

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3452
Summary Calendar

DEBORAH DONTAS,

Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY and
D. H. HOLMES COMPANY, LTD.,
GROUP UNIVERSAL LIFE PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-91-503-N)

(April 7, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

The widow of the insured brought a claim for life insurance benefits against an insurer and the insured's employer. The insurer refused to pay because the insured had failed to convert his terminated group policy to an individual policy in a timely manner. On appeal, the insured's widow argues that this period should be equitably tolled due to the insured's sudden

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

incapacitation during the conversion period. We affirm the district court's conclusions that the group policy was not an employee welfare benefit plan under ERISA, that equitable tolling is therefore not appropriate, and that appellant's state law claims are without merit.

BACKGROUND

Louis Dontas, the insured decedent, was an employee of D. H. Holmes Co., Ltd., a department store with 6,000 employees. In 1986, Holmes retained Johnson & Higgins, Inc. to structure and administer a multiple employer trust, through which group universal life insurance could be offered to its workers. Metropolitan Life Insurance Company provided the insurance via the trust to the employees. The administrative duties were assumed by an agent of the trustee closely related to Johnson & Higgins (hereinafter simply "Administrator"). This arrangement allowed Holmes to offer its employees low group rates without evidence of insurability and purportedly insulated Holmes and other participating employers from application of ERISA through careful drafting of the trust agreement.¹ Holmes' role in the Group Universal Life Plan (GUL

¹ That agreement in relevant part read:

A Consenting Employer's purpose in consenting to the terms hereof pursuant to the Consent Agreement is solely to allow its employees to become eligible to participate in any life insurance benefits established hereunder and in connection therewith to furnish certain information to any insurance company providing such benefits, to allow certain information to be furnished to its employees and to offer its employees the right to pay premiums for the purchase of such life insurance through payroll withholding and to remit such withheld premiums as provided herein. It is not intended that a Consenting Employer by signing the Consent Agreement shall, and each Consenting Employer expressly shall not, establish, maintain, or carry for the benefit of its

Plan) created by this agreement was well-summarized in an informational brochure given to Holmes employees:

Your employer is making available to the employees, without endorsement, the opportunity to enroll in Group Universal Life, through the distribution of brochures and other materials prepared by [the Administrator]. Premiums will be collected through payroll deductions. Group Universal Life is not intended to be an employer-sponsored welfare benefit plan for purposes of the EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, as amended.

The GUL Plan had several features that made it "portable." If an employee were terminated and wanted to continue his coverage under the GUL Plan, he could do so in most instances, as long as the group policy remained in place. Once the group policy terminated, however, this aspect of portability was not viable. The plan also provided for a 60-day grace period for non-payment of the monthly deduction. Finally, and most relevant to this case, the plan allowed participants to convert their coverage from the group policy to an individual policy if the GUL Plan ended. Under the written terms of the policy, this conversion was available only if the plan had been in place for at least five years and an application was made within 31 days after death benefits under the group plan terminated. The policy provided that if the participant died during this 31-day conversion period, the

employees any life insurance policies or program provided pursuant to this Agreement. [The sole functions of a Consenting Employer with respect to the program are, without endorsing the program, to permit the insurance company to publicize the program to employees, to collect premiums through payroll deductions and to remit them pursuant to [terms of the trust agreement].

plan would nevertheless pay a death benefit of \$10,000 or the amount of term insurance available under the GUL Plan, whichever was less.

Louis Dontas enrolled in the plan and was covered thereunder as of January 1, 1987. As of January 1, 1989, Dontas was entitled to \$310,000 of GUL coverage. Around January 1, 1987, Mr. Dontas was diagnosed as having lung cancer and was told that he had no more than five years to live. He received radiation treatments for brain cancer in September of 1988. By 1989, he was not undergoing cancer treatment, but continued to see his physician every two weeks.

Around this time, Holmes was purchased and merged with Dillard's department store. As a result of the merger, Mr. Dontas' employment ended on June 3, 1989. Dillard's chose not to participate as a consenting employer in the GUL Plan and took steps to terminate it. On June 29, 1989, the Administrator sent to group policy participants, including Mr. Dontas, a GUL Plan termination notice which explained that due to the merger of Holmes and Dillard's, all GUL Plan coverage would terminate effective September 1, 1989. This notice was in writing, stated the termination date, and was sent more than 15 days prior to that date -- all in compliance with the terms of the group life policy.

