THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

J. DAVID BENSON, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

PROVIDENCE HEALTH & SERVICES-WASHINGTON, a Washington corporation, et al.,

Defendants.

No. C10-941Z

ORDER

THIS MATTER comes before the Court on Plaintiff J. David Benson's Motion for Remand, docket no. 8. Having reviewed the pleadings, the Court enters the following Order.

I. Background

On October 10, 2008, Benson was severely injured in a motor vehicle collision. 2d Am. Compl. ("SAC"), ¶ 4.2, docket no. 1-5. Benson recovered $25,000.00 from

the tortfeasor's insurance company, the full policy limit but well below the amount of Benson's medical expenses. Id. at ¶¶ 4.4-4.6. To pay the remainder of his medical expenses, Benson submitted a claim to his medical insurance company. Id. at ¶ 4.5. Defendant Providence Health Plan ("PHP") is the claims administrator of Benson's insurance plan ("PN 501"), which is administered by defendant Providence Health and Services, Washington ("PH&S-W"). Rogers Decl., ¶ 5, docket no. 16. Benson is insured under PN 501 because his wife, Leona Benson, is employed by PH&S-W, and works at one of its hospitals.[1] Rogers Decl., ¶ 5, docket no. 16.

On October 16, 2008, PHP sent Benson a letter conditioning payment of his medical bills on his agreement to tender over the proceeds from any third party recovery. Warren Decl., Ex. 2, docket no. 15. On January 21, 2009, PHP denied Benson's claim for benefits because he refused to tender over the $25,000.00 he received from the tortfeasor's insurance policy. Warren Decl., ¶ 3(e), docket no. 15.

Benson filed this putative class action lawsuit in Washington State Court on October 2, 2009. Not. of Removal, Ex. 2 (Compl.), docket no. 1-3. Benson alleges that the defendants are liable for damages under the "made whole" doctrine, a state common law rule which precludes an insurer from, among other things, conditioning the payment of benefits on a beneficiary's agreement to tender over funds recovered from third parties. SAC ¶¶ 4.14, 6.1-6.4, 7.1-7.6, 8.1-8.2, 9.1-9.5, docket no. 1-5.

[1] The original complaint alleged that defendant Providence Health and Services ("PH&S") employed Benson's wife and administered PN 501. Id. Ex. 3 at ¶ 4.7. PH&S is a nonprofit corporation that has been the sole member of PH&S-W since January 2006. Rogers Decl., ¶ 3, docket no. 16. The parties appear to dispute which nonprofit corporation is the actual plan administrator, and Benson amended his complaint in 2010 to add PH&S-W as a defendant. See SAC, docket no. 1-5.

II. Discussion

Defendants removed this case from state court pursuant to 28 U.S.C. § 1441(b), asserting that the Court has original jurisdiction over Benson's cause of action under 28 U.S.C. § 1331 "because it is a civil action involving a federal question under [the Employee Retirement Income Security Act ("ERISA")]." Not. of Removal at 3, docket no. 1.

Benson moves for an order of remand, arguing that the Court lacks subject matter jurisdiction because ERISA does not apply. Specifically, Benson contends that prior to May 2009, PN 501 was a church plan, exempt from ERISA. Defendants dispute Benson's characterization of PN 501 as a church plan, and further argue that the issue is moot because PH&S-W filed an election with the Department of Labor in May 2009 that applied ERISA to PN 501 retroactively. In the alternative, defendants contend that Benson's claims arose after the May 2009 election, which created an ERISA plan.

A. Subject Matter Jurisdiction on Removal

In a motion for remand, the burden of establishing subject matter jurisdiction falls on the party invoking removal. See Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930, 932 (9th Cir. 1994). Any doubt is resolved against removability. Luther v. Countrywide Home Loans Servicing LP, 533 F.3d 1031, 1033 (9th Cir. 2008). Whether an action is properly removed under 28 U.S.C. § 1441(b), such that the cause of action "arises under the Constitution, laws, or treaties of the United States," is

governed by the "well-pleaded complaint rule." Toumajian v. Frailey, 135 F.3d 648, 653 (9th Cir. 1998). Under this rule, "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). To raise an issue of federal law, a federal question must appear on the face of the complaint. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983). Here, the SAC is strictly limited to state common law claims. Defendants argue that one of the following exceptions to the well-pleaded complaint rule applies: (1) Benson's complaint raises substantial federal questions; or (2) ERISA completely preempts Benson's claims.

