

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANCES M. BAGDEN : CIVIL ACTION  
 :  
 v. :  
 :  
 THE EQUITABLE LIFE ASSURANCE :  
 SOCIETY OF THE UNITED STATES : NO. 99-66

M E M O R A N D U M

Ludwig, J.

May 11, 1999

The question presented is whether this action for disability benefits is pre-empted by ERISA. 29 U.S.C. §§ 1001-1461. Procedurally, it will be considered as though cross-motions for partial summary judgment had been filed under Fed. R. Civ. P. 56.<sup>1</sup> See order, March 2, 1999. Jurisdiction is diversity, 28 U.S.C. § 1332, and substantive issues are governed by Pennsylvania law.

The threshold motion of defendant The Equitable Life Assurance Society of the United States having been granted in part and denied in part, order Feb. 5, 1999, the remaining claims are breach of contract, fraud, bad faith, and violation of the Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann. §§ 201-1 to 201-9.2 (1998). Defendant asserts ERISA

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<sup>1</sup>"Summary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the nonmoving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." In re Baby Food Antitrust Litig., 166 F.3d 112, 124 (3d Cir. 1999) (quoting Petruzzi's IGA v. Darling-Delaware, 998 F.2d 1224, 1230 (3d Cir. 1993)).

preemption as to all claims – acknowledging that the alleged breach of contract would be characterized by and litigated as an ERISA claim.

On October 17, 1990, defendant and a company known as 2317 Medical Center, located in Philadelphia, Pa., established an “Employer Sponsored Market Program” for the latter’s employees to purchase disability insurance. Pl. ex. A. Under the program, defendant master-billed the Medical Center for premiums due from the participating employees. Capuano dep. at 47-48, 56; Palazzo dep. at 63. Via payroll deductions, the employer remitted the premium payments to defendant. Capuano dep. at 47-48, 56; Palazzo dep. at 71-72. Significantly, it did not make monetary contributions of its own. Pl. ex. A; Palazzo dep. at 67. Its payroll manager helped to publicize the program and acted at times as an intermediary for the participants or referred them to the insurance company’s sales agent. Palazzo dep. at 45-49; Capuano dep. at 50.

As of November 1990, plaintiff Frances M. Bagden, a medical transcriptionist employed by the Medical Center, had purchased disability insurance from defendant. Compl., ex. A. In December 1994, she discontinued working claiming to have been disabled by reflex sympathetic dystrophy. Id. ¶¶ 7,8. Defendant paid disability benefits from the spring of 1995 to October 1998. Id. ¶ 11; answer ¶ 11. Following a medical evaluation performed at

defendant's request, the benefits were terminated. Compl. ¶¶ 12, 15; answer ¶¶ 12, 15.

The parties dispute whether the "Employer Sponsored Market Program" qualifies as an employee welfare benefit plan under ERISA. "The existence of an ERISA plan is a question of fact, to be answered in the light of all the surrounding circumstances from the point of view of a reasonable person." Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1120 (9th Cir. 1998). A disability insurance program falls under ERISA if (1) a "plan, fund, or program" exists, (2) the safe harbor regulations do not apply, and (3) the employer "established or maintained" the plan with the intent to provide benefits to its employees.<sup>2</sup> See Thompson v. American Home Assurance Co., 95 F.3d 429, 434-35 (6th Cir. 1996); Meredith v. Time Ins. Co., 980 F.2d 352, 355 (5th Cir. 1993).

"[A] 'plan, fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the

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<sup>2</sup>ERISA defines an employee welfare benefit plan as "any plan, fund, or program which was heretofore or is hereafter 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, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." 29 U.S.C. § 1002(1) (1998).

source of financing, and procedures for receiving benefits." Deibler v. United Food & Commercial Workers' Local Union 23, 973 F.2d 206, 209 (3d Cir. 1992) (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982)).

Here, a "plan, fund or program" would appear to have existed, since a reasonable person could readily determine that the insurance policies cover disability benefits; the class of beneficiaries included eligible employees; the source of financing was employee contributions; and the procedure for receiving benefits was outlined in each policy. However, "just because a plan exists does not mean that it is an ERISA plan." Gaylor v. John Hancock Mut. Life Ins. Co., 112 F.3d 460, 464 (10th Cir. 1997) (quoting Hansen v. Continental Ins. Co., 940 F.2d 971, 977 (5th Cir. 1991)).

