UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

DR. CARL BERNOFSKY Plaintiff	*	CIVIL ACTION NO. 98:-1577
VERSUS	*	
	*	SECTION "C"(5)
TEACHERS INSURANCE AND ANNUITY ASSOCIATION & THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND	*	JUDGE BERRIGAN
Defendants	*	

MOTION TO REMAND

NOW INTO COURT, through undersigned counsel comes plaintiff, Dr. Carl Bernofsky, who moves this Honorable Court to remand this action pursuant to 28 U.S.C. S 1447(c) to state court, the Civil District Court for the Parish of Orleans, State of Louisiana, where it was originally filed.

The state law cause of action alleged by plaintiff is not within this court's removal jurisdiction.

Costs to be taxed against defendants.

Respectfully submitted,

_____
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THE EASTERN DISTRICT OF LOUISIANA

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MEMORANDUM IN SUPPORT OF MOTION TO REMAND

MAY IT PLEASE THE COURT:

This memorandum is submitted on behalf of plaintiff, Dr. Carl Bernofsky ("Dr. Bernofsky"), in support of his motion to remand this action to state court where it was originally filed on April 8, 1998.

I. INTRODUCTION

Defendant, Teachers Insurance and Annuity Association ("TIAA") removed this action on May 27, 1998 asserting that Dr. Bernofsky's state law causes of action, alleging wrongful denial of disability benefits under an insurance arrangement offered by TIAA, are governed by ERISA.

As will be shown below, remand is necessary because Dr. Bernofsky's cause of action does not fall within the ambit of ERISA and therefore federal subject matter jurisdiction is lacking.

II. ANALYSIS

A. ERISA Statutory and Regulatory Framework

"Congress enacted ERISA to protect working men and women from abuse in the administration and investment of private retirement plans and employee welfare plans." Donovan v. Dillingham, 688 F.2d 1367, 1370 (11th Cir. 1982)(en banc). ERISA applies to any "employee benefit plan" if that plan is established or maintained by any employer or employee organization engaged in interstate commerce, or in any industry or activity affecting interstate commerce. 29 U.S.C. Section 1003(a); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990); Donovan, 688 F.2d at 1370.

There are two types of "employee benefit plans": "employee welfare benefit plans" and "employee pension benefit plans." 29 U.S.C. Section 1002(3). In this instance, whether the particular set of insurance arrangements offered by TIAA constitutes an "employee welfare benefit plan" is at issue.

ERISA defines an "employee welfare benefit plan" as any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment. . . . 29 U.S.C. Section 1002(1).

If the particular set of insurance arrangements offered by TIAA meets this definition, which it does not, then this Court would have subject matter jurisdiction of this dispute. In such a case, Dr. Bernofsky's only remedy would be that provided by ERISA.

However, since the particular set of insurance arrangements offered by TIAA does not meet this definition, then ERISA does not apply, and the Court has no subject matter jurisdiction of Dr. Bernofsky's state law cause of action.

It is a question of fact whether a particular set of insurance arrangements constitutes an "employee welfare benefit plan." Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1451 (5th Cir. 1991). The Department of Labor, pursuant to authority granted to it by Congress, has promulgated regulations providing that certain insurance and other benefit plans are excluded from ERISA's coverage. The particular set of insurance arrangements offered by TIAA meets the criteria set forth in the Department of Labor regulations, thus ERISA does not cover the insurance arrangement and this Court lacks subject matter jurisdiction. Kidder v. H & B Marine, Inc., 932 F.2d at 351 (5th Cir. 1991); Gahn, 926 F.2d at 1452.

The Department of Labor regulations provide that the term "employee welfare benefit plan":

> shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
>
> (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).

Group insurance plans which meet each of these criteria are excluded from ERISA's coverage. Kidder, 932 F.2d at 351; Gahn, 926 F.2d at 1452; Memorial Hospital, 904 F.2d at 241 n. 6.

Dr. Bernofsky's former employer, Tulane University Medical School ("Tulane") made no contributions to the program. Dr. Bernofsky throughout his employment at Tulane paid the premiums due to TIAA through payroll deductions collected and forwarded by Tulane to TIAA. The disability insurance arrangement was voluntary. Dr. Bernofsky has no knowledge that Tulane received any compensation in connection with the insurance arrangement or functioned other than to permit TIAA to publicize its insurance arrangement to Tulane employees and merely collected the premiums through payroll deductions.

