No. 17-17395

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDY RUDEL, et al.,
Petitioner-Appellee-Cross-Appellant

v.

HAWAII MANAGEMENT ALLIANCE ASSOCIATION,
Respondent-Appellant-Cross-Appellee

Appeal from the United States District Court
for the District of Hawaii
Case No. 1:15-CV-00539-JMS-RLP

BRIEF OF R. ALEXANDER ACOSTA, SECRETARY OF LABOR, AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY AND REQUESTING AFFIRMANCE

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STATEMENT OF THE ISSUES

Plaintiff Randy Rudel suffered serious injuries in a traffic accident and received medical benefits from his health plan, which is covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et. seq. Rudel sued the driver and settled with the driver's liability insurance carrier. Defendant Hawaii Medical Assurance Association (HMAA), the insurer and a fiduciary of Rudel's health plan, placed a lien on Rudel's settlement proceeds to recoup the medical benefits it paid to Rudel, relying on a provision in the plan. Rudel then sued HMAA in state court to invalidate the lien on the grounds that the plan's recoupment provision violated the Hawaii insurance law that limited HMAA's right to recoupment. HMAA removed the case to federal court and asserted that the Hawaii insurance law was expressly preempted by ERISA section 514(a), 29 U.S.C. § 1144(a). The questions presented are:

1. Whether the district court had jurisdiction because Rudel's state claim was completely preempted by ERISA section 502(a), 29 U.S.C. § 1132(a), as a claim that could be brought under ERISA to obtain benefits under the plan and did not arise from any independent state law duty.

2. Whether the Hawaii insurance law that limits HMAA's right to recoup benefits is exempt from express preemption under ERISA section 514(a), 29 U.S.C. § 1144(a), because it is saved from express preemption by ERISA section

514(b), 29 U.S.C. § 1144(b), as a law that regulates insurance, and thus provides the rule of decision for Rudel's benefit claim.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Secretary of Labor has primary authority to enforce the provisions of Title I of ERISA. 29 U.S.C. §§ 1132, 1135. The Secretary has an interest in both questions posed by this appeal. The first question implicates the Secretary's interest in ensuring that claims to enforce ERISA plan terms are brought under ERISA's enforcement regime in section 502(a), 29 U.S.C. § 1132(a), as federal claims, not state claims, and his interest in ensuring state claims do not conflict with ERISA's exclusive section 502(a) enforcement regime.

The second question implicates the Secretary's interest in appropriately delineating the state and federal regulatory spheres for insurers by ensuring that courts give effect to state insurance laws that are expressly saved from ERISA preemption under ERISA section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). To do otherwise would permit ERISA to improperly displace state insurance laws in areas that the Secretary does not regulate.

The Secretary files this brief as amicus curiae under the Federal Rule of Appellate Procedure 29(a). The parties are cross-appealing the district court's decisions. The Secretary agrees with the district court's resolution of the questions presented and supports affirmance of the court's decisions.

STATEMENT OF THE CASE

I. Facts

Plaintiff Randy Rudel ("Rudel") crashed his motorcycle into a vehicle whose driver made an illegal left turn in front of him. Rudel v. Hawaii Mgmt. All. Ass'n, No. CV 15-00539 JMS-RLP, 2017 WL 4969331, at *1 (D. Haw. Oct. 31, 2017). Rudel received $400,779.70 in health-insurance benefits to cover his medical expenses from his HMAA-insured health plan ("the Plan"), a plan governed by ERISA. Id. HMAA is a "Mutual Benefit Society" that provides employers "health benefits plan[s]" with "insurance benefits, including medical care, treatment, and services for injuries" Id. n.1.

Rudel sued the driver and received a $1.5 million settlement for his tort claim. Rudel, 2017 WL 4969331, at *1. The settlement agreement declared that the settlement amount was for Rudel's "general damages" only and did not "duplicate" his "medical payments."[1] Id.

HMAA claimed a $400,779.70 lien against Rudel's settlement proceeds, relying on the Plan's reimbursement provision. Rudel, 2017 WL 4969331, at *1.

[1] The agreement states as follows:

> The consideration paid herein constitutes general damages incurred on the account of personal injury or sickness and/or emotional distress resulting therefrom . . . and does not duplicate medical payments . . . or other special damages previously received by Randy Rudel.

Rudel, 2017 WL 4969331, at *1.

The Plan's Summary Plan Description ("SPD") states that HMAA has a lien on recoveries received by insured plan participants from third parties in the amount of medical benefits HMAA paid, even if the settlement agreement explicitly states that the recovery includes "general damages only" or does not specifically state it includes medical expenses.[2] Id. at *4. Rudel declined to reimburse HMAA from his settlement proceeds, contending that the Plan's reimbursement provision violates Hawaii law. Id. at *1.

