clauses are clearly not civil enforcement remedies protected under the provisions of ERISA.

B. ERISA SAVINGS CLAUSE

ERISA sets the federal regulatory standard for health and disability benefit plans, and ERISA § 514(a) provides that it "shall supercede any and all [s]tate laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). ERISA also contains a "savings clause" under ERISA § 514(b)(2)(A), stating that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any [s]tate which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The fundamental purpose behind ERISA's savings clause is to respect state sovereignty in insurance regulation. *See Stone v. Disability Mgmt. Servs., Inc.*, 288 F. Supp. 2d 684, 695-96 (M.D. Pa. 2003). Accordingly, Commissioner Morrison's disapproval of discretionary clauses under Mont. Code Ann. § 33-1-502(2) is saved from preemption because it constitutes a law that regulates insurance.

In *Kentucky Ass'n*, the Supreme Court clarified the appropriate test for determining whether a state statute regulates insurance for ERISA purposes. Specifically, the Court held "that for a state law to be deemed a 'law . . . which regulates insurance' under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance," and second, "the state law must substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n*, 538 U.S. at 341-42.

Although Standard makes a misguided attempt to argue otherwise, it cannot be seriously contended that Commissioner Morrison's actions are not specifically directed to the insurance industry, meeting the first part of this test. Therefore, the relevant question is whether the disapproval of discretionary clauses substantially affects the risk pooling arrangement between the insurer and the insured. The Court in *Kentucky Ass'n* determined that Kentucky's "Any Willing Provider" statute, prohibiting health benefit plans from discriminating against providers who were willing to meet participation requirements, "substantially affect[ed] the type of risk pooling arrangements that insurers may offer." *Id.* at 339. A state law need not actually spread the risk to substantially affect the risk pooling arrangement between the insurer and the insured; a state law that "dictates to

the insurance company the conditions under which it must pay for the risk that it has assumed . . . certainly qualifies as a substantial effect on the risk pooling arrangement between the insurer and the insured." *Id.* at 339 n.3.

Despite Standard's arguments to the contrary, it is apparent that Commissioner Morrison's disapproval of discretionary clauses in insurance policies affects the risk pooling arrangement. The disapprovals of discretionary clauses in insurance policies '"substantially affect the risk pooling arrangement between the insurer and insured' because they 'alter the scope of permissible bargains between insurers and insureds' by prescribing a term to which they may not agree." *Am. Counc. of Life Ins. v. Watters*, 536 F. Supp. 2d 811, 823 (W.D. Mich. 2008) (quoting *Kentucky Ass'n,* 538 U.S. at 338-39 & n.3).

Standard argues that a state law only has a substantial effect on a risk pooling arrangement if the law impacts the relationship between the insurer and the insured regarding the substance of the contract (i.e., benefits), and not if the law's only impact is on the court's legal analysis after a claim is denied. However, a ban on all discretionary clauses does not only affect judicial review. Prohibiting insurers from including discretionary clauses in policies "alter[s] the scope of permissible bargains between insurers and insureds." *Kentucky Ass'n*, 538 U.S. 338-39. A state administrative policy

stripping insurers of their discretion to make benefit determinations and policy interpretations effectively "dictates to the insurance company the conditions under which it must pay for the risk that it has assumed." *Id.* at 339 n.3. This was made clear in the recent Supreme Court decision in *Metro. Life Ins. Co. v. Glenn,* 128 S. Ct. 2343 (2008), in which the Court held that a discretionary clause causes an inherent conflict of interest for an insurance company. In finding this conflict, the Court also confirmed that such discretionary clauses may substantially affect the risk pooling arrangement:

> Conceding these differences, we nonetheless continue to believe that for ERISA purposes a conflict exists. For one thing, the employer's own conflict may extend to its selection of an insurance company to administer its plan. **An employer choosing an administrator in effect buys insurance for others and consequently (when compared to the marketplace customer who buys for himself) may be more interested in an insurance company with low rates than in one with accurate claims processing.**

Id. at 2349-50 (emphasis added).

C. ERISA § 502(a) PREEMPTION

Standard's reliance on ERISA § 502(a) to claim preemption of Commissioner Morrison's disapproval of discretionary clauses in insurance policies is similarly misplaced. Standard argues that under the Supreme Court's holding in *Aetna Health Inc. v. Davila,* 542 U.S. 200 (2004), the

extraordinary preemptive force of ERISA § 502(a) is not subject to ERISA's Savings Clause, which cannot save a state law that conflicts with ERISA's remedial scheme. The Court in *Davila*, 542 U.S. at 208-09, citing to its decision in *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987), discussed the scope of ERISA § 502(a) preemption:

> [T]he detailed provisions of §502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. **"The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly**."

Davila, 542 U.S. at 208-09 (emphasis added).