The terms of the plan did not require Metropolitan Life to offer a conversion from group coverage to individual coverage because the GUL Plan had been in place for less than five years. The notice of termination letter nevertheless announced that

Metropolitan Life Insurance had made available "a special conversion opportunity for all D. H. Holmes Group Universal Life participants." The terms of the conversion, included as a two-page attachment to the termination letter entitled "CONVERSION NOTICE", did not require proof of insurability, but did require the participant to apply for individual insurance to a Metropolitan Life Insurance representative within 31 days of the end of group coverage, i.e., by October 1, 1989. A further condition was that all group premiums through August 31, 1989 be paid. Premiums would be based on the applicant's age and the risk factors for his class. Attached to the notice was a listing of Metropolitan Life Insurance offices, managers, and their phone numbers for the convenience of those wishing to convert. The notice also reprinted the Administrator's toll-free number if the participants had any questions about the GUL Plan's pending termination.

The Administrator billed Mr. Dontas twice for premiums due under the soon-to-be-terminated GUL Plan. He paid the group rate premiums to retain coverage until the September 1 termination date. Thirteen days into the conversion period,² on September 13, 1989, Mr. Dontas became mentally incapacitated, "incoherent," and "non-functional;" he subsequently died on October 27, 1989 -- 26 days after the expiration of the 31-day conversion period. Mr. Dontas apparently never attempted during the first 13 days of the

² We refer to the 31 days following the GUL Plan's termination as the "conversion period" for the sake of convenience. Metropolitan Life represents that it would have accepted Mr. Dontas' application anytime after the June 29, 1989 letter through October 1, 1989.

conversion period to convert his policy. The evidence indicates that Mrs. Dontas was unfamiliar with her husband's financial and insurance affairs and thus took no action to convert his policy.

On November 14, 1989, Mrs. Dontas's brother-in-law, whom Mrs. Dontas had asked to help wind up Mr. Dontas's estate, contacted the Administrator to inform it of Mr. Dontas's death. On May 29, 1990, Mrs. Dontas submitted a life insurance claim statement to the Administrator, who in turn referred it to Metropolitan Life. On November 8, 1990, Metropolitan Life denied the claim.

Mrs. Dontas filed suit against the GUL Plan and Metropolitan Life for the full value of Mr. Dontas' death benefits under the group plan. The district court, in a very thorough opinion, ruled that the GUL Plan was not an employee welfare benefit plan under ERISA, 29 U.S.C. § 1001 et. seq., and refused to impose equitable tolling. The court also found that Mrs. Dontas's state law contentions were without merit.

DISCUSSION

Federal Claims

Whether a particular set of insurance arrangements constitutes an employee welfare benefit plan under ERISA is a question of fact which we review for abuse of discretion. Hansen v. Continental Ins. Co., 940 F.2d 971, 976 (5th Cir. 1991). The Department of Labor, pursuant to authority granted to it by Congress, has promulgated regulations which provide a safe harbor to certain insurance plans: (1) the employer must make no

contributions to the cost of insurance; (2) participation by employees must be completely voluntary; (3) the employer's sole function with respect to the program is to permit the insurer, without endorsement, to publicize the program, and to collect premiums through payroll deductions; and (4) the employer must receive no consideration in connection with the program other than reasonable fees in connection with payroll deduction. 29 U.S.C. § 1135; 29 CFR § 2510.3-1(j). A group insurance plan must meet all four conditions in order to be exempted from ERISA under the provision. The district court found that Holmes had met all four conditions.

Mrs. Dontas argues that Holmes' involvement with the plan went beyond the permissible bounds outlined in the third provision, publication of the program and premium collection through payroll deductions. She offers 16 actions which she claims constitute endorsement, involvement, and active administration of the GUL Plan. Many of these are irrelevant. For example, any activity Holmes undertook prior to offering the Plan to its employees, such as negotiating the best benefits for its employees' money, all occurred before the "program" referred to in the third prong existed. Other activities cited by Mrs. Dontas relate to Holmes employees who were hired, in part, to explain the terms of the plan to employees who had questions and infrequently to assist Holmes employees with questions by calling the Administrator directly. We will not read the third prong to prohibit such de minimus participation given in the spirit of helpfulness. Finally, Holmes

reconciled any differences between the Administrator's monthly premium bill to Holmes and the amount actually withheld from the wages of employees through its payroll deductions. Reconciliation of these inevitable variances is permissible under the safe harbor provisions. Cf. Hansen, 940 F.2d 971, 973-74 (finding that employer endorsed plan by distributing booklet bearing employer's corporate logo, encouraging employees to "give the program careful consideration [because it] can be a valuable supplement to your existing coverages," referring to the group insurance plan as "our plan," and employing full-time benefits administrator who accepted claims forms from employees and submitted them to the insurer).