The Hawaii Insurance Code prohibits an insurer from denying or limiting an insured's coverage when an insured receives a third-party settlement, unless the

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[2] The SPD stated:

> [HMAA] shall have a right to be reimbursed for any benefits we provide, from any recovery received from or on behalf of any third party or other source of recovery in connection with the injury or illness, including, but not limited to, proceeds from any:
>
> • Settlement, judgment, or award;
> • Motor vehicle insurance including liability insurance or your underinsured or uninsured motorist coverage;
> . . .
>
> We shall have a first lien on such recovery proceeds, up to the amount of total benefits we pay or have paid related to the injury or illness. You must reimburse us for any benefits paid, even if the recovery proceeds obtained (by settlement, judgment, award, insurance proceeds, or other payment):
>
> • Do not specifically include medical expenses;
> • Are stated to be for general damages only.

Rudel, 2017 WL 4969331, at *4-*5 (emphasis added).

recovery included "special damages" to cover health-insurance payments or benefits. Hawaii Revised Statutes ("HRS") §§ 431:13-103(a)(10) & 663-10.[3] This provision is a type of statute called an "antisubrogation law" because it limits the insurer's right to "subrogate" the insured's right to the settlement funds to recover the amount the insurer paid in benefits. The Supreme Court of Hawaii recently

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[3] The Hawaii Insurance Code, subject to certain exceptions, defines "unfair methods of competition and unfair or deceptive acts or practices in the business of insurance" as including the following:

> (10) Refusing to provide or limiting coverage available to an individual because the individual may have a third-party claim for recovery of damages; provided that:
>
> (A) Where damages are recovered by judgment or settlement of a third-party claim, reimbursement of past benefits paid shall be allowed pursuant to section 663-10; . . .

HRS Section 431:13-103(a) (emphasis added). In turn, HRS Section 663-10, entitled "Collateral sources; protection for liens and rights of subrogation," provides:

> (a) In any civil action in tort, the court . . . shall determine the validity of any claim of a lien against the amount of the judgment or settlement by any person . . . . The judgment entered, or the order subsequent to settlement, shall include a statement of the amounts, if any, due and owing to any person determined by the court to be a holder of a valid lien and to be paid to the lienholder out of the amount of the corresponding special damages recovered by the judgment or settlement . . . . As used in this section, lien means a lien arising out of a claim for payments made or indemnified from collateral sources, including health insurance or benefits, for costs and expenses arising out of the injury which is the subject of the civil action in tort.

HRS § 663-10 (emphases added).

confirmed that this provision applies to liens from health insurers and limits their rights to reimbursement in all health insurance contracts. Yukumoto v. Tawarahara, 140 Haw. 285, 295-96, 298 (Haw. 2017). The statute "did not provide that the lienholder may be reimbursed from an insured's recovery of general damages which . . . are difficult to determine exactly." Id. at 295. Instead, "[t]he legislation allowed for collateral sources to be reimbursed when special damages recovered in a judgment or settlement duplicated the amounts they had paid." Id. Thus, health insurers like HMAA can only assert liens on recoveries with special damages that duplicate the amounts the insurer paid, but health insurers can never be reimbursed from general damages. The parties do not dispute HMAA's lien is based on a Plan provision that violates Hawaii law. Rudel, 2017 WL 4969331, at *7; see Stipulation and Order Regarding Duplication of Benefits Under Haw. Rev. Stat. § 633-10 at 2-3, Rudel v. Hawaii Mgmt. All. Ass'n, No. CV 15-00539 (D. Haw. Nov. 21, 2017).

II. Procedural History

Rudel filed a state law claim in state court, seeking a declaration that HMAA's lien is invalid under Hawaii law. Rudel v. Hawaii Mgmt. All. Ass'n, No. CV 15-00539 JMS-BMK, 2016 WL 4083320, at *1 (D. Haw. Mar. 31, 2016). HMAA removed Rudel's claim to federal court, and Rudel moved to remand it to state court. Id.

The district court denied Rudel's motion to remand, finding it had federal-question jurisdiction over his claim because it was "completely preempted" by ERISA's enforcement provision, section 502(a). Rudel, 2016 WL 4083320, at *1. The court applied the two-prong test, adopted by Aetna v. Davila, 542 U.S. 200 (2004), for determining when ERISA section 502(a) completely preempts a state law claim, transforming it into a federal claim over which the district court has jurisdiction. Rudel, 2016 WL 4083320, at *2. Under that test, ERISA section 502(a) completely preempts a state law claim where: (1) the individual could "have brought the claim under [ERISA section 502(a)]," and (2) "there is no other independent legal duty that is implicated by a defendant's actions." Davila, 542 U.S. at 210.

First, the district judge held that Rudel's claim could have been brought pursuant to ERISA section 502(a)(1)(B) to "enforce his rights under the terms of the plan" or "to recover benefits due to him under the terms of his plan," reasoning that "although the benefits have already been paid, Rudel has not fully recovered them because he has not obtained the benefits free and clear of HMAA's claims." Rudel, 2016 WL 4083320, at *2. His claim essentially seeks to "establish his entitlement to ERISA benefits." Id. (internal quotation marks and brackets omitted).

