UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60028

CELESTINA PARRA, AS BENEFICIARY UNDER POLICY NUMBER 44355,

Plaintiff-Appellant,

VERSUS

MOUNTAIN STATE LIFE INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(CA-C-92-145)

(April 3, 1995)

Before WISDOM, KING, and DUHÉ, Circuit Judges.

WISDOM, Circuit Judge:[*]

The issue on appeal in this case is whether the Employment Retirement Security Act ("ERISA")[1] preempts state law causes of action. The district court dismissed the plaintiff, Celestina Parra's, state law causes of action against Mountain

[*] Local Rule 47.5.1 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Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] 29 U.S.C. §§ 1001-1461 (1985).

State Life Insurance Company under Rule 12(b)(6) of the Federal Rules of Civil Procedure. We reverse the judgment of the trial court and remand the case for a trial on the merits.

I

Luis Parra worked for the Grunwald Printing Company. After he died, his wife, named beneficiary under an insurance policy, sued Mountain States Life Insurance Company of America ("Mountain States") in state court for its failure to pay death benefits. Celestina Parra, the plaintiff/appellant, alleged state law causes of action for breach of contract, violations of the Texas Insurance Code,[2] violations of the Texas Deceptive Trade Practices Act,[3] negligence, and gross negligence. Basing jurisdiction on diversity of citizenship, the defendant removed the case to federal court, and the parties agreed to have the case tried by a magistrate judge. The defendant moved for summary judgment, arguing that Luis Parra's application for insurance was an offer to contract never accepted by Mountain Life, and that no contract for insurance was ever formed by Luis Parra and Mountain Life.

The trial court denied Mountain Life's motion, finding that there was a genuine issue of fact whether a policy was in effect at the time of Luis Parra's death. In its order denying Mountain Life's motion for summary judgment, the trial court raised the ERISA issue sua sponte. The court commented that although

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[2] Art. 21.21-2 Texas Insurance Code.

[3] Tex. Bus. & Comm. Code § 17.50(A)(4).

neither party raised the issue of whether the insurance policy was covered by ERISA, the court was of the opinion that "the policy in question is part of an employee benefit plan that is most likely subject to the provisions of [ERISA]".

Mountain Life then filed a motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted in accordance with Rule 12(b)(6). Mountain Life argued that ERISA covered the insurance policy and that the plaintiff's state law claims were preempted by ERISA. The trial court granted the plaintiff leave to amend her complaint, and the plaintiff amended her complaint to plead, in the alternative to her state law causes of action, a cause of action under ERISA. The plaintiff also filed an opposition to the defendant's Rule 12(b)(6) motion, asserting that her complaint stated claims upon which relief could be granted under state law or, in the alternative, under the provisions of ERISA.

In its order granting the defendant's motion to dismiss the plaintiff's state law causes of action, the trial court found that the insurance policy in question fitted the definition of an employee welfare benefit plan, that the plan was covered by the provisions of ERISA, and that the plaintiff's state law causes of action were preempted by ERISA. The trial court dismissed the plaintiff's state law causes of action, and the case went to trial for consideration of the plaintiff's alternative causes of action under ERISA. The defendant filed a motion for judgment as a matter of law in accordance with Rule 50 of the Federal Rules of Civil

Procedure, arguing that no reasonable jury could find that under the provisions of ERISA the plaintiff had demonstrated that a contract of insurance existed between Luis Parra and Mountain States. Before the case went to the jury, the trial court granted the defendant's motion for judgment as a matter of law.

From that final judgment, the plaintiff appeals. She contends that the trial court committed reversible error in finding that ERISA preempted her state law claims and by dismissing those claims under Rule 12(b)(6). We agree.

II

This Court reviews de novo a dismissal for failure to state a claim under Rule 12(b)(6), and we uphold the dismissal only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations.[4] In this case, the defendant did not raise the affirmative defense of ERISA preemption in its answer; the defendant raised the issue for the first time in its motion to dismiss under Rule 12(b)(6). The rule in this Circuit provides that affirmative defenses may be raised by motion to dismiss provided that the complaint shows affirmatively that a claim is barred by the affirmative defense.[5]

Determining whether the plaintiff's state law causes of

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[4] Barrientos v. Reliance Standard Life Ins. Co., 911 F.2d 1115, 1116 (5th Cir. 1990), cert. denied, 498 U.S. 1072 (1991) (quoting Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986)).

[5] See Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958).

action are barred by ERISA preemption is a several step process.[6] The first step is to determine whether the trial court correctly concluded that the insurance program in this case is an "employee benefit plan" that falls within the coverage of ERISA. If we conclude that the plan is covered by ERISA, we turn to the second question of whether ERISA preempts the plaintiff's state law causes of action.

ERISA applies to employee benefit plans that are established or maintained by an employer or an employee organization engaged in commerce or in any industry or activity affecting commerce.[7] ERISA regulates two kinds of "employee benefit plans": employee welfare benefit plans and employee pension benefit plans.[8] This case involves employee welfare benefit plans. ERISA defines these:

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or 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 or unemployment . . . .[9]

Whether a particular set of insurance arrangements constitutes an

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[6] Barrientos, 911 F.2d at 1116.

[7] 29 U.S.C. § 1003(a) (1985).

[8] 29 U.S.C. § 1002(3) (1985); Hansen v. Continental Ins. Co., 940 F.2d 971, 976 (5th Cir. 1991).