Unfortunately, in its brief Standard neglected to cite to the actual provisions of ERISA § 502(a). If it had, it would have been quickly apparent that discretionary clauses are not part of the comprehensive civil enforcement scheme of ERISA, are not remedial in nature, and do not provide for a separate cause of action recognized under ERISA. As the District Court in this case stated, the *Davila* case addresses ERISA's preemptive force in terms of *remedies*, which are a distinct and different area

of the law, while Commissioner Morrison's disapproval of discretionary clauses does not implicate ERISA's enforcement scheme at all, and is no different from the types of substantive state regulation of insurance contracts that the Supreme Court has permitted in the past. To emphasize this point, this Court should consider the exact provisions of ERISA § 502(a), as currently codified under 29 U.S.C. § 1132(a):

> Civil enforcement (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;
>
> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other

> appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;
>
> (6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), (6), or (7) of subsection (c) of this section or under subsection (i) or (l) of this section;
>
> (7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);
>
> (8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or
>
> (9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan . . . .

As is readily apparent, ERISA § 502(a) does not reference discretionary clauses or their impact, because discretionary clauses are not a remedy or enforcement scheme under ERISA. Therefore, Commissioner Morrison's disapproval under Montana state law of the discretionary clauses found in Standard's policies cannot be preempted under ERISA § 502(a).

D. Discretionary Clauses Model Act

Standard has charged that Commissioner Morrison's "ban is aimed at a perceived problem that is unique to ERISA cases" and that his exclusive intention is one of affecting the federal courts' handling of claims seeking a

remedy for the denial of ERISA benefits. Standard also implies that this is the motivation of the NAIC. Standard incorrectly confuses a cause with an effect in this argument: the intent of both Commissioner Morrison's and the NAIC's actions with respect to discretionary clauses is that the reasonable expectations of the insurance consumer must be protected under an objective, contract-based standard for claims, which squarely falls under the duties and powers of state insurance commissioners. This applies equally to both ERISA and non-ERISA insurance policies.

This intent is also consistent with the Montana law upon which Commissioner Morrison relied to disapprove discretionary clauses, Mont. Code Ann. § 33-1-502(2), which provides that Montana's Insurance Commissioner shall disapprove policy forms that contain "any inconsistent, ambiguous, or misleading clauses . . . which deceptively affect the risk purported to be assumed in the general coverage of the contract." Montana's statute is uniformly consistent with the powers granted to the insurance commissioner in most other NAIC member jurisdictions, as is demonstrated in the fairness provision of the Individual Term Life Insurance Policy Standards published and adopted by the Interstate Insurance Product

Regulation Commission ("IIPRC") on June 1, 2007.[1] This standard is applicable to products filed with the IIPRC for sale in up to 32 member jurisdictions.

The NAIC originally passed the Discretionary Clauses Model Act in 2002 prohibiting the use of discretionary clauses in health insurance policies. *See* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 4, 12-13 (2002); *see also* 2002 NAIC Proc. 1ST Qtr. p. 7, 2002 WL 32591532. Among the reasons cited were that the NAIC membership believed that discretionary clauses in insurance contracts are considered to be inequitable, deceptive and misleading to consumers. *See* 2 Proc. of the Nat'l Ass'n of Ins. Comm'rs 17 (2002); *see also* 2002 NAIC Proc. 2ND Qtr. p. 10, 2002 WL 3270063 (noting issues in technical amendment and project history).

In 2004 the NAIC extended this prohibition to disability insurance. *See* 4 Proc. of the Nat'l Ass'n of Ins. Comm'rs 57 (2004); *see also* 2004 NAIC Proc. 4TH Qtr. p. 56, 2004 WL 3671315. Currently 12 states (California, Colorado, Hawaii, Illinois, Indiana, Michigan, Maine, Montana, New Jersey, New York, Oregon and Utah) have adopted some type of prohibition against discretionary clauses in either health (sometimes called

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1 *Available* *at* www.insurancecompact.org/rulemaking_records/record_stnd_indiv_term_life_ins_policy_stds.pdf (last visited Aug. 25, 2008).

"disability" or "accident and sickness" coverage in insurance codes) or disability income insurance policies.[2]

The NAIC's members develop model laws and regulations to serve as standards for the promulgation of insurance laws and regulations in individual states. Consistent with its mission, the NAIC helps its members and their respective insurance departments explain the function and significance of NAIC model laws and regulations to legislatures, courts, other divisions of the executive branch, industry, consumers and the general