Second, the court held HMAA's actions did not implicate any other independent legal duty, because the relevant statutory provisions did not impose any legal duty on HMAA. Rudel, 2016 WL 4083320, at *3. Rather, the court found that HRS section 431:13-103(a)(10)(A) is permissive and "allow[s]" but does not require "reimbursement of past benefits paid." Id. The provisions also do not impose any liability on HMAA. Id. Finding that Rudel's claim satisfied both of Davila's prongs, the court held that Rudel's claim was completely preempted, thereby conferring the court with jurisdiction because his claim would now be treated as a claim under ERISA section 502(a). Id. at *4.

The parties then filed cross-motions on the merits of Rudel's claim. Rudel moved for a determination that HMAA's asserted lien was invalid under Hawaii law, and HMAA filed a cross-motion for summary judgment, arguing the Hawaii law is expressly preempted under ERISA section 514. Rudel, 2017 WL 4969331, at *1. The district court ruled that because Hawaii's antisubrogation law regulates insurance, it is exempt from ERISA section 514 preemption under ERISA's insurance savings clause in section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). Id. at *10. Once saved from ERISA section 514 preemption, the Hawaii law acts as the rule of decision for the ERISA claim. Id. The court further concluded that the insurance law did not run afoul of section 502(a)'s exclusive remedial scheme because it provided "'no new cause of action . . . and authorize[d] no new form of

ultimate relief.'" Id. (quoting Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002)). Rather, the Hawaii law operated "simply to define the scope of a benefit provided" to HMAA-insured members and provided members no additional remedy outside of ERISA. Id. at *9. HMAA conceded the lien was invalid under Hawaii law if that law is not preempted, so the district court issued a final judgment declaring the lien unenforceable. J. In A Civil Case, Rudel v. Hawaii Mgmt. All. Ass'n, No. CV 15-00539 JMS-BMK, at 1 (D. Haw. Nov. 21, 2017).

SUMMARY OF THE ARGUMENT

1. The district court correctly held that ERISA section 502(a) completely preempted Rudel's claim because he could have brought it as a claim for benefits under ERISA and it does not arise from any independent state law duty imposed on HMAA. See Aetna v. Davila, 542 U.S. 200 (2004). Rudel's claim seeks to retain benefits that HMAA paid him and to defeat HMAA's efforts to recoup those benefits. Essentially, he claims that his benefits paid under the plan should be free and clear of HMAA's competing claims on those benefits. Rudel's claim does not rely on any independent legal duties imposed on HMAA by Hawaii law, because the Hawaii antisubrogation law merely permits, but does not require, HMAA to seek reimbursement from a third-party settlement for special damages. Instead, HMAA attempts to recoup those benefits by relying on provisions in the Plan. As such, both prongs of Davila are met and the court correctly held Rudel's claim was

completely preempted by ERISA section 502(a), so the court had jurisdiction and his claim was properly treated as an ERISA claim.

2. The district court also correctly found that the Hawaii antisubrogation law is not expressly preempted by ERISA section 514. ERISA section 514(b)(2)(A) saves the Hawaii antisubrogation law from express preemption because the law regulates insurance and thus serves as the relevant rule of decision for Rudel's claim, now treated as an ERISA claim. See FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). The law is specifically directed at entities engaged in insurance because it is in the Hawaii Insurance Code and substantially affects the risk pooling arrangement between insurer and the insured by allocating the risk for paying medical expenses after a third-party settlement or judgment. Under Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999), state laws saved under ERISA section 514 become the "rule of decision" for related ERISA claims, effectively allowing the state law to serve as operative plan terms. Because HMAA conceded its lien on Rudel's settlement is invalid under Hawaii law, the district court properly invalidated the lien under Hawaii law.

ARGUMENT

ERISA has two preemption doctrines: "complete preemption" by ERISA section 502(a) and "express preemption" by section 514. Fossen v. Blue Cross & Blue Shield of Mont., Inc., 660 F.3d 1102, 1107-108 (9th Cir. 2011). This case

concerns both doctrines and their application to state antisubrogation laws that protect accident victims from their insurers' efforts to recoup benefits paid for related medical care from the victims' tort settlements. Three out of four circuit courts to reach the issue concluded that ERISA section 502(a) completely preempts state law claims filed pursuant to similar state antisubrogation laws, transforming them into ERISA claims over which federal courts have jurisdiction. Most courts also have concluded that antisubrogation laws are "saved" from express preemption by ERISA's savings clause for state insurance laws, which permits the law to act as the "rule of decision" for the ERISA claim. States thus retain the right to regulate the content of insurance policies, including subrogation provisions, so long as the state law creates no new cause of action nor provides remedies beyond those provided by ERISA.