[9] 29 U.S.C. § 1002(1) (1985).

"employee welfare benefit plan" is a question of fact.[10]

To qualify as a plan covered by ERISA, an employer or employee organization engaged in an industry or activity affecting commerce, and not individual employees, must establish or maintain the plan.[11] The plaintiff does not dispute that Luis Parra's employer, the Grunwald Printing Company, is an employer engaged in activities affecting commerce. The plaintiff does dispute, however, that the Grunwald Printing Company established or maintained this insurance plan.

To determine whether an employer "established or maintained" a benefit plan covered by ERISA, we conduct two inquiries. First, we apply the Safe Harbor Provision of ERISA prescribed by the Secretary of Labor to determine initially whether the insurance policy at issue is excluded from ERISA's coverage. Under that provision, an insurance policy is not covered by 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

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[10] Hansen, 940 F.2d at 976; Gahn v. Allstate Life Ins. Co., 926 F.2d 1449, 1451 (5th Cir. 1991).

[11] Hansen, 940 F.2d at 977-78 (citing Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc)).

> or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.[12]

To be exempt from ERISA, an insurance plan must meet all four criteria.[13]

After considering the plaintiff's complaint, we cannot say that no relief could be granted under any set of facts that could be proved consistent with the allegations in the plaintiff's complaint. Paragraph seven, for example, of the plaintiff's response to the defendant's motion for summary judgment alleges that Grunwald Printing did not make any contributions to the insurance program.[14] Participation in the program appears to have been voluntary, and the plaintiff's complaint does not state that the Grunwald Printing Company received any compensation in connection with the administration of the insurance program. It is possible that, given the opportunity, the plaintiff could have shown that the insurance plan in this case fits each of the Safe Harbor criteria. It was, therefore, inappropriate for the trial court to conclude on the pleadings that ERISA covered this insurance plan.

The Safe Harbor Provision is not, however, the only means

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[12] 29 C.F.R. § 2510.3-1(j) (1993).

[13] Gahn, 926 F.2d at 1452.

[14] The paragraph alleges that "since the employer has made no payment of any benefits that might be applicable under ERISA, plaintiff should be entitled to proceed under state remedies".

by which a plaintiff may demonstrate that ERISA does not cover an insurance program. If a court does not find that the Safe Harbor criteria are satisfied, the court goes on to ask whether, "from the surrounding circumstances [sic], a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits".[15] To make this determination, we focus on the employer and its involvement with the plan.[16]

This Court has held that where an employer does nothing more than purchase insurance for its employees and has no further involvement with the collection of premiums, administration of the policy, or submission of claims, the plan is not an ERISA plan.[17] We require some meaningful degree of participation by the employer in the creation and administration of the plan, and we require evidence that the employer intended to provide its employees with a welfare benefit program through the purchase and maintenance of a group insurance policy.[18]

The plaintiff's complaint states that the policy was provided by Luis Parra's employer. The complaint does not,

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[15] Gahn, 926 F.2d at 1452 (quoting Donovan v. Dillingham, 688 F.2d at 1373).

[16] Hansen, 940 F.2d at 978 (quoting Gahn, 926 F.2d at 1452).

[17] Hansen, 940 F.2d at 978 (citing Kidder v. H & B Marine Inc., 932 F.2d 347, 353 (5th Cir. 1991); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 242 (5th Cir. 1990).

[18] Memorial Hospital, 904 F.2d at 241.

however, offer any indication that Grunwald Printing participated in the creation of the plan, endorsed the program or participated in the administration of the plan. It is quite possible that, given the opportunity, the plaintiff could have shown that Grunwald Printing did not participate in the creation or administration of the insurance plan. Such a showing would be consistent with the plaintiff's allegations of state law violations and would preclude coverage by the provisions of ERISA. We cannot say, therefore, that no relief could be granted under any set of facts that could be proven consistent with the plaintiff's allegations.

The defendant strongly argues that this Court cannot reverse the decision of the trial court, even if the trial court's decision was erroneous, because to do so would give the plaintiff two trials: one trial on her ERISA causes of action and one trial on her state law causes of action. This, the defendant urges, would give the plaintiff "two bites at the apple".

Although the argument "two bites at the apple" is always intriguing, here it is unpersuasive. In response to the defendant's Rule 12(b)(6) motion raising ERISA for the first time, the plaintiff amended her complaint to allege state law causes of action and, in the alternative, causes of action under ERISA. Alternative pleadings may be inconsistent.[19] By pleading a cause of action under ERISA, the plaintiff did not concede to ERISA coverage of this insurance plan nor to ERISA preemption of their

[19] Fed. R. Civ. P. 8(e)(2); Banco Continental v. Curtiss Nat'l Bank of Miami Springs, 406 F.2d 510, 513 (5th Cir. 1969).

state law claims. Had the trial court denied the defendant's motion to dismiss, the trial would have included a determination of whether ERISA did in fact cover this insurance plan and whether ERISA preempted any or all of the plaintiff's state law causes of action. We reverse the trial court's erroneous decision and remand the case for a trial on the merits. This does not give the plaintiff two trials. Our decision today gives the plaintiff the trial she should have had.

Because we find that in this case, the trial court erred in concluding that on the face of the pleadings ERISA covers the insurance plan, we do not address the second step in the inquiry, whether ERISA preempts the plaintiff's state law causes of action. Reversed and remanded.