Here, each of the four criteria for exclusion from ERISA's coverage as set out by the Department of Labor regulations has been met by the particular insurance arrangement offered by TIAA. Accordingly the inquiry should be ended. This type of insurance

arrangement is not covered by ERISA; therefore this Court lacks subject matter jurisdiction over Dr. Bernofsky's state law cause of action and this matter must be remanded to state court.

In the event that the Court is persuaded that the exclusion criteria above are not met by the insurance arrangement offered by TIAA, it does not necessarily mean that the insurance arrangement is covered by ERISA.

B. Tests for Determining What Plans are ERISA Plans

Merely because an insurance arrangement is not excluded from ERISA by the Department of Labor regulations does not necessarily mean that the plan is covered by ERISA.

ERISA applies only to those employee welfare benefit plans that are established or maintained: 1) by an employer . . . ; or 2) by an employee organization . . . ; or by both an employer and an employee organization. 29 U.S.C. Section 1003(a).

The purpose of the plan must be to provide benefits to its participants or their beneficiaries. 29 U.S.C. Section 1002(1).

1. Employer Plans

If it is asserted that the employer "established or maintained" the plan, then the focus should be on the employer's involvement with the administration of the plan. An employer who does no more than purchase insurance for its employees, and has no more involvement than to collect insurance premiums has not established an ERISA plan.

As the Fifth Circuit explained in one of its early ERISA cases,

> [c]onsidering the history, structure and purposes of ERISA, we cannot believe that that Act regulates bare purchases of insurance where . . . the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.
> . . .
>
> The supposed Taggart `plan' has no assets and is liable for no benefits. There is nothing to be placed in trust, so there is no trust. The corporation did no more than make payments to a purveyor of insurance. . . . There simply exist no assets for ERISA's statutory safeguards to protect . . . .

Taggart Corp. v. Life & Health Benefits Admin., Inc., 617 F.2d 1208, 1211 (5th Cir. 1980), cert. denied 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981).

In this instance, insurance was merely purchased from TIAA with payroll deductions by employees at Tulane. Claims were processed by TIAA. The only assets were premiums paid. Tulane neither directly nor indirectly owned, controlled, administered or assumed responsibility for the insurance policy or its benefits. See Taggart, supra. Thus, Tulane neither established nor maintained an employee welfare benefit plan.

TIAA offered certain disability benefits to employees of various employers. These employers did not participate in the day-to-day operation or administration. 29 U.S.C. 1002(4)(A) defines a "multiple employer welfare arrangement" as an arrangement established or maintained to offer or provide certain benefits to employees of two or more employers. See Taggart, 617 F.2d at 1210 (holding that a multiple employer trust, a "proprietary enterprise" that acted "as a mere conduit for

hundreds of unrelated subscriber customers," and "which did not participate in the `day-to-day operation or administration' of the trust" was not "established or maintained" by an "employer" under ERISA), cited in Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241-42 (5th Cir. 1990).

Assuming, therefore, that TIAA offered to provide these benefits to the subscribing employers' employees, the question is whether TIAA did so "in the interest of" the subscribing employers, such as Tulane. 29 U.S.C. Section 1002(5). Here, TIAA's primary interest was for itself.

TIAA is neither an "employer" under ERISA nor is it an association of employers acting indirectly for an employer in relation to an employee benefit plan. Id. No economic relationship exists between TIAA and the employers, such as Tulane. Nor can it be said that TIAA acted "indirectly" for employers, such as Tulane, in its entrepreneurial venture of marketing insurance to unrelated employers who did not participate in the day-to-day operation or administration of the plan.

"To allow an entrepreneurial venture to qualify as an "employer" by establishing and maintaining a multiple employer welfare arrangement without input from employers who subscribe to the plan would twist the language of the statute and defeat the purposes of Congress (citations omitted)." MD Physicians & Associates, Inc., 940 F.2d 971, 975 (5th Cir. 1991)

2. Employee Organization Plans and Their Participants

If it is asserted that an employee organization "established or maintained" the plan, the focus should be on who are the "participants." The Fifth Circuit has agreed with the Eighth Circuit "that the entity that maintains the plan and the individuals that benefit from the plan [be] tied by a common economic or representation interest, unrelated to the provision of benefits." MD Physicians & Associates, Inc., 957 F.2d 178, 185 (5th Cir. 1991) (citing Wisconsin Educ. Ass'n. Ins. Trust v. Iowa state Bd., 804 F.2d 1059, 1062-63 (8th Cir. 1986)).