1. The SAC Does Not Raise a Substantial Question of Federal Law

Defendants argue that the well-pleaded complaint rule does not apply in this case, relying heavily on the Supreme Court's decision in Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005). In Grable, the federal government foreclosed a tax lien on the plaintiff's real property, and sold the property to the defendant. Id. at 310-11. The plaintiff subsequently brought a quiet title action against the defendant, and the defendant removed the case to federal court, arguing that the plaintiff's claim to title depended upon the interpretation of the federal statute related to the government's tax lien foreclosure. Id. The Supreme Court held that the federal court had jurisdiction because 1) the case necessarily raised a federal issue; 2) the federal issue was substantial and in actual dispute; and 3) the exercise of federal jurisdiction would not disturb any congressionally approved balance of federal and

state judicial responsibilities. Id. at 314-15. Only a small, special category of cases fit within the Grable exception to the well-pleaded complaint rule. Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 704 (2006) (holding that the federal preemption provision in the Federal Employees Health Benefits Act did not give rise to subject matter jurisdiction under Grable to enforce an insurer's right of reimbursement on a state law breach of contract claim). Defendants argue that Benson's complaint raises a substantial federal question under ERISA because the Court must necessarily determine whether PN 501 is an ERISA plan.

The Court concludes that the limited jurisdictional exception enunciated in Grable does not apply. Here, unlike in Grable, Benson's claims are based exclusively on state law, and the merits of his claims do not depend upon an interpretation of a federal statute or a determination of the propriety of an agency's actions. Moreover, applying the limited Grable exception in this case would expand the scope of federal jurisdiction to include any case which involves a dispute over the existence or non-existence of an ERISA benefit plan. Such a broad expansion of federal jurisdiction disturbs the congressionally approved balance of federal and state judicial responsibilities, and would be inconsistent with the long line of cases holding that the existence of a federal preemption defense to a state law claim, standing alone, is insufficient to confer removal jurisdiction. See Empire Healthchoice, 547 U.S. at 704; see also Marin General Hospital v. Modesto & Empire Traction Co., 581 F.3d 941, 946 (9th Cir. 2009) ("[A] defense of federal preemption of a state-law claim, even

conflict preemption under [section 1144(a)] of ERISA, is an insufficient basis for . . . removal jurisdiction."); Franchise Tax Bd., 463 U.S. 1 (1983) ("[A] defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law.") (emphasis added).

2. Complete Preemption

Defendants also argue that the Court has jurisdiction under the doctrine of complete preemption, which is premised on the notion that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metro. Life, 481 U.S. at 63-64.

Complete preemption under ERISA requires that a plaintiff's state law claims fall within the scope of both 29 U.S.C. § 1144(a) and ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). Toumajian, 135 F.3d at 654 ("If both conditions are not met . . . the federal court does not have subject matter jurisdiction and the matter should be remanded."). A state law claim falls within the scope of section 1132(a) if (1) an individual, at some point in time, could have brought the claim under ERISA section 1132; and (2) there is no independent legal duty that is implicated by a defendant's actions. Aetna Health, Inc. v. Davila, 542 U.S. 200, 210 (2004).

However, "[t]he existence of a plan is a prerequisite to jurisdiction under ERISA." Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986). Consequently, if PN 501 is not an ERISA plan, Benson's claims are not subject to complete preemption because neither Benson nor any other plaintiff could have

brought the present claims under ERISA section 1132(a). Therefore, the Court must first determine whether ERISA applies to PN 501.[2]

B. The Church Plan Exemption

The crux of the parties' dispute over jurisdiction is whether PN 501 is a church plan that is exempt from ERISA. Benson argues that the defendants are procedurally barred by the doctrine of collateral estoppel from relitigating whether PN 501 is a church plan that is exempt from ERISA. In the alternative, Benson argues that this Court lacks subject matter jurisdiction because PN 501 is a church plan that is exempt from ERISA.