I. ERISA Section 502(a) Completely Preempts Rudel's State Law Claim

A. Complete Preemption Under ERISA Section 502(a)

ERISA's complete preemption doctrine "confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim." Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581 F.3d 941, 945 (9th Cir. 2009). Specifically, ERISA section 502(a) completely preempts a state law claim where: (1) the individual could "have brought the claim under [ERISA section 502(a)]," and (2)

"there is no other independent legal duty that is implicated by a defendant's actions." Davila, 542 U.S. at 210. Effectively, complete preemption converts the state law claims into a federal cause of action. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 46-64 (1987).

B. A Majority of Circuits Hold That Similar Claims Filed Pursuant To State Antisubrogation Laws Are Completely Preempted By ERISA Section 502(a)

Three out of four circuits to reach the issue held that state law claims filed pursuant to similar state antisubrogation laws are completely preempted by ERISA section 502(a) in cases with the same material facts. In each, the plaintiff was injured and received medical treatment through an ERISA plan. After the plaintiff filed and settled a tort suit, the plaintiff's insurer placed a lien on the recovery, seeking reimbursement authorized by plan terms for the medical expenses the insurer paid. The plaintiffs then filed claims in state court to invalidate the lien pursuant to the state's antisubrogation laws that limit the insurers' ability to impose liens on general tort recoveries.

The Third, Fourth, and Fifth Circuits held that claims under such laws are completely preempted by ERISA section 502(a). See Singh v. Prudential Health Care Plan, Inc., 335 F.3d 278, 283 (4th Cir. 2003); Arana v. Ochsner Health Plan, 338 F.3d 433, 438 (5th Cir. 2003) (en banc); Levine v. United Healthcare Corp., 402 F.3d 156, 163 (3d Cir. 2005). Though these decisions did not address Davila,

the courts' analyses tracked Davila's requirements. Each court reasoned that section 502(a) completely preempted the claims because they were essentially claims for ERISA plan benefits, satisfying Davila's first prong, and the claim implicated no independent legal duty apart from the insurer's payment of benefits pursuant to the plan, satisfying Davila's second prong.

In Singh, the participant first paid the insurer's lien on his settlement and then sued the insurer to recover his payment. 335 F.3d at 281. The Fourth Circuit held that the state law claim

> to recover the portion of her benefit that was diminished by her payment to [the insurer] under the unlawful subrogation term of the plan [was] no less a claim for recovery of a plan benefit under § 502(a) than if she were seeking recovery of a plan benefit that was denied in the first instance.

335 F.3d at 291. The court reasoned that "ERISA's complete dominion over" benefit claims "is not affected by the fortuity of when a plan term was misapplied to diminish the benefit." Id. (emphasis added).

Similarly, the en banc Fifth Circuit in Arana viewed the claim as one for benefits because the participant's benefits "are under something of a cloud" when a plan asserts a lien on a settlement to offset those benefits. 338 F.3d at 438. "Although the benefits have already been paid, [the participant] has not fully 'recovered' them because he has not obtained the benefits free and clear of [defendant's] claims." Id.

In Levine, the Third Circuit agreed with both Singh and Arana and concluded the claim was "for benefits due" because it turned solely on the provisions of the ERISA-governed plans: whether the insurer had a right, granted by a plan term, to reimburse paid benefits from a settlement despite a state law otherwise limiting the recoupment of those benefits. 402 F.3d at 163. The Third Circuit reaffirmed Levine in Wirth v. Aetna U.S. Healthcare, 469 F.3d 305 (3rd Cir. 2006), concluding: "[h]ere as in Levine, the actions undertaken by the insurer resulted in diminished benefits provided to the plaintiff insureds." 469 F.3d at 309. State antisubrogation laws may factor into the analysis of plan terms that authorize the reimbursement of paid benefits, but the state laws did not alter the essence of the underlying claim as a claim for benefits under ERISA. Id. at 311.

The Second Circuit diverged with its sister circuits. Wurtz v. Rawlings Co., 761 F.3d 232, 236 (2d Cir. 2014). The court held that the participants' state law claim filed pursuant to the state antisubrogation law satisfied neither prong of Davila. Id. at 241. The court held that the first prong was not met because the participants did not seek benefits pursuant to plan terms but rather sought to protect their tort settlement under New York state law from their insurers' liens. Id. The court reasoned, "the terms of plaintiffs' ERISA plans are irrelevant to their claims." Id. at 242. The second prong was not met because the state law created the legal

duty – the protection of the settlement from the insurer's liens.[4] Id. at 243. That duty was "independent because it is unrelated to whatever plaintiffs' ERISA plans provide about reimbursement." Id. The Second Circuit recognized its decision diverged from the Third, Fourth, and Fifth Circuits but dismissed those decisions as contrary to Davila, stating they "would expand complete preemption to encompass state laws that regulate insurance." Id. at 244.

