THE SUPREME COURT OF FLORIDA

Case No. _____
Lower Tribunal Case No. 4d07-4241

BARBARA BERTONI, Plaintiff/Respondent,

vs.

STOCK BUILDING SUPPLY, INC., f/k/a CAROLINA HOLDINGS, INC., f/k/a STUART LUMBER COMPANY OF POMPANO BEACH, FLORIDA, and STUART LUMBER COMPANY OF FORT MYERS, FLORIDA; STOCK BUILDING SUPPLY OF FLORIDA, INC., Defendants/Petitioners.

PETITIONERS' BRIEF ON JURISDICTION

On Discretionary Review from the District Court of Appeal of Florida, Fourth District

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INTRODUCTION

This petition involves whether the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* preempts a common law negligence claim against an employer for alleged improper processing of an employee's supplemental life insurance forms in connection with the employer's administration of its ERISA plan. Federal and Florida authorities clearly hold that ERISA preempts such a claim. Section 1144 of ERISA provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . ." 29 U.S.C. § 1144 (emphasis added). The Supreme Court has held that ERISA preempts a state law claim if "it has a connection with or reference to [an ERISA] plan." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) (brackets added). In Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842, 846 (Fla. 2003), this Court held that "[i]f a claim relates to the manner in which the ERISA plan is administered, ERISA preempts the claim." (citations omitted). The Villazon court cited with approval the holding of In re Estate of Frappier, 678 So.2d 884, 887 (Fla. 4th DCA 1996): "'Concerning the direct negligence, corporate liability, and implied contract claims, we concur with the lower court's decision that these allegations would be completely preempted because they present issues unequivocally related to the administration

of the plan and are within the scope of section 502(a)(1)(B).'" 843 So.2d at 846 (quoting Frappier, 678 So.2d at 887).

The Fourth District Court of Appeals' decision (the "Fourth District decision") expressly and directly conflicts with Villazon, Frappier, and other district court decisions such as Bradshaw v. Ultra-Tech Enters., Inc., 747 So.2d 1008 (Fla. 2d DCA 1999). The decision fashions a new three-part test for ERISA preemption by cobbling together disparate and irreconcilable decisions from the federal Fourth, Sixth, and Ninth Circuit Courts of Appeals. The new ERISA preemption test is an amalgamation of (1) a three-part test from a tax ordinance case, Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6th Cir. 1987); (2) a case involving an employer's professional malpractice claim against insurance professionals, Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996); and (3) the purported resolution of a conflict in the federal circuits over ERISA preemption when a plaintiff lacks standing to sue, relying principally on Miller v. Rite Aid Corp., 504 F.3d 1102 (9th Cir. 2007). The Fourth District decision is irreconcilable with settled ERISA jurisprudence and should be reversed.

STATEMENT OF THE CASE AND FACTS

Respondent Barbara Bertoni is the former spouse of her deceased husband, John Patrick Bertoni ("Bertoni"). (App. p. 1.) Petitioners (collectively "Stock") hired Bertoni in January 2000. (Id.) In February 2000, Stock's Human Resources

Director, Tricia Helfrich, conducted three separate employee benefits enrollment meetings, and Bertoni attended each. (Id.) At each meeting, Helfrich explained the enrollment forms Stock required an employee to complete and submit for processing if the employee intended to enroll in Stock's optional supplemental life insurance plan, which required payment of a separate premium. (Id. at 1-2.) Stock provided basic life insurance coverage to employees at no cost. (Id.) Helfrich expressly instructed employees to complete a Sun Life Supplemental Life Insurance Enrollment Form to enroll in Stock's supplemental life insurance plan, and to disregard any supplemental life references on a separately provided General American Enrollment Form (that Stock used only for electing health insurance coverage and for designating beneficiaries of basic life insurance coverage). (Id. at 2). Nonetheless, contrary to instructions, Bertoni did not submit the required Sun Life form and instead checked a box on the General American form purporting to select supplemental life insurance coverage. (Id.) Stock's Benefit Manager, Jennifer Jackson, processed all insurance forms, and she administered Stock's supplemental life insurance plan provided through Sun Life Assurance Co. of Canada ("Sun Life"). (Id.) Jackson processed Bertoni's General American form and enrolled him in Stock's health insurance and basic life coverages. (Id.) However, Jackson never received from Bertoni a Sun Life form, and Bertoni therefore never became enrolled in Stock's supplemental life insurance plan. (Id.)