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2 *See* COLO. REV. STAT. § 10-3-116(2) (effective Aug. 5, 2008); ME. REV. STAT. ANN. tit. 24-A § 4303 (1995); ILL. ADMIN. CODE tit. 50, § 2001.3 (2005); MICH. ADMIN. CODE r. 500.2201-2202 (2007); N.J. ADMIN. CODE § 11:4-58 (2007); UTAH ADMIN. CODE r. 590-218 (2003); *Am. Counc. of Life Ins. v. Watters*, 2008 WL 541654 (W.D. Mich. 2008); *Standard Ins. Co. v. Morrison,* 2008 WL 510043 (D. Mont. 2008); Notice, Cal. Dep't of Ins., Notice to Withdraw Approval and Order for Information (Feb. 27, 2004), *available at* www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Notice-February-27-2004.pdf (last visited Aug. 26, 2008); Commissioner's Memorandum 2004-13H from the Hawaii Dep't of Ins. On Discretionary Clauses in HMSA's Agreement for Group Health Plan and Guide to Benefits (Dec. 8, 2004), *available at* www.hawaii.gov/dcca/areas/ins/commissioners_memo/Commissioners_Memorandum_2004 (last visited Aug. 26, 2008); Bulletin 103 - Full and Final Discretion Clauses in Group Health Contracts (Ind. Dep't of Ins. June 8, 2001), *available at* www.ins.state.ny.us/circltr/2006/c106_14.htm (last visited Aug. 28, 2008); Circular Letter No. 14 (State of N.Y. Ins. Dep't June 29, 2006), *available at* www.ins.state.ny.us/circltr/2006/c106_14.htm (last visited Aug. 28, 2008); Standard Provisions for Long and Short Term Disability Group or Individual (Or. Ins. Div. Apr. 5, 2005), *available at* www.oregoninsurance.org/docs/serff/2447.pdf (last visited Aug. 26, 2008).

public. The public policy behind the NAIC's Discretionary Clauses Model Act is clearly stated in *Section 2. Purpose and Intent*:

> The purpose of this Act is to assure that health insurance benefits and disability income protection coverage are contractually guaranteed, and to avoid the conflict of interest that occurs when the carrier responsible for providing benefits has discretionary authority to decide what benefits are due. Nothing in this Act shall be construed as imposing any requirement or duty on any person other than a health carrier or insurer that offers disability income protection coverage.

1 NAIC *Model Laws, Regulations and Guidelines*, 42-1 to 42-6 (2002, amended 2004); *see also* 2004 NAIC Proc. 3RD Qtr. p. 668, 2004 WL 3650374.

The U.S. Congress charged state insurance commissioners with great responsibility in enacting the McCarran-Ferguson Act by reserving to the states the authority to regulate the business of insurance. 15 U.S.C. § 1012(b). NAIC members have acted accordingly in adopting the Discretionary Clauses Model Act, which seeks to protect the reasonable expectation of insurance consumers by permitting insurance commissioners to disapprove the use of discretionary clauses in insurance policies. This Court should give due deference to the collective experience of the members of the NAIC who are entrusted to regulate insurance coverage.

E. MULTISTATE MARKET CONDUCT EXAMINATION

Commissioner Morrison and the other state insurance commissioners who make up the membership of the NAIC are charged with the responsibility to protect the fair and equitable treatment of insurance consumers in their states. The NAIC has a rich history and tradition of consumer protection and, as the primary regulators of insurance, the commissioners are in the best position to understand and evaluate the risks that are associated with insurance transactions and take appropriate actions to mitigate against these dangers. In order for this Court to gain a better understanding of the risks to consumers that are associated with the use of discretionary clauses, the NAIC would like to share the findings of the Report of the Targeted Multistate Disability Income Market Conduct Examination (Feb. 29, 2004) ("Unum Multistate Examination Report").[3]

Unum/Provident Corporation ("Unum"), the largest disability insurance company in the United States, had been the target of nearly 3,000 lawsuits, in addition to a 2002 class action suit alleging that Unum was unfairly and deliberately denying disability claims. Many federal courts have commented on Unum's aggressive claims denial practices during this

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[3] *Available at* www.maine.gov/pfr/insurance/unum/Unum_Multistate_ExamReport.htm (last visited Aug. 26, 2008).

time, speaking about Unum's selective review of the administrative record, lack of objectivity, abuse of discretion, misuse of ambiguous test results, and claims evaluation practices that defied common sense and bordered on outright fraud. *See* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA,* 101 NW.U. L. REV. 1315, 1320 (Spring 2007).

NAIC member states conducted a multistate market conduct examination focusing on Unum claims practices starting in 2003. In November 2004, Unum (without admitting, denying or conceding any actual or potential fault) signed an agreement with the insurance commissioners of Massachusetts, Maine, and Tennessee in which Unum settled allegations related to systematic irregularities found in its claim handling practices for both individual and group disability claims. *See supra* Unum Multistate Examination Report at Paragraph C.12.