1. Collateral Estoppel

Benson alleges that collateral estoppel precludes the defendants from relitigating whether PN 501 is a church plan. Collateral estoppel bars a party from relitigating a legal issue where (1) there was a full and fair opportunity to litigate the issue in a previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action. In re Palmer, 207 F.3d 566, 568 (9th Cir. 2000). The applicability of the church plan exemption to PN 501 was fully litigated to a final

[2] Defendants argue that under Williston Basin Interstate Pipeline Co. v. Exclusive Gas Easement, 524 F.3d 1090 (9th Cir. 2008), the Court cannot reach the substantive question of whether ERISA applies because that determination is inextricably intertwined with the merits of the case. Here, Benson's claims for relief are grounded entirely in state law so the applicability of ERISA does not go to the merits of Benson's claims. Moreover, unlike in Williston, this case is before the court on removal from state court, where the Court must reject federal jurisdiction "if there is any doubt as to the right of removal in the first instance." Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985).

judgment in Rinehart v. Life Ins. Co. of N. Am., 2009 WL 995715 (W.D. Wash. 2009), and although the defendants were not named parties in that case, Benson makes a strong argument that they should be bound by collateral estoppel. For example, defendants' general counsel participated heavily in the Rinehart litigation, and the defendants affirmatively elected not to intervene in that action. Seiler Decl., Exs. 7-8, docket no. 9. Nonetheless, the Court declines to decide whether the defendants are procedurally barred from relitigating the church plan exemption issue and instead will address the substantive question that is at the core of the parties' jurisdictional dispute: whether PN 501 is a church plan that is exempt from ERISA.

2. PN 501 is a Church Plan

ERISA defines a "church plan" as a plan "established and maintained . . . for its employees (or their beneficiaries) by a church . . . ." 29 U.S.C. § 1002(33)(A). Defendants contend that since the company that established and maintained PN 501, PH&S-W, is not a church in the traditional sense, PN 501 was not "established or maintained" by a church, and consequently, PN 501 cannot constitute a church plan.

However, "ERISA brings a plan established or maintained by a non-church organization within the general definition of a church plan if that organization is controlled by or associated with a church." Rinehart, 2009 WL 995715 at *3. In Rinehart, the court concluded that plans established and maintained by non-church entities could qualify as church plans because ERISA expansively defines the term "employee of a church" to include employees of civil law corporations. Id. at *4 ("By

defining the term 'employee' in the manner it does [ERISA] broadens the definition of the term 'church plan.'"). Although the defendants take issue with the Rinehart court's analysis, it is consistent with the other cases that have addressed the scope of the church plan exemption. See Lown v. Cont'l Cas. Co., 238 F.3d 543, 547 (4th Cir. 2000); Chronister v. Baptist Health, 442 F.3d 648 (8th Cir. 2006); Welsh v. Ascension Health, 2009 WL 1444431 (N.D. Fla. 2009); Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77, 85 (D. Me. 2004). Thus, under Rinehart, PN 501 is a church plan because, as the defendants concede, PH&S-W is "associated with" the Roman Catholic Church. Opp'n at 16, docket no. 14.

Moreover, even if plans established and maintained by non-church entities could not qualify as church plans, the Court concludes that remand is appropriate because PH&S-W meets the definition of a "church" under ERISA. The Treasury Department has enacted regulations that clarify the definition of the term "church."[3] Under the regulations, the term "church" includes "a religious order or a religious organization if such order or organization (1) is an integral part of a church; and (2) is

[3] The Court notes that the Labor Department is the agency charged with the administration of ERISA, not the Treasury Department. 29 U.S.C. § 1002(13). In general, an agency's interpretation of a statute that it does not administer is entitled to no deference. Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth., 435 F.3d 1049, 1051 (9th Cir. 2006). However, the Treasury Department regulations cited above predate the enactment of ERISA. The language in 26 C.F.R. § 1.414(e)-1(e) originated in an earlier treasury regulation. See 26 C.F.R. § 1.511-2(a)(3)(ii). The Treasury Department promulgated section 1.511-2 in 1960, fourteen years before Congress enacted ERISA. See 25 Fed. Reg. 11402, 11748 (Nov. 26, 1960). Therefore, the Court presumes that Congress adopted the Treasury Department's expansive definition of what constitutes a "church" (now set forth in 26 C.F.R. § 1.414(e)-1) when it enacted ERISA in 1974. See Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) (holding that where Congress adopts a new law incorporating sections of prior law that have previously been interpreted by an administrative agency, Congress "is presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise." 26 C.F.R. § 1.414(e)-1(e) (emphasis added).