As discussed further below, Wurtz mistakenly diverged from the other circuits because it did not recognize that the dispute between the insurer and the plan participant over the lien was based solely on the validity or application of the plan's reimbursement provisions. Wurtz concluded that ERISA's complete preemption of such claims also foreclosed the application of state insurance laws. But, to the contrary, complete preemption only confers federal jurisdiction; it does not foreclose the application of state insurance laws as rules of decision when the court makes the merits determination of the validity of the plan's reimbursement provision, as long as those laws are saved from express preemption under ERISA section 514(a).[5]

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[4] The New York antisubrogation law states that payers of benefit claims have no "right of subrogation or reimbursement against any such settling party." Wurtz, 761 F.3d at 236 (citing N.Y. Gen. Oblig. Law § 5-335).

[5] Wurtz, 761 F.3d at 241, acknowledges that the New York antisubrogation law is exempt from ERISA preemption as a saved insurance law.

C. ERISA Section 502(a) Completely Preempts Rudel's State Law Claim

The district court examined the four circuit court decisions and properly concluded that Davila's two-prong test for complete preemption was met. Rudel, 2016 WL 4083320, at *1. The court concluded the first prong was met because Rudel's benefits were under "something of a cloud" and that his claim was really one to enforce his right to his plan benefits that could have been brought pursuant to ERISA section 502(a)(1)(B). Id. at *2 (citing Arana, 338 F.3d at 438). Though the court acknowledged that the Second Circuit reached a contrary opinion, it concluded that the reasoning in Wurtz "flouts the direction in Davila to examine the essence of a claim." Id.

The court also found that the second prong of Davila was met because the Hawaii law was permissive – it allowed but did not require insurers to recover benefits paid as long as certain conditions were met. Rudel, 2016 WL 4083320, at *3. The court concluded that even if the law did create a legal duty, it is dependent on ERISA because whether reimbursement was permitted requires a "threshold analysis of the benefits [defendant] provided pursuant to the plan" and not any independent legal duty. Id.

The court's analysis, which adopted the reasoning of the Third, Fourth, and Fifth Circuits, is correct. Tellingly, before Rudel filed his state law claim at issue, he brought suit pursuant to ERISA section 502(a) to compel HMAA to cover his

medical expenses without requiring Rudel to return any benefits to satisfy any future liens. Rudel, 2017 WL 4969331, at *1 n.2. In that suit, Rudel argued that HMAA refused to provide benefits unless he first signed a reimbursement agreement that would obligate him "to repay HMAA from any recovery [he] received" even if it did not "specifically include medical expenses" or was "described as general damages only," which violated Hawaii law. Id. Rudel dismissed the suit voluntarily upon HMAA's agreeing to provide benefits without requiring him to sign the reimbursement agreement. Id.

"ERISA's complete dominion over" benefit claims "is not affected by the fortuity of when a plan term was misapplied to diminish the benefit." See Singh, 335 F.3d at 291. It would make scant sense for ERISA to govern Rudel's original suit to obtain benefits but not govern his present suit to retain those benefits "because resolution in each case requires a court to determine entitlement to a benefit under the lawfully applied terms of an ERISA plan." Id. (emphasis omitted).

Importantly, the Supreme Court consistently treats similar disputes over the reimbursement of paid benefits pursuant to plan subrogation provisions as ERISA questions. See Montanile v. Bd. of Trs., 136 S.Ct. 651 (2016); Sereboff v. Mid Atl. Med. Servs., Inc., 547 U.S. 356, 363 (2006); Great–West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002). The only difference here is the presence of

a state insurance law that affects the claim payer's underlying subrogation right, but the presence of the state insurance law does not alter the essence of the underlying claim, which is to enforce the right to a benefit under ERISA section 502(a)(1)(B) free and clear of the insurers' liens. See, e.g., Filler v. Blue Cross of Cal., 593 F. App'x 685 (9th Cir. Feb. 13, 2015) (unpublished) ("The claims were premised on recovering money owed to Filler's patients under an ERISA benefits plan, and thus fell within the scope of ERISA § 502(a)."). The interpretation of state laws may bear on whether the plan's subrogation provisions are unenforceable. But that question arises in ruling on the merits of the section 502(a) benefit claim here, not on the jurisdictional question of whether the original state claim is completely preempted and, therefore transformed into a section 502(a) claim. See Cleghorn v. Blue Shield of Cal., 408 F.3d 1222, 1226-227 (9th Cir. 2005) (reserving the question about applying California insurance law to the merits of the completely preempted state law claim, now re-characterized as an ERISA claim).

The court also correctly held that Hawaii's antisubrogation law imposes no independent legal duty on insurers. Instead, it merely defines the insurers' rights to offset their obligation to pay benefits with future settlement funds based on the terms of their own policies. Courts consistently view an insurer's reliance on plan terms to offset promised benefits as part of the ERISA claims process and subject to section 502(a)(1)(B), not as an independent obligation. E.g., Standard Ins. Co.

v. Saklad, 127 F.3d 1179 (9th Cir. 1997); White v. Coca-Cola Co., 542 F.3d 848, 857 (11th Cir. 2008); Leonelli v. Pennwalt Corp., 887 F.2d 1195, 1198-199 (2d Cir. 1989). The district court thus properly denied Rudel's motion to remand and treated the case as if originally filed under ERISA section 502(a).

