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"CONSUMER PROTECTION" AND ERISA[†]

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I. WHAT COMES TO MIND WHEN HEARING THE WORD "ERISA"?

Because of my work with ERISA reimbursement issues, I have had folks (including many law students) speak to me with some initial excitement about ERISA. They think this must be a fun and exciting area of the law. I would like to pose the initial question, "What comes to one's mind when she or he hears the word, 'ERISA?'"

For me, the word "ERISA" projects an image of an APOCALYPTIC EVENT. By way of analogy, let me talk briefly about an EMP Bomb . . . what is an EMP Bomb? It is an Electricalmagnetic Pulse Bomb—it is a type of bomb which causes a burst of electromagnetic waves which destroys all electronic circuits. It has been thought that an EMP Bomb might be utilized as a weapon by terrorists in recent years. It has also been featured on a couple of episodes of 24—where Jack Bauer and others had to deal with the aftermath of an EMP Bomb detonation. What is the aftermath? All computers are totally erased and voided. All electric circuits destroyed. Any device utilizing an electric circuit is useless. Motor vehicles, lights, computers all rendered useless. The result is an apocalyptic rendering of the environment and all functions of life have to start from scratch, all over again.

Well, to my way of thinking, ERISA is like an EMP Bomb detonation in the matter of insurance benefits. How so?

II. STATE REGULATION OF INSURANCE

The business of insurance—health insurance, disability insurance, life insurance—has never been regulated on the federal level. Why not? Because the U.S. Supreme Court ruled in 1868, in *Paul v. Virginia*, that an insurance

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[†] The South Dakota Law Review Symposium on the Employee Retirement Income Security Act of 1974 took place in Vermillion, South Dakota on February 24, 2011. The Board of Editors would like to thank all of the panelists for their participation in the event and for their written contributions to this issue. In particular, the Board would like to thank Professor Roger Baron for his immense knowledge on the subject, his contacts within the field, and, most importantly, for caring deeply about the success of the event and ERISA itself. Both the Symposium and this issue would not have been possible without him.

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policy was not an item of "commerce" and, therefore, Congress lacked authority to regulate insurance through the interstate commerce clause. This decision meant that Congress could NOT regulate insurance. As a result, insurance became regulated by the states. And, the states have regulated insurance intensely – with much interaction by state legislatures, judicial decision, and regulations by state departments/divisions of insurance. In my insurance class, we are constantly exploring the "give and take" of state regulations as courts and legislatures carefully mold rules that protect consumers and also foster an acceptable and healthy environment for insurance companies to do business.

As a result of *Paul v. Virginia,* the matter of insurance regulation has been undertaken by states. This decision is not, of course, the law today. In 1944 the U.S. Supreme Court overruled *Paul v. Virginia* and held that insurance was an item of commerce and that it could be regulated. But, this decision was handed down the day before D-Day and our country's entry into the European theater of WWII. Congress was not in a position to start regulating insurance and immediately responded with the McCarran Ferguson Act which was a recognition that the states are doing a great job regulating insurance and that the states should continue to do so. Thus, state regulation of insurance was endorsed by Congress and continued to flourish.

III. ERISA PREEMPTION

But – enter ERISA in 1974. With the enactment of ERISA in 1974 – designed initially and primarily for the protection of pension plans, we have Federal Preemption. The impact of this federal preemption and the enactment of ERISA is the equivalent of an EMP Bomb. In AN INSTANT, all state laws are preempted. Rational rules and regulations protecting consumers which have been developed in over a century of state regulation – INSTANTLY WIPED OUT! Well, what is left? Since Congress has never regulated insurance, there was and there is no "federal standard" or federal substitution of reasonable rules. Instead we have an apocalyptic landscape, which was completely virgin territory – a vacuum, if you will. Similar to the devastation left in the area where an EMP Bomb is detonated. Well, vacuums don't exist for long. The "void" or "absence of regulation" was quickly filled by corporate America, the ERISA Plans and the insurance industry. Now, the rules are unilaterally written and implemented without any regulation. Plan documents are drafted and amended without approval or supervision. Extremely harsh provisions are implemented, leaving the consumer without any input or protection. And the federal courts are put into the position of being simple enforcement tools of corporate policy. Federal courts are invoked to blindly enforce unilateral and harsh terms and are not in position to make decisions based on public policy.

This is the world of ERISA – let there be no mistake about it. It is a world *void* of consumer protection – completely void of consumer protection. The idea of "consumer protection" is treated as a "dirty word" in ERISA matters. There is none. The sole issues become, "what does the plan document say" and "how does the plan want to handle this?"

Now, with this background, let me get to my question. Understanding that ERISA has created this APOCALYPTIC environment where the rules are dictated unilaterally by corporate America – similar to the renegade bands of warlords seen in the Mad Max movies – I see signs of hope every now and then. Every now and then there are efforts to bring some sort of consumer protection into play – but the environment is sparse indeed – very little sunlight, very arid, no water, and only a very limited impact. Signs of hope are to be found in the movements like the "anti-discretionary clause" prohibitions. And, these can only extend as far as state regulation extends and, as we know, that is extremely limited in an ERISA setting.

IV. QUESTION – IS THERE HOPE?

My Question – to you experts. Talk to me about the **positive** now – let's focus, for this question, simply on "what good things" do you see which are coming into play for the purpose of protecting consumers? What devices or procedures or measures exist or might come into existence which might provide any kind of semblance of consumer protection? Is there going to be any kind of "rebound" or hope for the notion of consumer protection?