There is no dispute that the unincorporated association of religious women known as the Provincial Superior and Members of the Provincial Council of the Sisters of Providence-Mother Joseph Province (the "Sisters") is a religious order that is an integral part of the Catholic Church, and engaged in carrying out the functions of the Church. Rogers Decl., ¶¶ 1-2, docket no. 16. Prior to January 1, 2006, the Sisters were PH&S-W's sole member. Id. at ¶ 1; Seiler Decl., Ex. 7 (Rogers Dep.) at 45-46, docket no. 9. After a corporate reorganization in 2006, the Sisters became the sole member of PH&S, which in turn became the sole member of PH&S-W. Rogers Decl., ¶¶ 2-3, docket no. 16. The Sisters hold complete control over the operation of these corporations by virtue of their retained rights to amend or repeal bylaws, and appoint or remove board members, among other powers. Seiler Decl., Ex. 8 (Rogers Decl. ¶ 3), docket no. 9. Therefore, the Court concludes that PH&S-W is a civil law manifestation of the Sisters, through which the Sisters carry out the functions of the Catholic Church.[4] Id. at ¶ 1. Consequently, PH&S-W meets the definition of a "church" for purposes of determining whether the church plan exemption applies.

[4] See Rogers Decl., Ex. 1 (IRS Private Letter Ruling) at 5 ("Thus [the Sisters]—and [PH&S-W] which [is] a civil law manifestation of [the Sisters]—[are] included within the meaning of the word 'church'. . . ."), docket no. 16.

To qualify as a church plan, however, PN 501 must also be established and maintained for the benefit of church employees. 29 U.S.C. § 1002(33)(A). ERISA expansively defines a church employee as including:

> an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church . . .

Id. at § 1002(33)(C)(ii)(II). A church is "deemed" to be the employer of an individual described in section 1002(33)(C)(ii). Id. at § 1002(33)(C)(iii).

Leona Benson is an employee of PH&S-W, a civil law corporation which the defendants concede is associated with the Catholic Church. Rogers Decl., ¶ 5, docket no. 16; Opp'n at 16, docket no. 14. Consequently, Ms. Benson is an employee of a church within the meaning of section 1002(33)(C)(ii)(II), and the Court concludes that remand is appropriate because PN 501 is a church plan, exempt from ERISA.

C. Defendants' May 2009 ERISA Election Did Not Retroactively Preempt Benson's Claims

Church plans are made subject to ERISA if the plan administrator makes a formal election under 26 U.S.C. § 410(d).[5] Defendants argue that the formal ERISA

[5] Strict compliance with ERISA's formal election requirements is important, "especially considering the irrevocable nature of the election after it is made." Rinehart, 2009 WL at *5 (citing 26 C.F.R. § 1.410(d)-1). Defendants did not make a valid, affirmative election until May 2009. See Rogers Decl., Ex. 2, docket no. 16. Nonetheless, defendants argue that ERISA should apply to PN 501 because they have always acted as though ERISA applied to the plan. Defendants cite Duckett v. Blue Cross Blue Shield of Alabama, 75 F. Supp. 2d 1310, 1317 (M.D. Ala. 1999) and Saltarelli v. Bob Baker Group Med. Trust, 35 F.3d 382, 386 (9th Cir. 1994) for the general proposition that the Court should reject the strict statutory requirement of a formal election and instead preserve the parties' reasonable expectations when determining whether ERISA applies to a plan. In Duckett, the district court concluded on summary judgment that the defendant did not maintain a church plan because the plaintiff had failed to present any evidence that the defendant was controlled by or associated with a church. Duckett, 75 F. Supp. 2d at 1317. Duckett does not apply here, where the defendants concede that they are affiliated with the Catholic Church. Opp'n at 16, docket no. 14. In Saltarelli, the Ninth