In response, HMAA argues Davila changes the analysis and cites to Wurtz for support. While true that Singh, Arana, and Levine do not address Davila, each case seeks to answer the same underlying question: is the state law claim, in essence, a claim for benefits under section 502(a)(1)(B)?[6] Wurtz erred by overlooking the underlying premise in these cases: the insurer relied on a plan provision to file a lien on the plaintiffs' ERISA-covered benefits. Had the plan not included a subrogation provision for its ERISA-covered benefits, the insurer has no right to a lien on those benefits. Ultimately, the plaintiffs' claims turn on the validity and interpretation of an ERISA plan provision granting the insurer an offset on benefits paid or promised by the plan. See Singh, 335 F.3d at 291; Arana, 338 F.3d at 438; Levine, 402 F.3d at 163. The Second Circuit acknowledged this argument but cursorily rejected it, stating "plaintiffs' claims are based on a state law that regulates insurance and are not based on the terms of the

[6] The Fifth Circuit relies on Arana for post-Davila claims. See Woods v. Texas Aggregates, L.L.C., 459 F.3d 600, 603 (5th Cir. 2006) (citing Arana, after Davila, to hold that section "502(a) operated to preempt state law claims despite the fact that the law in question may have been exempt from [section] 514(a) preemption as a law regulating insurance").

plans." Wurtz, 761 F.3d at 242. But again, this ignores that the obligation to pay benefits, or to repay an insurer for paid benefits, is inextricably intertwined with the interpretation of the plan's terms because the duty for both arises from the plan itself. The Second Circuit also raised concerns about the impact on state insurance laws if they are preempted, id. at 244, but those concerns conflate complete preemption of state law claims by section 502(a), which only affects the court's jurisdiction over claims filed pursuant to those laws, with the express preemption of state laws by section 514(a) which nullifies the state law and defeats those claims. The Second Circuit also erred when it analogized its decision to Marin General Hospital v. Modesto & Empire Traction Co., 581 F.3d 941 (9th Cir. 2009). Marin concerned a claim of promissory estoppel based solely on an oral contract between a hospital and insurer for the payment of out-of-network services. Id. at 943. The Ninth Circuit correctly held that Davila's second prong was not met because "the state-law claims asserted in this case are in no way based on an obligation under an ERISA plan, and since they would exist whether or not an ERISA plan existed, they are based on 'other independent legal duties.'" Id. at 950 (internal brackets omitted). Unlike the oral contract at issue in Marin that existed separate and apart from the participant's plan, Wurtz, Singh, Arana, and Levine all address the validity of a lien that existed only because the participant's plan contained a subrogation provision. The presence of a state law that may bear on

the scope or validity of that plan term does not change the character of the claim as an ERISA claim. E.g., Cleghorn, 408 F.3d at 1226-227.

II. Hawaii's Antisubrogation Law Is Not Preempted by ERISA Section 514(a) And Serves As The Rule of Decision

A. Hawaii's Antisubrogration Provision Is "Saved" From Express Preemption

ERISA section 514 expressly preempts any state law that "relate[s] to an employee benefit plan." ERISA section 514(a), 29 U.S.C. § 1144(a). This conspicuously expansive preemption clause is narrowed by the insurance savings clause in section 514(b)(2), which provides that state laws "regulat[ing] insurance" are exempt from preemption, "return[ing] to the States the power to enforce those state laws that 'regulate insurance.'" FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990) (quoting 29 U.S.C. § 1144(b)(2)(A)).[7] The parties agree that the Hawaii law "relates to" an employee benefit plan, but dispute whether the law regulates insurance and, therefore, is saved from ERISA's express preemption provision. Rudel, 2017 WL 4969331, at *11.

[7] ERISA, however, limits that state power through the "deemer clause." ERISA section 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). "Under the deemer clause, an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts." FMC Corp., 498 U.S. at 58. Because Rudel and his health plan are insured by HMAA, an insurance company, the "deemer clause" is inapplicable to HMAA. See UNUM Life, 526 U.S. at 367 n.2.

A law "regulates insurance" if it: (1) is "specifically directed toward entities engaged in insurance," and (2) "substantially affect[s] the risk pooling arrangement between the insurer and the insured." Kentucky v. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 342 (2003). This first prong is met if the law is "grounded in policy concerns specific to the insurance industry." Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No. 625, 856 F.3d 686, 693 (9th Cir. 2017).

The district court correctly concluded the first prong is met. As it recognized, the Hawaii Supreme Court provided an extensive analysis of HRS sections 431:13-103(a)(10) and 663-10 in Yukumoto, 140 Haw. at 291. There, the Hawaii Supreme Court found that Hawaii's legislature intended to prevent an injured person from receiving a windfall by barring recovery of damages from a tortfeasor for medical costs that an insurer already provided. Id. at 295. At the same time, the "legislature intended to limit a health insurer's right of subrogation" by limiting "the type of damages from which a lienholder may be reimbursed." Id. at 294.

