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 Defendants	*	JUDGE BERRIGAN

REPLY MEMORANDUM IN SUPPORT OF MOTION TO REMAND

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

At issue here is simply whether the insurance arrangement offered by Teachers Insurance and Annuity Association("TIAA") meets the statutory definition of an "employee welfare benefit plan" under ERISA, 29 U.S.C. Section 1002(3).

If the insurance arrangement meets the statutory definition, then this Court has jurisdiction of this dispute, and Dr. Bernofsky's only remedy is that provided by ERISA. If ERISA applies, his state law remedy is preempted. Alternatively, if the insurance arrangement at issue does not meet this strict

statutory definition, then this Court has no jurisdiction over this dispute and Dr. Bernofsky may proceed with his state law cause of action. Accordingly, a great deal hangs in the balance.

As an initial matter, ERISA preemption is not at issue. At page 3 of his Memorandum In Support Of Motion To Remand, Dr. Bernofsky states that if the insurance arrangement at issue here meets the definition of an ERISA employee welfare benefit plan then "Dr. Bernofsky's only remedy would be that provided by ERISA." Thus Defendants' Memorandum In Opposition To Remand focusing primarily on ERISA preemption which is not the issue before the Court misses the mark.

Instead of a recitation of well-settled ERISA preemption jurisprudence, the relevant response would have demonstrated what facts are present to determine whether an employer or employee organization "established or maintained" an employee welfare benefit plan. To make this determination, "the Court should [focus] on the employer and . . . [its] involvement with the administration of the plan." (Citations omitted.) Hansen v. Continental Ins. Co., 940 F.2d 971, 978 (5th Cir. 1991).

There must be some meaningful degree of participation by the employer in the creation or administration of the plan. Id. "`Established or maintained' `requires some degree of active involvement in the plan's funding and administration,'" Clark v. Golden Rule Ins. Co., 737 F.Supp. 376 W.D. La. 1989), affirmed 887 F.2d 1276 (5th Cir. 1989).

A discussion of these facts should have been forthcoming.

Instead, Defendants preferred to ignore these matters content to rest on their own stated but unproven assertion. According to Defendants, an ERISA plan exists because Tulane says one exists. Tulane makes the assertion, ipse dixit, it must be true. Yet if Tulane had bothered to read the authorities cited in Dr. Bernofsky's Memorandum In Support Of Motion To Remand, it would have discovered that its assertion without more is not enough to establish an ERISA employee welfare benefit plan.

MD Physicians & Associates, Inc., 957 F.2d 178, 188 n. 7 (5th Cir. 1991), specifically rejected the argument that a "plan" constitutes an ERISA plan because it was crafted to comply with ERISA requirements. Or that the entity that established the "plan" painstakingly drafted the required documents and agreements, which all stated that ERISA controlled the terms of the particular document. Or that the entity that established the "plan" intended ERISA to cover the "plan". To these arguments the Fifth Circuit responded:

> We find this logic flawed. ERISA protection and coverage turns on whether the MDP Plan satisfies the statutory definition of `employee welfare benefit plan,' not whether the entity that established and maintained the MEWA intended ERISA to govern the MEWA. See Mathew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21,22 (2d Cir. 1985).

Defendants are silent as to whether Tulane participated in the day-to-day operation or administration of the plan. Instead, the arrangement is something established or maintained by TIAA to provide certain benefits to employees of two or more employers. See Mathew 25 Ministries, 771 F.2d at 22 (holding that a trust

that solicited "disparate and unaffiliated" employer-enrollees that evidently played no role in management of the trust was not "established or maintained" by an employer.); Taggart Corp. v. Life & Health Benefits Admin., Inc., 617 F.2d 1208, 1210 (5th Cir. 1980), cert. denied 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981) (holding that a multiple employer trust, a "proprietary enterprise" that acted as a mere conduit for hundreds of unrelated customers," 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).

A discussion of any such participation would be expected, if any existed. But Defendants preferred to gloss over this inquiry and submitted in its place a recitation on ERISA preemption. Their silence cannot be inadvertent.

At paragraph 12 of his petition, Dr. Bernofsky alleges that "Tulane neither directly nor indirectly controls, administers or assumes responsibility for the Insurance policy or its benefits." (Emphasis added.)

At paragraph 12 of Tulane's answer, it states: "For answer to the allegations contained in paragraph 12, admits that it neither directly nor indirectly owns, controls, or assumes responsibility for the insurance policy or its benefits and denies any and all other allegations contained therein. See Tulane's Answer, paragraph 12.

In Taggart the "plan" had no assets and was liable for no benefits. There was nothing to be placed in trust, so there was no trust. Id. at 1211. The Taggart Court noted that Congress clearly distinguished between "health plans" and "health insurance". According to Taggart Congress made clear that pure insurance plans are not ERISA plans. Id.

What are the plans assets? What assets did Tulane contribute? What assets were held in trust? These are the issues one would think Defendants would have wanted to address rather than an irrelevant dissertation on ERISA preemption.

All claims were submitted directly to TIAA and all correspondence to Dr. Bernofsky concerning his application for benefits came directly from TIAA. Where is the active involvement of Tulane? If it took place, why was it not set forth in Defendants' Memorandum In Opposition To Remand? This was the appropriate response rather than attempting to divert the Court's attention with an irrelevant discussion of ERISA preemption.

In determining whether an employer "established or maintained" an employee welfare benefit plan, two factors were pivotal in Hansen, supra. These were: 1) a booklet bearing the employer's name and logo; and language "endorsing" the plan. The employer stated that it "encouraged the employees to consider carefully participating in the group accidental death and dismemberment plan, as it would be a valuable supplement to your existing coverages." Id. at 978. The documents provided to Dr.

Bernofsky are devoid of any such endorsement by Tulane. [1]

In contrast the booklet provided to Dr. Bernofsky, entitled "A STEP-BY-STEP GUIDE TO APPLYING FOR LONG-TERM DISABILITY BENEFITS" lists TIAA on the cover with no mention of Tulane. (See Exhibit 1, TIAA, "A STEP-BY STEP GUIDE TO APPLYING FOR LONG-TERM DISABILITY BENEFITS".)

Where is Defendants' explanation of Tulane's involvement in the day-to-day operation of the supposed plan?

The insurance policy at Part 6(B)&(C) provides that TIAA decides whether benefits will be provided or denied, and that TIAA reviews its decision concerning the denial of benefits. (See Policy. Defendants' Exhibit # 2, page 6.2.)

Defendants' silence on the facts determinative of whether

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[1] Apparently, no assertion is being made by Defendants that the "plan" is established or maintained by an employee organization. The insurance policy at Part 2 states that staff at the Tulane University Medical School are eligible participants.

> 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 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.

the insurance arrangement at issue here meets the statutory definition of an employee welfare benefit plan under ERISA is no accident. Their failure to address the relevant issue is not inadvertent. Defendants have not demonstrated that the insurance arrangement offered by TIAA to Tulane's employees at the Medical School meets the statutory definition of an employee welfare benefit plan under ERISA. Therefore, this Court has no jurisdiction of this dispute, and it must be remanded to state court where it was originally filed so that Dr. Bernofsky may proceed with his state law claim.

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 29th day of June, 1998.

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Roger D. Phipps