STATE OF MICHIGAN

COURT OF APPEALS

CLAYTON GROUP SERVICES, INC., f/k/a CLAYTON ENVIRONMENTAL CONSULTANTS,

Plaintiff-Appellant,

v

FIRST ALLMERICA FINANCIAL LIFE INSURANCE COMPANY, GROUP PERKS, INC., and ROBERT SCHECHTER & ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
July 26, 2002

No. 226491
Oakland Circuit Court
LC No. 99-015795-CK

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I agree with the majority's holding that plaintiff's state law claims against First Allmerica Financial Life Insurance Company are preempted by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.*, for the reasons stated by the majority. I respectfully dissent from the majority's ruling that plaintiff's state law claims against Group Perks, Inc. and Robert Schechter & Associates (Group Perks/Schechter) are also preempted by ERISA.

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 USC 1144(a). The United States Supreme Court has observed that this language is broad and clearly expansive. *Egelhoff v Egelhoff*, 532 US 141; 121 S Ct 1322; 149 L Ed 2d 264 (2001). A law is said to "relate to" an employee benefit plan "if it has a connection with or reference to such a plan." *Shaw v Delta Air Lines, Inc*, 463 US 85, 96-97; 103 S Ct 2890; 77 L Ed 2d 490 (1983). A law refers to an employee benefit plan if it: (1) imposes requirements by reference to ERISA covered programs, (2) acts immediately and exclusively on ERISA plans, or (3) the existence of the ERISA plan is essential to the state law's operation. *California Division of Labor Standards Enforcement v Dillingham Construction, N A, Inc*, 519 US 316, 324-325; 117 S Ct 832; 136 L Ed 2d 791 (1997). To determine whether a law has a connection with an ERISA plan, the court must look to the objectives of ERISA and the nature of the effect of the state law on ERISA plans. *Id.* at 325. "The basic thrust of the preemption clause, then, [is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins Co*, 514 US 645, 657; 115 S Ct 1671; 131 L Ed 2d 695 (1995).

The Supreme Court, however, has cautioned that the term "relate to" cannot be "taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course." *Travelers* at 657. Therefore, § 514(a) of ERISA does not include every possible relation to ERISA. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 321; 565 NW2d 915 (1997). Indeed, there is a presumption that Congress does not intend to preempt state law. *DeBuono v NYSA-ILA Medical & Clinical Services Fund*, 520 US 806, 813; 117 S Ct 1747; 138 L Ed 2d 21 (1997); *Travelers*, *supra* at 654. "State laws or state-law claims whose effect on employee benefit plans are merely tenuous, remote, or peripheral are not preempted." *D'Avanzo*, *supra* at 321-322.

Plaintiff has alleged that it relied on Group Perks/Schechter's expertise and advice, through its employee Peter Mendler, to interpret the plan issued by First Allmerica, that Group Perks/Schechter was negligent in failing to properly interpret the plan, and that plaintiff suffered economic loss. Initially, I emphasize that Group Perks/Schechter is an independent insurance agency and is clearly not an ERISA entity in this case. This fact is crucial because there is a substantial and cohesive body of case law in the federal circuit courts of appeal holding that state laws involving traditional areas of state regulation not affecting relations among principal ERISA entities will not be preempted. *Abraham v Norcal Waste Systems, Inc*, 265 F3d 811, 820 (CA 9, 2001); *Geweke Ford v St Joseph's Omni Preferred Care Inc*, 130 F3d 1355, 1360 (CA 9, 1997); *Arizona State Carpenters Pension Trust Fund v Citibank*, 125 F3d 715, 724 (CA 9, 1997); *Wilson v Zoellner*, 114 F3d 713, 718-719 (CA 8, 1997); *Morstein v National Ins Services, Inc*, 93 F3d 715, 722 (CA 11, 1996); *Custer v Sweeney*, 89 F3d 1156, 1167 (CA 4, 1996); *The Meadows v Employers Health Ins*, 47 F3d 1006, 1009 (CA 9, 1995); *Airparts Co, Inc v Custom Benefit Services of Austin, Inc*, 28 F3d 1062, 1065 (CA 10, 1994); *Perkins v Time Ins Co*, 898 F2d 470, 473 (CA 5, 1990). In *Arizona State Carpenters*, *supra* at 724, the court summarized an exception to ERISA's otherwise expansive preemption as follows:

> [W]here state law claims fall outside the three areas of concern identified in *Travelers*, [whether the state law mandates employee benefit structures or their administration; whether the state law binds employers or plan administrators to particular choices or precludes uniform administrative practice; or whether the state law provides alternate enforcement mechanisms] arise from state law of general application, do not depend upon ERISA, and do not affect the relationships between the principal ERISA participants; the state law claims are not preempted.

In *Airparts*, the plaintiffs were the employer/administrator and co-trustees of an ERISA plan who brought state common law claims of negligence, implied indemnity, and fraud against an outside consultant firm that had been hired to provide expert benefit plan consultation and advise the plan's trustees. The court held that these state common law claims were not preempted by ERISA and began by noting that these were laws of general application that did not specifically target ERISA plans. Specifically, the court held that the state common law claims were not preempted because the state laws did not regulate benefits or terms of the plan; did not create reporting, disclosure, funding, or vesting requirements for the plan; did not affect the calculation or benefits; were not common law rules designed to rectify faulty plan administration; and did not affect the relations between the principal ERISA entities. *Id.* at 1065-1066.

In *Custer*, the court was faced with the issue whether ERISA preempts a legal malpractice claim against attorneys representing the ERISA plan. The plaintiff was a trustee and participant in an ERISA plan and brought suit against the plan's attorneys alleging breach of fiduciary duty under ERISA and legal malpractice in their representation of the plan. Although the court held that the breach of fiduciary duty claim was properly dismissed, the court held that the legal malpractice claim was not preempted by ERISA. The court so held, reasoning that permitting a legal malpractice claim against an attorney representing the plan would not undermine the congressional policies underlying ERISA, that there is a presumption that ERISA does not preempt state laws that represent a traditional exercise of state authority, that such a claim does not implicate relations among the traditional ERISA plan entities, and that the claim does not fall within the categories of laws generally found to be preempted by ERISA (laws that provide alternative causes of actions to collect benefits, laws that interfere with the calculation or benefits owed, or laws referring specifically to and applying solely to ERISA plans). *Id.* at 1167.

In *Arizona State Carpenters*, three multi-employee pension trust funds filed suit against Citibank, which served as a depository and custodial agent for the trust fund but was not a fiduciary within the meaning of ERISA, alleging, among other things, state common law claims of breach of custodial agreement, breach of common law fiduciary duties, breach of implied covenant of good faith and fair dealing, negligence, and fraud. The court held that these state law claims were not connected with ERISA, and, therefore, not preempted. Again, the court reasoned that there was no preemption because the claims arose from state laws of general application, did not depend on ERISA, did not affect the relations among the principal ERISA participants, did not address the employee benefit structure or the administration of benefits, were not aimed at binding employers or plan administrators to particular practices or precluded uniform administrative practices, and were not alternative enforcement mechanisms to obtain benefits. *Id.* at 723-724.

In *Geweke Ford*, the employer brought suit against a third-party administrator and an excess liability insurer of its health benefit plan alleging a state law claims of breach of contract and for declaratory relief. The employer hired the third-party administrator to manage the day-to-day operations of the plan, including claims processing. The excess liability insurer provided excess loss coverage requiring the insurer to reimburse the employer for payment made under the plan above a certain deductible in a given year. Once again, the court held that the state law claims were not preempted for the same reasons set forth in *Arizona State Carpenters*. Further, the court again emphasized that "ERISA does not necessarily preempt relationships between an ERISA and a third party." *Geweke Ford, supra* at 1360.