Respondent alleges that she is the intended beneficiary of the supplemental life insurance benefits to which Bertoni was entitled. (Id.) On March 1, 2004, Respondent sued Stock and Sun Life in state court alleging breach of contract and negligence claims; the defendants timely removed the case to federal court. (Id. at 2-3.) On June 8, 2004, Respondent amended her complaint to allege negligence and ERISA breach of fiduciary duty claims against Stock. (Id. at 3.) The federal district court dismissed Respondent's negligence claim, holding expressly that it was preempted by ERISA. (Id.) Upon remand, the state trial court granted Stock's motion for summary judgment, finding that ERISA preempted Respondent's negligence claim. (Id.) The Fourth District reversed, finding that ERISA did not preempt the negligence claim. On October 2, 2008, the Fourth District denied Stock's motion for rehearing and rehearing en banc.

SUMMARY OF THE ARGUMENT

The Fourth District decision adopts a novel, three-pronged ERISA preemption test that expressly and directly conflicts with the ERISA preemption analysis articulated and approved in Villazon, Frappier, and Bradshaw (as well as in numerous United States Supreme Court decisions), all of which adhere to the well-established principle that ERISA preempts and displaces state common law negligence claims that "relate to" an ERISA-governed employee benefits plan.

ARGUMENT

I. Standard for Jurisdiction.

This Court has jurisdiction to review a decision of a district court of appeal "that expressly and directly conflicts" with a decision of another district court or of the supreme court on the same question of law. Fla. Const. Art. V, § 3(b)(3). To be "express" the decision must express the legal basis for the ruling in writing. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). It need not identify the cases with which it conflicts in order to have a direct conflict but must only articulate the conflicting legal principle. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

II. Florida and Federal Courts Consistently Have Followed the Firmly-Established "Relate To" Test for ERISA Preemption.

It is well established that if a state law "relates to" an employee benefit plan, it is preempted by ERISA. Pilot Life, 481 U.S. at 45. The phrase "relate to" has a broad common sense meaning, such that ERISA preempts a state law cause of action if "it has a connection with or reference to such a plan." Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 730, 732-33 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983). The Supreme Court repeatedly has noted the expansive sweep of ERISA preemption. See, e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990) ("The pre-emption clause is conspicuous for its breadth.").

Florida state courts have followed federal principles in determining ERISA preemption. See MEBA Med. & Benefits Plan v. Lago, 867 So.2d 1184, 1187

(Fla. 4th DCA 2004) (relying on Supreme Court precedent and noting the expansive sweep of ERISA's preemption clause). Consistent with Pilot Life, Florida courts have applied § 1144's "relate to" test for ERISA preemption. "A state claim 'relates to' an employee benefit plan 'if it has a connection with or reference to such a plan.'" Reineke v. Reineke, 627 So.2d 1182, 1184 (Fla. 1st DCA 1993) (quoting Shaw, 463 U.S. at 97).

This Court has observed that ERISA preempts state law claims relating to the processing and administration of insurance claims connected to an ERISA plan. In Villazon, for example, the plaintiff brought a state law wrongful death claim against an HMO based on vicarious liability for medical malpractice of a member physician. 843 So.2d at 846. Relying on the Supreme Court's "relate to" test, this Court distinguished between claims attacking the quality of benefits provided and claims involving the administration of benefits. Id. at 848. The former -- such as the medical malpractice claim in Villazon -- are not preempted by ERISA, while the latter -- such as Respondent's improper processing claim here -- are preempted. Id. This Court held: "If a claim relates to the manner in which the ERISA plan is administered, ERISA preempts the claim." Id. at 846 (citations omitted).

Similarly, in Bradshaw the plaintiff alleged that the defendant breached its agreement to pay him retirement and life insurance benefits. Relying on the "relate to" test, the court found the claim preempted by ERISA, observing:

> ERISA supersedes 'any and all State laws insofar as they … relate to any employee benefit plan' governed by that act. *See* 29 U.S.C. § 1144(a). Thus, even state common law causes of action, including those for breach of contract, are preempted by ERISA when they relate to or have any connection with an employee benefit plan.

747 So.2d at 1009 (citing federal cases including Shaw, 463 U.S. 85). Thus, Florida courts consistently have followed the Supreme Court's "relate to" test.[1]

III. The Fourth District Decision Expressly and Directly Conflicts with Prior Florida Decisions Setting Forth the ERISA Preemption Analysis.

Citations to Villazon and Frappier are conspicuously absent from the Fourth District's ERISA analysis. Instead, the Fourth District decision combines and follows three lines of authority from the Sixth, Fourth, and Ninth Circuit Courts of Appeals to craft its new three-part test for ERISA preemption.

The Fourth District decision's reliance on the Sixth Circuit's opinion in Neusser, 810 F.2d 550, which addresses the interplay of a city tax ordinance and ERISA, is improper. First, the Sixth Circuit expressly limited Neusser to its facts: "We hold ***only*** that where, as here, a municipality enacts a neutral income tax of general application which applies to employees without regard to their status as

[1] The Fourth District decision states that the Supreme Court narrowed its definition of "relate to" in New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). Although the Court declined to read the term "relate to" in section 514 literally, it re-emphasized the breadth of ERISA's preemption provisions and cited with approval its prior holdings. Id. at 656 (citing Shaw 463 U.S. at 96-97). Thus, the Court in Travelers further clarified the "relate to" test's application to a particular state law. In cases decided after Travelers, the Supreme Court has reaffirmed its traditional application of the "relate to" test. See Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001).