Forty-seven other states and the District of Columbia joined the three lead states. The U.S. Department of Labor, which conducted a related investigation of Unum's practices involving employee benefit plans covered by ERISA, was also a party to the settlement, and New York's Attorney General also endorsed the settlement. *See* Joint Press Release, Multi-State

Settlement Addresses Concerns Regarding Unum-Provident Claims Handling (Nov. 18, 2004) ("Multistate Settlement Announcement").[4]

The Unum Multistate Examination Report, which was issued after Unum had lost several high-profile disability claim cases, included a $140 million settlement and a $15 million fine against Unum. California, which settled separately with Unum, imposed an additional $8 million civil penalty. California Settlement Agreement, File No. DISP05045984.[5] The Multistate Settlement Announcement identified several claims handling practices of concern to state regulators:

- Excessive reliance on in-house medical staff to support the denial, termination, or reduction of benefits;
- Unfair evaluation and interpretation of attending physician or independent medical examiner reports;
- Failure to evaluate the totality of the claimant's medical condition; and
- An inappropriate burden placed on claimants to justify eligibility for benefits.

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[4] *Available at* www.state.tn.us/commerce/pdf/press/prsRls111804.pdf (last visited Aug. 26, 2008).

[5] *Available at* http://www.secinfo.com/d14D5a.z5UXk.d.htm#1stPage (last visited Aug. 26, 2008).

As part of the Claim Reassessment Process, the Unum Multistate Examination Report required that Unum form a new Claim Reassessment Unit for the purpose of providing a "de novo" review of claims previously denied or terminated pursuant to a review procedure approved by the Lead Regulators. As part of the California Settlement Agreement, Unum was ordered to discontinue use of a provision that has the effect of conferring unlimited discretion on Unum or other plan administrators to interpret policy language, or requires an "abuse of discretion" standard of review if a lawsuit ensues unless the reviewing court determines otherwise ("discretionary authority provision") in any California contract.

The Unum Multistate Examination Report has been referred to as one of the most significant multistate insurance regulator actions in NAIC history,[6] and it stands as a startling example of what can occur when an insurance company takes advantage of ERISA and uses discretionary clauses as a shield to protect the nonpayment of legitimate claims. In the course of discovery proceedings against Unum, an internal memorandum written by a Unum executive was uncovered illustrating this point:

> A [company] task force has recently been established to promote the identification of [disability] policies covered by

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[6] *See* Multistate Settlement Announcement, quoting then Maine Insurance Superintendent Alessandro Iuppa.

> ERISA and to initiate active measures to get new and existing policies covered by ERISA. The advantages of ERISA coverage in litigious situations are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, **and claims administrators may receive a deferential standard of review.** The economic impact on [company] from having policies covered by ERISA could be significant. As an example, [a company employee] identified 12 claim situations where we settled for $ 7.8 million in the aggregate. If these 12 cases had been covered by ERISA, our liability would have been between zero and $ 0.5 million.
>
> In order to take advantage of ERISA protection, we need to be diligent and thorough in determining whether a policy is covered. **[While] our objective is to pay all valid claims and deny invalid claims, there are gray areas, and ERISA applicability may influence our course of action.**

Mark D. DeBofsky, *Disability Insurance Under the ERISA Law: Economic Security or Litigation Nightmare,* 25 J. Ins. Reg. 33, 37-38 (Spring 2007) (emphasis added).

Please note that the NAIC is not alleging or implying that Standard has been engaged in the same type of inappropriate claim practices as were found against Unum, nor are we making a general statement that these practices are common in the insurance industry. However, Unum's conduct demonstrates what could happen if regulation of discretionary clauses by Commissioner Morrison and the NAIC membership is found to be preempted under ERISA.

IV. CONCLUSION

The NAIC requests that this Court uphold the decision of the District Court and affirm that Commissioner Morrison has the power to disapprove the use of discretionary clauses found in insurance policies issued by Standard under the authority of Mont. Code Ann. § 33-1-502(2). Further, the NAIC requests that this Court affirmatively find that the power to disapprove the use of discretionary clauses is not preempted under either ERISA §§ 502(a) or 514(a), but instead is saved from preemption under ERISA § 514(b)(2)(A). Finally, we request that this Court acknowledge and confirm the NAIC's interest in protecting the reasonable expectations of insurance consumers under the Discretionary Clauses Model Act by affirming the decision of the District Court.

Respectfully Submitted,

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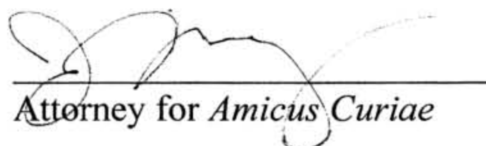
CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 08-35246

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, this *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

August 28, 2008
Date



Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I certify that on this 28TH day of August, 2008, two true and correct copies of the foregoing Brief of *Amicus Curiae* National Association of Insurance Commissioners in Support of Appellee was served by overnight mail to the following:

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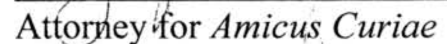

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