

**ENFORCEMENT OF DISCRETIONARY CLAUSES
TO BE ILLEGAL IN SOUTH DAKOTA UNDER ARSD 20:06:52**

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The South Dakota Division of Insurance has enacted new rules prohibiting enforcement of discretionary clauses in insurance policies, even if contained in ERISA plans. Discretionary clauses are now found in almost all ERISA plans, which include all employee benefit plans such as health insurance and disability insurance. A discretionary clause vests the insurer or claims administrator with "discretion" so that its claim decision cannot be overturned by a court unless the decision is "unreasonable," "arbitrary and capricious," "extraordinarily imprudent," etc. (the verbal formulation varies, but the essence of it is that a court must uphold an insurer or administrator's decision if the decision has any reasonable basis, regardless of whether the court agrees with it). The Rules Review Committee approved the new rules on August 19, and they will go into effect on September 8. SDTLA played a significant role in lobbying for the new rules.

The new rules are great news for every South Dakotan who does not own an insurance company. The new rules are part of the ERISA pendulum *finally* swinging a little bit back toward fairness. Several states have adopted similar rules. Courts in Montana and Michigan have upheld similar rules against the insurance industry's claim that ERISA pre-empts such rules. *Standard Insurance Company v. Morrison*, 537 F. Supp.2d 1142 (D. Mont. 2008) and *American Council of Life Insurers v. Watters*, 536 F. Supp. 2d 811 (W. D. Mich. 2008). The insurance industry tells us that these cases are on appeal, so the final word on pre-emption has not yet been written. We could see similar litigation in South Dakota, or the insurance industry may let litigation elsewhere take its course before deciding whether to bring a similar challenge here.

If you see Merle Schreiber or Randy Moses of the Division of Insurance, please thank them heartily for their initiative in protecting South Dakotans by drafting and adopting the new rules over vociferous opposition from the insurance industry. South Dakota is now a leader in this area and South Dakotans who have insurance policies which contain discretionary clauses will be treated much more fairly.