Hawaii Insurance Code Section 431-103(a)(10) states: "[w]here damages are recovered by judgment of settlement of a third-party claim, reimbursement of past benefits paid shall be allowed pursuant to section 663-10." (emphasis added). Section 663-10 limits section 431-103(a)(10)'s right to reimbursement to "special

damages," i.e., damages that specifically cover medical costs. HRS § 663-10. Given its legislative history, HRS sections 431:13-103(a)(10) and 663-10 specifically regulate entities engaged in insurance because together they are grounded in policy specific to the insurance industry, namely, preventing plaintiffs from receiving windfalls while also regulating insurers' rights to reimbursement from third-party settlements and judgments.

The district court also correctly found that Hawaii's state law substantially affects the risk-pooling arrangement. Rudel, 2017 WL 4969331, at *12. Indeed, sections 431:13-103(a)(10) and 663-10 directly govern whether the insurer or insured bears risk for paying medical expenses where the insured obtained a recovery from a third-party. HRS §§ 431:13-103(a)(10) & 663-10. As such, the law "dictates to the insurance compan[ies] the conditions under which it must pay for the risk that it has assumed," and thus meets the second prong. Kentucky Ass'n of Health Plans, Inc., 538 U.S. at 339.

Supreme Court precedent supports the district court's holding. In FMC Corp., the Court explained that a Pennsylvania antisubrogation provision "directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain." 498 U.S. at 61 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740-41 (1985)). The Court noted that the law "does

not merely have an impact on the insurance industry; it is aimed at it." Id. (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 50 (1987)).

Like the Pennsylvania statute in FMC, the Hawaii statute regulates insurance under ERISA's saving clause. The law effectively prevents insurers from obtaining reimbursement, despite a plan document that permits subrogation where the beneficiary prevails in a tort action and obtains a recovery. By regulating the insurers' subrogation rights, the state law transfers a policyholder's risk (in this instance, back to HMAA), affects an integral part of the policy relationship between an insurer and insured, and is aimed principally at a practice of the insurance industry.[8]

On appeal, HMAA relies on the Third Circuit's decision in Levine. Appellant Br. at 36. Levine held that a state antisubrogation law did not regulate insurance because the law was "in the portion of New Jersey's statutes dealing with civil actions" and "govern[ed] [] all civil actions, not merely those involving insurance entities." 402 F.3d at 165. Here, however, there can be no doubt that the Hawaii laws regulate insurance as both are within the Hawaii Insurance Code itself

[8] The Court in FMC ultimately concluded that the Pennsylvania provision was not saved in that case, because the plan was self-funded, and thus "excluded from the reach of the saving clause by virtue of the deemer clause." 498 U.S. at 61. Nevertheless, on the general question of whether a state antisubrogation provision constitutes an insurance regulation, FMC Corporation is controlling and dictates that a state antisubrogation clause is saved under ERISA section 514(b)(2)(A) in its application to insured employee benefit plans.

and specifically govern who reimburses medical expenses covered by health insurance. Rudel, 2017 WL 4969331, at *2. This conclusion is bolstered by Singh, which held that the antisubrogation provision regulated insurance though it was in statutes governing HMOs, because the law "addresses who pays in a given set of circumstances and is therefore directed at spreading policyholder risk." Singh, 335 F.3d at 284-85. HRS sections 431:13-103(a)(10) and 663-10 undoubtedly regulate insurance.

HMAA also misconstrues ERISA's different preemption provisions. Appellant Br. at 40-44. Whether the state law is preempted under ERISA's express preemption provision is an inquiry separate and apart from the section 502(a) analysis of Rudel's claim. E.g., Cleghorn, 408 F.3d at 1226-227. Because section 502(a) completely preempted Rudel's claim, it proceeded as if originally filed as an ERISA section 502(a) action. Rather than ending Rudel's case, section 502(a) merely "confer[red] federal jurisdiction," Fossen, 660 F.3d at 1107, so the district court could then rule on the merits of Rudel's claim that Hawaii's antisubrogation law invalidates the HMAA lien, including his claim that the law is saved from express preemption under section 514(b)(2).[9]

[9] HMAA also claims that Coventry Health Care of Missouri, Inc. fka Group Health Plan, Inc. v. Nevils, 137 S. Ct. 1190 (2017) provides "useful guidance." Appellant Br. at 44 n.8. Nevils is inapplicable. Nevils does not address whether a state law is saved from ERISA's express preemption provision under ERISA section 514(b)(2)(A).