Finally, this court has repeatedly held that in cases involving the purchase of group insurance policies, the evidence must show that the employer had an intent to provide its employees with a welfare benefit program through the purchase and maintenance of the group insurance policy. Hansen, 940 F.2d at 978, citing, e.g., Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241 (5th Cir. 1990). In the instant case, the employer specifically and repeatedly manifested its intent not to establish an employee welfare benefit plan under ERISA. This stated purpose to avoid ERISA, coupled with determined efforts to comply with the safe harbor provisions for insurance coverage, allow us to easily affirm the district court's finding that this was not an ERISA plan. We therefore do not address Appellant's arguments for equitable tolling under federal common law pertaining to ERISA plans. See Branch v. G. Bernd Co., 955 F.2d 1574 (11th Cir. 1992).

State Claims

Alternatively, Mrs. Dontas argues that if the GUL Plan was not an ERISA plan, then Louisiana law requires judgment in her favor. We disagree. Louisiana law prohibits equitable tolling unless authorized by statute. LA. Civ. Code art. 3468 ("Prescription runs against absent persons and incompetents, including minors and interdicts, unless exception is established by legislation."). The district court was unaware of any legislation that would toll prescription in this case and none has been brought to our attention on appeal.

Mrs. Dontas' argument, at least as best as we can construe it, is that Louisiana law specifies that a group life insurance policy can be placed in force "only if at least seventy-five percent of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions." La. Rev. Stat. 22:175, recodified at La. Rev. Stat. 22:3117(B)(3). Citing evidence that far less than seventy-five percent of Holmes employees signed up for the GUL plan, Mrs. Dontas asserts that what was actually created was not a group life insurance plan but a collection of individual policies. She then builds on this and asserts that Metropolitan Life Insurance failed to comply with all of the technicalities of La. Rev. Stat. 22:177 which governs cancellation of individual life insurance policies. That statute requires that a notice of cancellation sent to an insured under an individual policy state the premium amount due, state the place of

remittance, and allow 30 days for payment. Mrs. Dontas then argues that the termination and conversion notices received on June 29, 1989 did not meet these requirements, mandating reinstatement of the policy.

The district court properly rejected these contentions. Neither Holmes, Metropolitan Life, the Administrator, nor Mr. Dontas ever interpreted the policy at issue as anything but a group life insurance policy. The only question is what action a court should take when a policyholder brings to its attention an insurer's noncompliance with statutory requirements. In the only Louisiana case addressing this issue, the court concluded that when fewer than seventy-five percent of eligible employees enrolled in a group life insurance plan the effect of the statute was to render the purported group life insurance plan nugatory, *i.e.*, no life insurance plan existed until at least seventy-five percent of the eligible employees enrolled. McFarlain v. Pilot Life Ins. Co., 254 So.2d 506 (La. Ct. App. 1971). In that case, the purported policy existed only for a very short time. When the insurer realized that fewer than seventy-five percent of the employees would enroll, it refunded all premiums paid to date and voided the policy.

Naturally, Mrs. Dontas does not espouse the nullification of the policy according to McFarlain. Instead, she avers that "the validity of [Metlife's] contract with Mr. Dontas cannot be contested after it has been in force for two years." La. Rev. Stat. § 22:176(2). Just so. This statutory provision, however, supports Metlife, as its group policy was in force for 2 1/2 years

before termination. Mrs. Dontas cannot now assert that the policy was not what all parties understood it to be, i.e., a group policy. We therefore affirm the district court's holding that the GUL Plan is best construed as a group policy which was subject to Louisiana statutes addressing group life insurance.

With this finding, the remainder of Mrs. Dontas' case must fail. Metropolitan Life and the Administrator complied with all other Louisiana statutes governing group life insurance plans. In examining the record, notwithstanding the caustic tone of Metlife's brief, we are convinced that the Administrator and Metropolitan Life adhered to the terms of the plan and at all times acted fairly and in good faith toward Mr. Dontas.

The district court's judgment is **AFFIRMED**.