> The definition of an employee benefit welfare plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits.

Wisconsin Educ. Ass'n. Ins. Trust v. Iowa State Bd., 804 F.2d 1059, 1063 (8th Cir. 1986).

Employees of Tulane other than faculty also participated in the insurance arrangement at issue here offered by TIAA. Where the only relationship between the sponsoring organization and non-member recipients stems from the benefit plan itself, such a relationship is similar to the relationship between a private insurance company, which is subject to myriad state insurance regulations, and the beneficiaries of a group insurance plan. Wisconsin Educ. Ass'n. Ins. Trust v. Iowa State Bd., 804 F.2d at 1063.

In reaction to the broad range of "persons" claiming the protection of ERISA's broad preemption against application of state regulation, Congress evidenced its intent shortly after the

passage of ERISA. The Activity Report of the Committee on Education and Labor revealed that

> certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is profiting from the provision of administrative services are establishing insurance companies and related enterprises. The entrepreneur will then argue that [its] enterprise is an ERISA benefit plan which is protected, under ERISA's preemption from state regulation . . . . [W]e are of the opinion that these programs are not `employee benefit plans' . . . . [T]hese plans are established and maintained by the appropriate parties to confer ERISA jurisdiction . . . They are no more ERISA plans than is any other insurance policy sold to an employee benefit plan. . . .
>
> . . . [W]e do not believe that the statute and legislative history will support the inclusion of what amounts to commercial products within the umbrella of the [`employee benefit plan'] definition. . . . [T]o be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirement of section 3(3) [, which defines "employee benefit plan",] in both substance and form.
>
> H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977). "While not contemporaneous legislative history," we, like other courts, find the Report "`virtually conclusive' as to legislative intent." Hamberlin v. VIP Ins. Trust, 434 F.Supp. 1196, 1199 (D. Ariz. 1977) (quoting Sioux Tribe v. United States, 62 S.Ct. 1095, 1101 (1942)(footnote omitted), cited in Taggart Corp. v. Life and Health Benefits Admin., Inc., 617 F.2d 1208, 1210 (5th Cir. 1980), cert. denied 101 S.Ct. 1739 (1981) and Bell v. Employee Sec. Benefit Ass'n, 437 F.Supp 382, 392 (D.Kan. 1977).

MD Physicians & Associates, Inc., 957 F.2d 178, 184 (5th Cir. 1991).

There must be a nexus between the employee organization sponsoring the plan and the individuals benefiting from the plan if the plan is intended to provide benefits "for its participants" as required by section 3(1) of ERISA, 29 U.S.C.

Section 1002(1). ERISA defines "participant" at Section 3(7), 29 U.S.C. Section 1002(7). A significant factor in Wisconsin Educ. Ass'n. Ins. Trust v. Iowa State Bd., was the fact that the U.S. Department of Labor had concluded that the arrangement at issue there was not an employee welfare benefit plan since benefits were provided to individuals who were neither represented nor employed by the labor unions sponsoring the arrangement. Id. at 1065.

Similarly, the TIAA arrangement at issue here is not an employee welfare benefit plan under section 3(1) of ERISA because it also provides benefits to individuals other than teachers who would comprise the membership of any employee sponsoring organization.

III. CONCLUSION

The insurance arrangement offered by TIAA at issue here does not meet the strict definition of an "employee welfare benefit plan" under 29 U.S.C. 1002(1). Therefore, 29 U.S.C. Section 1144(a) is inapplicable. ERISA does not preempt state regulation of the insurance arrangement offered by TIAA, subject matter jurisdiction is lacking, and this matter must be remanded to state court.

Respectfully submitted,

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MOTION FOR TRIAL BY JURY WITH INCORPORATED MEMORANDUM

NOW INTO COURT, through undersigned counsel comes plaintiff, Dr. Carl Bernofsky, who moves this Honorable Court to try the issue in this action by jury pursuant to Federal Rule of Civil Procedure 81(c) in the event that this matter is not remanded to state court, the Civil District Court for the Parish of Orleans, State of Louisiana, where it was originally filed.

The notice of removal was served by placing it in the U.S. Mail to plaintiff on May 27, 1998 and this motion is therefore timely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been duly served upon counsel by placing same in the United States Mail, postage pre-paid, properly addressed, this 9th day of June, 1998.

_____

Roger D. Phipps