B. Hawaii's Antisubrogation Law Supplies The "Rule of Decision"

Generally, a state law expressly preempted by ERISA section 514 cannot apply to ERISA actions, and the ERISA plan terms govern. If, however, the law is saved from express preemption, the law may supply the operative terms for the ERISA claims under the "rule of decision" doctrine. Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 377 (1999). In Unum, the Court held that a California law prohibiting insurers from denying claims solely because the claim was untimely, unless the insurer can show it was prejudiced by the delayed claim, was a law that regulated insurance and was saved from preemption under ERISA section 514(b)(2)(A). 526 U.S. at 371. The Court then held that the "notice-prejudice rule supplied the relevant rule of decision" for the section 502(a) suit. Id. at 377. Effectively, state laws saved from preemption pursuant to section 514(b)(2)(A) supply the "terms of the plan" that govern a section 502(a) suit. Singh, 335 F.3d at 289. That is, "the State law merely operates to define benefits." Id.

HMAA argues that the Plan terms must apply because it is an ERISA plan, even if those terms conflict with HRS section 431:13-103(a), but the Supreme Court has long rejected this "contra plan term" argument. Unum, 526 U.S. at 375; Rush Prudential, 536 U.S. at 385 n.16 ("insurance regulation is not preempted merely because it conflicts with substantive plan terms"). Because HRS sections 431:13-103(a)(10) and 663-10 are saved from preemption by ERISA section

514(b), they became the "rule of decision" and the operative plan terms. As Unum reasoned, to enforce a plan term contrary to saved state insurance laws would leave states "powerless to alter the terms of the insurance relationship in ERISA plans." 526 U.S. at 37-77. Indeed, a contrary conclusion would "virtually read the savings clause out of ERISA." Id. at 376. Thus, the district court correctly rejected HMAA's argument that the Plan's terms control, regardless of section 514(b)'s savings clause. Rudel, 2017 WL 4969331, at *12. The saved Hawaii state law "operate[s] to define the benefits that may be enforced under [section] 502(a)." See Singh, 335 F.3d at 289.

C. The Hawaii Antisubrogation Law Is Not Preempted Under Davila Because It Does Not Provide Remedies Beyond Those Provided in ERISA

Even if a state law is saved from preemption under ERISA section 514, a claim under that law can still be preempted under section 502(a) to the extent the state law provides remedies beyond those explicitly provided in ERISA. Davila reaffirmed the Court's earlier recognition that "even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." 542 U.S. at 217-28. Preemption based on ERISA's limited remedial scheme is "a limited exception from the saving clause." Rush Prudential, 536 U.S. at 381.

HMAA argues that the court erred by permitting claims that "duplicate, supplement, and supplant ERISA's civil enforcement remedies" because section 663-10 provides "a new cause of action" to review what HMAA argues is a claim for benefits. Appellant Br. at 25-27. That is a red herring and belies the very cases HMAA relies upon which all found that state laws violate ERISA's exclusive remedial scheme only when the statute provides for additional remedies beyond those "certain remedies" that ERISA provides. Pilot Life, 481 U.S. at 43, 54 (preempting law that permitted compensatory and punitive damages); Metro. Life, 481 U.S. at 61-62 (preempting law that permitted compensation for mental anguish); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 136 (1990) (preempting law that permitted punitive damages and compensation for mental anguish); Elliot v. Fortis Benefits Inx. Co., 337 F.3d 1138, 1147 (9th Cir. 2003) (finding Maryland law preempted because it provided remedies, such as punitive damages, that were beyond those delineated in ERISA).

The Hawaii Insurance Code provides Rudel no additional, non-ERISA remedies, and Rudel seeks none. HRS § 431:13-103(a). Rather, the provision merely regulates when an insurer may recoup benefits it provided. Rudel, 2017 WL 4969331, at *10. While HRS section 663 does permit a settling party to bring suit to challenge the validity of any liens placed on the settlement, the suit is limited to "a determination of the validity and amount of any claim of a lien."

HRS § 663-10. As the district court correctly determined, this is no more than what ERISA section 502(a) already permits because such a suit is akin to an ERISA section 502(a)(1)(B) action seeking ERISA benefits or to "clarify [a participant's] rights to future benefits under the terms of the plan." Rudel, 2017 WL 4969331, at *6. Such a determination is far less than the independent medical review provided for by an Illinois statute, which did not run afoul of ERISA's remedial scheme because it imposed "no new obligation or remedy." Rush Prudential, 536 U.S. at 386. "Because . . . [Hawaii's] subrogation prohibition . . . does not supplement or supplant ERISA's exclusive remedies by creating a 'prohibited alternative remedy,' [id.], [] it remains 'saved.'" Singh, 335 F.3d at 289.

CONCLUSION

The Secretary respectfully requests the district court's decisions be affirmed.

Respectfully submitted,

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Dated: April 16, 2018

/s/ Kira Hettinger
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2018, true and correct copies of the foregoing - THE SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF DISTRICT COURT-were filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and served electronically via email to the Participants in the case who are registered CM/ECF users of the appellate CM/ECF system.

Dated: April 16, 2018

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