election PH&S-W filed with the Labor Department in May 2009 applies ERISA to PN 501 retroactively, thereby preempting Benson's claims. The plain language of ERISA is dispositive: ERISA elections do not retroactively preempt state law claims because preemption occurs upon the making or filing of a section 410(d) election. See 29 U.S.C. § 1144(a) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) . . . ."); id. at § 1003(b) (providing that ERISA "shall not apply to any employee benefit plan . . . if such plan is a church plan . . . with respect to which no election has been made under section 410(d) . . . ."); see also Welsh v. Ascension Health, 2009 WL 1444431, *8 (N.D. Fla. 2009); Geter v. St. Joseph's Healthcare Sys., Inc., 575 F. Supp. 2d 1244, 1249-50 (D. N.M. 2008); Catholic Charities of Maine, Inc. v. City of Portland, 319 F. Supp. 2d 88, 89 (D. Me. 2004).

D. Benson's Claims Arose Prior to May 2009

Finally, defendants argue that even if PN 501 is a church plan, and their ERISA election does not apply retroactively, Benson's claims arose after the May 2009 election, and therefore ERISA preempts his claims. Specifically, defendants contend that Benson did not sign the objectionable waiver and did not relinquish the money he

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Circuit held that where ERISA applies to preempt state law, federal courts should preserve the parties' reasonable expectations when interpreting insurance contracts under federal common law. Salterelli, 35 F.3d at 387. Salterelli does not control here because ERISA does not apply.

recovered from the tortfeasor until after May 2009. Warren Decl., ¶¶ 3(l)-(p), docket no. 15.

The SAC alleges four causes of action: (1) breach of contract; (2) violation of the state consumer protection act; (3) unjust enrichment; and (4) bad faith. All of the causes of action arise out of the same nucleus of facts: defendants' refusal to provide medical benefits until Benson (or any other potential class beneficiary) agreed to tender over the proceeds of any third party settlement. Thus, Benson was injured, and his claims arose, on January 21, 2009, when defendants denied coverage.[6] It was at that time that Benson gained the right to pursue a claim in court.

As Benson's claims arose prior to the May 2009 election, ERISA does not apply or otherwise operate to preempt his claims. See 29 U.S.C. §§ 1003(b), 1144(a).[7]

III. Conclusion

The defendants in this case come before the Court with a two-strike count. On two previous occasions, the applicability of ERISA's church plan exemption to PN 501 has been decided against the defendants. Judge Leighton called the first strike in Rinehart, 2009 WL 995715 at *3, holding that PN 501 was a church plan. Although

[6] Defendants also contend that Benson's complaint alleges claims under the ERISA plan created by the May 2009 election because it requests injunctive relief extending into the future. See 2nd Warren Decl., ¶ 3(o)-(q), docket no. 15. The defendants' contentions are misplaced because Benson seeks no relief from the plan after May 2009. See Reply at 7-8, docket no. 19.

[7] Moreover, PN 501 provides for claims to be paid under the plan that is in effect at the time the beneficiary incurs the medical expenses. Seiler Decl., Ex. 1 at 5-1, 16-6, docket no. 9-2 ("When you submit a claim for payment for medical . . . services, it is paid based on your elected option in effect at the time you incurred the expense, not when you submit it.") (emphasis added). Thus, PN 501 contemplates that claims for benefits arise when beneficiaries incur medical expenses.

not parties in that action, the defendants were "at-bat." Prior to removal in this case, State Superior Court Judge Doyle called the second strike. See King County Superior Court Cause No. 09-2-35792-7 SEA.

Benson has delivered the third pitch, arguing that ERISA does not apply because PN 501 is a church plan. For the reasons set forth above, the Court agrees. Strike three! ERISA does not apply and the defendants have failed to meet their burden to show that this Court has subject matter jurisdiction on removal. Accordingly, the Court GRANTS Benson's motion for remand, docket no. 8, and directs the clerk to REMAND this case to King County Superior Court.[8] The Court DENIES the defendants' pending motion to stay, docket no. 10, as moot.

IT IS SO ORDERED.

DATED this 30th day of November, 2010.

Thomas S. Zilly
United States District Judge

[8] Benson requests an award of his attorneys' fees. See Reply at 12, docket no. 19. Although the Court has discretion to award attorneys' fees in an order remanding a case to state court, see 28 U.S.C. § 1447(c), the Court declines to award fees.