ERISA participants, that tax is not preempted by ERISA." Id. at 556 (emphasis added). Second, Neusser identified three nondispositive *factors* a court may consider in analyzing § 1144 preemption: (1) whether the state law represents a traditional exercise of state authority; (2) whether the state law affects relations among the principal ERISA entities -- the employer, the plan, the plan fiduciaries, and the beneficiaries; and (3) the incidental nature of any possible effect of the state law on an ERISA plan. Id. at 555-56. None of these three factors has been crystallized into a "test" by this Court or any other Florida court. Yet, the Fourth District decision transforms Neusser's nondispositive factors into three dispositive elements of the first prong of its new three-part test for ERISA preemption.

The Fourth District's reliance on Fourth Circuit's decision in Coyne also is erroneous. Coyne addressed "whether ERISA preempts [an employer's] garden-variety professional malpractice claim against [the defendants] in their (non-fiduciary) capacities as insurance professionals." 98 F.3d at 1466. It held that ERISA did not preempt such a claim, because the malpractice claim did not implicate relations among the traditional ERISA entities (the employer, the plan, the plan fiduciaries, and the beneficiaries). Id. at 1471 (citations omitted). The plaintiff in Coyne was not a beneficiary; the defendants were not fiduciaries. Id. Here, Respondent asserts intended beneficiary status; Stock is an ERISA fiduciary in two capacities, as plan sponsor and plan administrator. Also, the plaintiff in

Coyne was not seeking to recover ERISA benefits. Id. at 1471-72. Respondent's negligence claim here is specifically aimed at ERISA benefits under Stock's plan.

Finally, the Fourth District decision purports to resolve a conflict among the federal circuits over whether § 1144 of ERISA preempts a state law if the plaintiff lacks standing to sue under § 1132 of ERISA, after pondering "how the United States Supreme Court would resolve this conflict among the circuits." (App. p. 9.) Based principally on the Ninth Circuit's decision in Miller, it wrongly concludes that the "weight of authority" holds that if a plaintiff lacks standing under ERISA, ERISA cannot preempt the claim. This is error for several reasons.

First, if such a conflict exists among the federal circuits, this Court should be the ultimate arbiter of whether Florida follows a "majority" or "minority" view. Second, the Eleventh Circuit has addressed this precise issue and concluded that ERISA preemption under § 1144 is not dependent on standing under § 1132.[2] Third, the Fourth District erroneously relies on a line of cases where the plaintiffs lacked standing precisely because they clearly were neither participants nor beneficiaries under § 1132. Here, Respondent claims intended beneficiary status and thus has standing. Lastly, the Fourth District decision is contrary to better-

[2] See, e.g., Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207 (11th Cir. 1999); Sanson v. Gen. Motors Corp., 966 F.2d 618 (11th Cir. 1992); see also Cromwell v. Equicor-Equitable HCA Corp., 944 F.2d 1272 (6th Cir. 1991); Lee v. E.I. DuPont de Nemours and Co., 894 F.2d 755 (5th Cir. 1990); Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989).

reasoned opinions directly addressing this issue, such as the Fifth Circuit's opinion in Lee, 894 F.2d 755, which addressed a proposed approach to the interplay of standing under § 1132 and preemption under § 1144 that is virtually identical to the approach the Fourth District adopted. The court noted:

> The plaintiffs, however, propose a novel rule for construing section 1144. They argue that the scope of preemption should turn on the scope of 29 U.S.C. § 1132(a), the ERISA civil enforcement provision. If a plaintiff's claim is cognizable under section 1132(a), plaintiffs propose, it is preempted by ERISA. If not, then section 1144 does not preempt the claim when asserted under state law. The plaintiffs further argue that their claim is not cognizable under section 1132(a), because the misrepresentation they allege prevented them from becoming "participants" in the [ERISA plan], which they argue is a prerequisite to standing under section 1132(a). Therefore, plaintiffs contend, section 1144(a) does not preempt their misrepresentation claim.

Id. at 756-57. The Fifth Circuit summarily rejected this approach and held that ERISA preempted the state common law claims, even though the plaintiffs lacked standing to bring those claims under § 1132 of ERISA. Id. at 757.

CONCLUSION

The Fourth District decision is fatally flawed both legally and factually, and it expressly and directly conflicts with decisions from this Court and other district courts of appeal. This Court should accept jurisdiction and reverse the Fourth District decision for the reasons stated above.

Dated the ___ day of November, 2008.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first class mail this ____ day of November, 2008, to the following counsel of record.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel herby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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