

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:02-CV-945-H(3)

FILED

JUN 5 2003

DAVID W. DANIEL, CLERK
US DISTRICT COURT
E. DIST. N. CAROLINA

WALKER L. CASEY,)
)
 Plaintiff,)
)
 v.)
)
 TRENT W. PIERCE and)
 UNUMPROVIDENT CORPORATION,)
)
 Defendants.)

ORDER

This matter is before the court on plaintiff's motion to remand to state court pursuant to 28 U.S.C. § 1447(c). The parties have responded. The court also held an evidentiary hearing on May 29, 2003, where the parties addressed the propriety of federal jurisdiction. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiff filed this complaint in Wake County Superior Court on November 25, 2002, alleging breach of contract, bad faith refusal to settle a claim, and unfair and deceptive trade practices against Trent W. Pierce, a Provident Life and Accidental Insurance Company ("Provident") insurance agent and UnumProvident Corporation ("Unum") as Provident's parent company. On December 31, 2002, defendants removed the case to federal court based on federal subject matter jurisdiction, asserting that the underlying

insurance policy was part of an "employee welfare benefit plan" governed by the Employee Retirement Income Security Act ("ERISA"). Plaintiff's motion to remand contends that his policy was not part of an "employee welfare benefit plan" and therefore, his state claims are not preempted by ERISA, making federal jurisdiction improper in this case.

STATEMENT OF THE FACTS

Plaintiff, Walker L. Casey, was president and sole shareholder of Classic Management Systems ("CMS"), an S-type corporation based in Raleigh, North Carolina. In early 1993, plaintiff applied for and received an individual disability insurance policy no. 06-337-07114140 with Provident. This application process was facilitated by Trent W. Pierce, his Provident insurance agent, who had previously aided the plaintiff in securing health insurance coverage for his employees.

After acquiring his own disability coverage, the plaintiff and Mr. Pierce discussed the possibility of Provident offering disability insurance to CMS employees. The men decided to use a Salary Allotment Program ("SAP") made available through Provident, which allows all employees to receive a 10% discount on their monthly premium, so long as a minimum of three employees sign up for individual disability insurance and the employer pays Provident directly. However, the SAP does not dictate where the payments will originate; thus, the monies may come from the employee's

salary or from the employer. Mr. Pierce and Mr. Casey also discussed the possibility of obtaining group disability coverage; however, Mr. Casey preferred the individuality of SAP due to the fact that it allowed employees who left CMS to take the disability coverage with them and simply remit payment to Provident directly after they terminated their employment with CMS. The employees would also maintain their discounted premium rates for the duration of their coverage even after they left CMS.

Mr. Pierce was then permitted to approach each new CMS employee individually to solicit business on behalf of Provident. Mr. Casey also decided to pay a portion of his employees' monthly premiums up to 50% of the monthly amount. Though the record is unclear as to the actual amount paid by CMS, it is clear that all CMS payments stopped in August 1999 and CMS employees paid 100% of the Provident premium from that point forward.

During this solicitation period, Mr. Pierce was able to secure individual policies for approximately five CMS employees. Each policy was individually discussed and negotiated and contained different underlying elements of coverage. Also, each employee could terminate the policy at any time. The possibility of obtaining a Provident disability insurance policy was not included in any employment offer letters, nor was it discussed as an incident of employment. However, Mr. Pierce did communicate to employees interested in the program CMS's willingness to pay a

portion of the monthly premium.

COURT'S DISCUSSION

The issue presented in this dispute is whether plaintiff's insurance policy was part of "an employee welfare benefit plan" as defined by 29 U.S.C. § 1002(1). While the removal statute, 28 U.S.C. § 1447(c), is strictly construed against removal, ERISA coverage is to be liberally construed. ERISA provides that all state laws are preempted "insofar as they may now or hereafter relate to an employee benefit plan." 29 U.S.C. § 1144(a). ERISA preemption broadly covers "any state law that "refers to or has a connection with covered benefit plans. . . even if the law is not specifically designed to affect such plans, or the effect is only indirect." District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 130 (1992) (quotations omitted).

For an employee welfare benefit plan to be governed by ERISA, the following factors must be satisfied: (1) there must be a plan or program, (2) established or maintained, (3) by an employer or employee organization, (4) for the purpose of providing a benefit, (5) to employees or beneficiaries. Custer v. Pan American Life Ins. Co., 12 F.3d 410, 417 (4th Cir. 1993) (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982)). According to the Fourth Circuit in Custer, "[t]here must be some payment and manifestation of intent by the employer [...] to provide a benefit to the employees or the employee's beneficiaries..." Id. For

example, "financing or arranging to finance or fund the intended benefits, establishing a procedure for disbursing benefits, assuring employees that the plan or program exists" are acts which exemplify such a manifestation. See 688 F.2d at 1373.