The second step of the analysis asks whether the plan comes within the safe harbor provision. Promulgated under 29 U.S.C. § 1135, a regulation of the Department of Labor excludes employee insurance policies from ERISA 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 service actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j) (1999).

The first, second, and fourth criteria of the regulation are not at issue. The Medical Center did not subsidize the premiums; the decision to purchase coverage was the employees' alone; and the Medical Center received no consideration for its assistance. Defendant maintains that the third criterion is not satisfied because of the Medical Center's active role in promoting and administering the program.

According to the Department of Labor, "employer neutrality is the key to the rationale for not treating such a program . . . as an employee benefit plan." 40 Fed. Reg. 34,526 (1975). "But as the regulation itself indicates, remaining neutral does not require an employer to build a moat around a program or to separate itself from all aspects of program administration." Johnson v. Watts Regulator Co., 63 F.3d 1129, 1134 (1st Cir. 1995).

"[A]n employer will be said to have endorsed a program within the purview of the Secretary's safe harbor regulation if, in light of all the surrounding facts and circumstances, an objectively reasonable employee would conclude on the basis of the employer's actions that the employer had not merely facilitated the program's availability but had exercised control over it or made it

appear to be part and parcel of the company's own benefit package." Id. at 1135; see also Thompson, 95 F.3d at 436-37 (following Johnson).

Employers may perform administrative tasks other than payroll and promotion without losing safe harbor status.

Activities such as issuing certificates of coverage and maintaining a list of enrollees are plainly ancillary to a permitted function (implementing payroll deductions). Activities such as answering brokers' questions similarly can be viewed as assisting the insurer in publicizing the plan. Other activities that arguably fall closer to the line, such as the tracking of eligibility status, are compatible with the regulation's aims.

Johnson, 63 F.3d at 1136; see also Byard v. Qualmed Plans for Health, Inc., 966 F. Supp. 354, 359 (E.D. Pa. 1997) ("The courts have broadly construed [the safe harbor provision] in light of the policy underlying the regulation generally.").

Here, the Medical Center made its employees aware of the opportunity to obtain coverage, but stopped short of endorsing the program. The Medical Center did not market the plan as its own or offer it as a supplement to other programs, or act in any manner as an insurance carrier. Furthermore, the policy did not make reference to the Medical Center or to subscribers' rights under ERISA. See Johnson, 95 F.3d at 437 (summary plan description listing rights under ERISA falls under ERISA); Hansen, 940 F.2d at 977-78 (safe harbor inapplicable in part because employer promoted plan as "our plan" and informational packet was embossed with company logo). In these circumstances, an objectively reasonable

employee of the Medical Center would have realized that the plan was a third-party offering and not subject to the employer's control.

The administrative functions performed by the Medical Center were consistent with the safe harbor regulation. According to defendant, the Medical Center went beyond payroll and promotional activities in a number of respects: by paying the premiums with a corporate check, selecting the effective date of the policy,<sup>3</sup> permitting insurance presentations at the medical office, providing employee information to defendant, and answering questions about the policies. The first two activities are ancillary to payroll functions; the last three are promotional in nature. Furthermore, the Medical Center's administrative role was less than that of the employer in Johnson in that it did not regularly assist employees in the claims process. 63 F.3d at 1136. In short, the Medical Center "performed only administrative tasks, eschewing any role in the substantive aspects of program design and operation." Id.

Accordingly, defendant's disability policy was not an ERISA employee welfare benefit plan, and plaintiff's claim is, therefore, not preempted.<sup>4</sup>

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<sup>3</sup>The Medical Center's payroll manager adjusted the dates to coincide with the timing of payroll deductions. Capuano dep. at 70.

<sup>4</sup>Because the plan falls within the safe harbor provision, there is no need to determine whether the Medical Center  
(continued...)

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Edmund V. Ludwig, J.

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<sup>4</sup>(...continued)  
"established or maintained" the disability plan. See 29 U.S.C. §  
1002(1) (1998).

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O R D E R

AND NOW, this 11th day of May, 1999, plaintiff Frances M. Bagden's disability insurance claims against defendant The Equitable Life Assurance Society of the United States are held not to be preempted by ERISA.

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Edmund V. Ludwig, J.