Lastly, in *Abraham*, former employee-shareholders brought a state court action against the employee stock ownership plan covered by ERISA, the plan's sponsor, the plan's trustee successor, and lenders for the plan's leveraged stock buyout, alleging claims of constructive fraud, breach of fiduciary duty, and negligence when the employee stock ownership plan ultimately defaulted on its indebtedness to the plaintiff shareholders. The court held that these state law claims were not preempted by ERISA, again focusing on the fact that these claims did not encroach on any relationship regulated by ERISA so as to trigger preemption. The court specifically noted that the plaintiffs were suing in their status as note holders to an indenture and not as participants in the plan, that the state law claims did not arise from any transactions directly relating to the plan benefits or administration or any duties imposed by ERISA, and the

financial relationship arose from a transaction explicitly exempted from ERISA regulations. *Id.* at 821-823.

In applying the analysis set forth in this line of cases, I find that plaintiff's state law misrepresentation and negligence claims against Group Perks/Schechter are not preempted by ERISA. Indeed, substantial deference should be given to these consistent rulings in the federal courts, especially because this case involves the interpretation of a federal statute. See *Yellow Freight System, Inc v Michigan,* 464 Mich 21, 29, n 10; 627 NW2d 236 (2001); *Etefia v Credit Technologies, Inc,* 245 Mich App 466, 470; 628 NW2d 577 (2001). Here, the state law claims do not mandate employee benefit structures or their administration, do not bind the employer or plan administrators to particular choices or preclude uniform administrative practice, and do not provide alternative enforcement mechanisms to obtain ERISA plan benefits. *Geweke Ford, supra* at 1360; *Arizona State Carpenters, supra* at 723. Plaintiff is not making a claim under the plan against Group Perks/Schechter, inasmuch as there is no allegation that the any of the plan's terms have been breached, but rather that Group Perks/Schechter failed to properly advise plaintiff regarding the impact on the premiums when changing the employees from the plan to health maintenance organizations. *Airparts, supra* at 1066. The claims do not involve an action to collect benefits, do not interfere with the calculation of benefits owed to an employee, and do not regulate any reporting, disclosure, funding, or vesting requirements for the plan. *Id.* at 1065.

Further, the misrepresentation and negligence claims do not refer specifically and apply solely to an ERISA plan, do not impose requirements by reference to an ERISA covered program, and do not attempt to rectify a faulty plan administration because Group Perks/Schechter is not an administrator of the plan. *Airparts, supra* at 1065. The existence of the ERISA plan is not essential to the state law's operation. In other words, the misrepresentation and negligence claims are of general application that do not depend on ERISA, and do not affect the relationships between the principal ERISA entities. *Geweke Ford, supra* at 1360; *Arizona State Carpenters, supra* at 724.

Here, Group Perks/Schechter is an independent insurance agency having no connection with the plan. Rather, plaintiff engaged the services of Group Perks/Schechter to find a new group health insurance policy and to advise plaintiff in changing from its plan with First Allmerica to a different plan. Group Perks/Schechter is not a fiduciary and not an ERISA entity. Rather, Group Perks/Schechter is an outside insurance agency that did not directly perform any administrative acts with regard to the plan. See *Airparts, supra* at 1066. Its relationship with plaintiff was no different than that with any other customer for which it would seek insurance policies. See *Arizona State Carpenters, supra* at 724. Thus, the misrepresentation and negligence claims do not encroach on any relationship regulated by ERISA. *Abraham, supra* at 820-821; *Geweke Ford, supra* at 1358. Therefore, I conclude that the state law claims of misrepresentation and negligence are not preempted because their relationship with the plan is merely tenuous, remote, and peripheral. *Id.* at 1360; *Arizona State Carpenters, supra* at 724; *Airparts, supra* at 1065.

The fact that plaintiff alleges that Group Perks/Schechter failed to properly interpret the plan, as emphasized by the majority, is not necessarily dispositive because the interpretation merely involves the premiums under the plan and Group Perks/Schechter is not an ERISA entity. This appears to be a situation where the "relate to" provision is being taken to an illogical extreme. As Justice Scalia has stated:

> [A]pplying the "relate to" provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else. [*Dillingham, supra* at 335.]

I would hold that the trial court erred in finding that plaintiff's state law misrepresentation and negligence claims against Group Perks/Schechter was preempted by ERISA for the reasons set forth above. I would reverse the trial court's ruling with respect to Group Perks/Schechter and allow the state law claims to proceed below.

/s/ Kathleen Jansen