The Department of Labor ("DoL") has defined the circumstances under which an employer may be exempt from ERISA, even in the context of a "group-type" program. Under the "safe harbor" provision, a plan is not an employee welfare benefit plan if

- (1) no contributions are made by an employer or employee organization;
- (2) participation in the program is completely voluntary for employees or members;
- (3) the sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
- (4) the employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j). It is important to note that even though the employer may not be deemed a "participant" in the plan for the purpose of determining ERISA eligibility, as long as there are other employees who take part in the plan, the overall plan may still be governed by ERISA. See Madonia v. Blue Cross & Blue Shield of Virginia, 11 F.3d 444, 448 (4th Cir. 1993). Thus, here, where the policyholder is also an employer of an S-type corporation

and the sole shareholder, his status as employer/sole shareholder does not negate the applicability of ERISA as long as other employees took part in the plan. See id.

The court finds that the plaintiff's plan falls under the safe harbor provision and therefore is not governed by ERISA. The court views the inapplicability of the safe harbor provision as the final requirement for a plan to be housed under ERISA. All the factors of the safe harbor provision are satisfied in the case at bar.

In analyzing factor one, the court finds the reasoning of the Second Circuit persuasive. In Grimo v. Blue Cross & Blue Shield, the circuit court held that the payment of policy premiums in the past, where an employer has made a decision to permanently cease funding in the future, does not remove an employer from the safe harbor exception. See, 34 F.3d 148, 153 (2^d Cir. 1994). The court examined the first requirement of 29 C.F.R. § 2510.3-1(j) and focused on the present tense of the phrase "no contributions **are** made," coupled with its reasoning that past payments also do not conclusively "establish" or "maintain" a program. See id. (emphasis added). Here, even though the employer contributed 50% of the premium as an initial matter, it has not done so since August 1999. Thus, based on the reasoning articulated above, the court finds that factor one is satisfied.

Under factor two, the plaintiff has testified by affidavit that participation was voluntary. Under factor three, Mr. Pierce

was permitted by Mr. Casey to solicit business from CMS employees and CMS's involvement was limited to the use of the salary allotment program. As the statute states, the mere collection of "premiums through payroll deductions" does not remove an employer from the ambit of the safe harbor provision. See 29 C.F.R. § 2510.3-1(j)(3). Finally, under factor four, CMS did not receive any remuneration for its administration of the salary allotment program; therefore, factor four is met.

The defendants cite Madonia and Custer, supra, to support their contention that CMS, at the every least, "established" an ERISA plan in 1993 even if it did not maintain one. However, the court does not find the use of a salary allotment program and past premium payments by an employer sufficient to evince a manifest intent to "establish" a "plan" and create a fiduciary relationship governed by ERISA. As the Custer court highlighted, "the purchase of every insurance policy does not automatically establish a welfare benefit plan under ERISA." 12 F.3d at 417.

Madonia and Custer are factually distinguishable from the case at bar. Though Madonia also involved an S-type corporation and a sole shareholder, the similarities end there. Unlike the case at bar, the policy in Madonia was a group health plan purchased under a group name, fully paid for by the corporation, and the corporation claimed the premium payments on its corporate tax returns, thereby deriving a benefit from its group status. See 11

F.3d at 445. Likewise, in Custer, the factual distinctions are forceful. Custer involved a group health/life insurance plan which was negotiated by the employer, who determined the underlying benefits offered in the group policy and had the authority to terminate the plan without employee approval. See 12 F.3d at 417. CMS, on the other hand, did not negotiate any of its employees' individual disability policies; each policy contained different underlying benefits; CMS had no authority to terminate the employee policies; the policies were portable and were not contingent on a participant's employment status at CMS; and, CMS did not claim its partial premium payments on its corporate tax returns.

Defendants call attention to the seemingly contradictory interaction of the "establish or maintain" requirement articulated by Donovan and the first requirement of the safe harbor provision. The disjunction occurs, according to the defendants, due to the fact that a plan is governed by ERISA if it is **either** "established" **or** "maintained." Thus, as the defendants correctly point out, an ERISA plan may be "established" through past action, or "maintained" through current action by the employer. However, the safe harbor provision speaks in the present tense, which defendants aver may be read as effacing the possibility that a plan qualifies under ERISA simply because it was "established" in the past. However, defendants' reasoning is unduly restrictive.

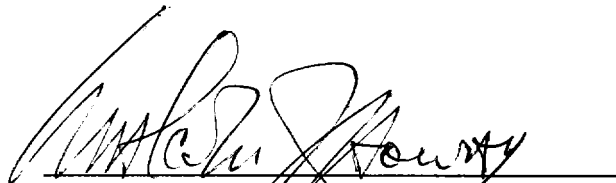
It is possible for a plan to preserve its ERISA status even

when it is "established" in the past. However, when the only linchpin is the employer's past payment of premiums, as is the case here, the language of the safe harbor provision must take precedence. As the Donovan court highlighted, the employer must take some affirmative action to evince its intent to create an ERISA plan. Here, where the only continued indicia of intent is the use of a salary allotment program, the language of the safe harbor provision is clear and directive. The court finds CMS's current participation in the administration of the plan too limited to invoke ERISA. Thus, the plaintiff's claim is not preempted by ERISA as his policy is not an "employee welfare benefit plan."

CONCLUSION

For the foregoing reasons, the court GRANTS plaintiff's motion to remand to state court. The clerk is directed to close this case.

This 3rd day of June, 2003.


MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
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