THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BUSINESS HEALTH TRUST, in its fiduciary capacity for an association or member-governed group plans; and THE ASSOCIATION OR MEMBER GROUP-GOVERNED PLANS,

Plaintiffs,

v.

MIKE KREIDLER, in his capacity as Washington State Insurance Commissioner,

Defendant.

No. 2:14-cv-01918-RSL

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION AND BACKGROUND

The Commissioner's background about the Premera Blue Cross ("Premera") policy filed in February 2014 for each Association or Member-Group Governed Plan (the "Association Health Plans") is merely a red herring. In the instant case, the 2014 contract is terminated, no one is covered by the policy and it is no longer being sold. Dkt. # 11 at ¶ 2. Because the Commissioner has now indicated that his determination with respect to the 2014 filing will not affect the Plaintiffs' 2015 filing, Plaintiffs no longer seek to enjoin his determination regarding the 2014 filing, but only seek to enjoin any determination of the 2015 filing, pending this Court's review. In other words, only actions of the Commissioner with

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1 respect to the status of the Associations as employers within the meaning of Section 3(5) of the
2 Employee Retirement Income Security Act of 1974, as amended ("ERISA") with respect to the
3 2015 policy should be enjoined, pending this Court's determination.
4 The Commissioner now maintains that he is making no determination about the status
5 of the Associations as ERISA Section 3(5) employers other than stating that Premera's 2014
6 rate filing application did not include sufficient information to show that the Associations
7 satisfy the factors set forth by the Department of Labor. *See* Dkt. # 29 at 11. The
8 Commissioner argues that the Plaintiffs are free to go through the same review process with
9 Premera or another carrier in 2015. *Id.* Premera indicates that it is unlikely to challenge the
10 Commissioner's disapproval on either ground cited, *see* Declaration of Richard J. Birmingham
11 ("Birmingham Decl."), ¶ 2, and the Commissioner, in his filed Answer, argues that Plaintiffs
12 lack standing to contest the same. Dkt. # 9 at 9.
13 As the Commissioner maintains he is making no determination as to the status of the
14 Associations as ERISA Section 3(5) employers and that Plaintiffs lack standing to challenge his
15 non-determination, it is fortunate that ERISA provides that such determination can be made by
16 this Court. Pursuant to ERISA Section 502(a)(3), Plaintiffs can bring a declaratory action
17 requesting a determination that the Associations are ERISA Section 3(5) employers as defined
18 by the terms of the insurance plan, which contains the federal requirement that the plan sponsor
19 must be an employer as defined by ERISA Section 3(5). The Commissioner's sole response to
20 this argument – that no ERISA plan is involved – is without merit. As a matter of law, it
21 cannot be seriously contested that a medical insurance contract, adopted by an employer and
22 offered to its employees, is not covered by ERISA. As explained at oral argument on
23 Plaintiffs' Motion for Temporary Restraining Order, the ERISA issue is whether there is one
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ERISA plan (a single large group contract) or 661 ERISA plans offered by 661 different employers. Regardless of the decision the Court reaches on this issue, the matter is subject to ERISA.

II. FACTUAL BACKGROUND

In February 2014, Premera submitted to the Commissioner rate filing applications for each of the Association Health Plans for large-group coverage. Dkt. # 14 at ¶ 14. These applications included all information requested by the Commissioner, including information demonstrating that each sponsoring Association is an ERISA Section 3(5) Employer. *Id.* Prior to the expiration of the health plan offered by Business Health Trust in December 2013, Business Health Trust and its legal counsel worked extensively with the Commissioner to create industry-focused health plans, divided by industry group, that would be compliant with the Affordable Care Act. *See* Dkt. 14 at ¶ 13. On March 26, 2013, the Commissioner sent a letter indicating that the structure of the Association that would sponsor the Aerospace Industry Health Trust qualified as an ERISA Section 3(5) employer. *Id.* ¶ 3, Ex. A. Similarly, on May 7, 2013, the Commissioner sent a letter to the legal counsel for Business Health Trust, acknowledging that the Agriculture Industry would qualify as an ERISA Section 3(5) employer. *Id.* ¶ 4, Ex. B.

On April 2, 2014, the Commissioner suddenly reversed its position with respect to the status of the Associations as ERISA Section 3(5) employers, sending Premera an objection letter for all of the Association Health Plans, except the Agriculture Industry Health Trust and Aerospace Industry HealthTrust, indicating that it was suspending its review of Premera's rate filing applications pending further documentation establishing that the corresponding Associations qualified as ERISA Section 3(5) employers. Dkt. # 14 at ¶ 16. The requested

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responses were submitted by Premera on or around May 8, 2014, and a second set of requested documents was submitted on or around October 7, 2014. *Id.*

On October 28, 2014, the Commissioner sent a letter to Ms. Maud Daudon, indicating that, despite the repeated submission of additional information supporting the Associations' ERISA Section 3(5) employer status, the Plaintiffs' reorganization would not be able to overcome the Bend Chamber of Commerce decision. Birmingham Decl. ¶ 5, Ex. C. In relevant part, the letter provides:

> As I shared with you in an email dated July 31, 2012, the U.S. Department of Labor's Susan Rees shared that she did not believe that Seattle Chamber was capable of satisfying ERISA's definition of "employer" even with the proposed structural changes. *Id.*

It is significant to note that this letter was written outside of the rate filing review process as the letter was not addressed to Premera, but rather to Maud Daudon. *Id.* The letter did not discuss the Premera filing. Rather, the purpose of the letter was to inform Ms. Daudon that the thirteen (13) group health plans were not sponsored by an ERISA Section 3(5) employer. In other words, the letter threatened the ability of Business Health Trust to contract with any carrier for group health insurance.

III. ARGUMENT

A. This matter is subject to the jurisdiction of this Court pursuant to ERISA and the federal court has exclusive jurisdiction over injunctive and declaratory relief.

Plaintiffs, through their Motion for Declaratory and Injunctive Relief, Dkt. # 17, request that this Court declare this action subject to the exclusive jurisdiction of this Court. The grounds for declaratory relief are firmly planted in ERISA Section 502(a)(3), which empowers a fiduciary to bring a civil action to obtain any appropriate equitable relief needed to enforce any provision of subchapter (a), including the enforcement or clarification of plan terms.

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1. Federal jurisdiction is proper as there is no dispute over whether the Association Health Plans are ERISA plans.

The Commissioner, citing to *International Association of Entrepreneurs of America v. Angoff*, 58 F.3d. 1266, 1270 (8th Cir. 1995), argues that ERISA Section 502(a)(3) only gives courts the authority to issue injunctive relief after a determination has been made that the "plan" is provided by an ERISA employer. Dkt. # 29 at 19. The Commissioner's reliance on *Angoff* is misplaced. In the instant case, unlike the facts in *Angoff*, it is undisputed that each employer adopted a plan for the benefit of its employees, as each member-employer executed an adoption agreement that provided medical coverage for its employees. *See* Birmingham Decl. ¶ 7, Ex. E.

As a matter of law, an ERISA plan exists as the following factors are present: (1) a medical contract (2) adopted by an employer (3) for its employees. *See Donovan v. Dillingham*, 688 F.2d 1367, 1371 (8th Cir. 1982). ERISA Section 3(2)(A). As explained at oral argument, the issue to be litigated is not whether the Association Health Plans are ERISA plans, but whether there is a single ERISA plan or 661 ERISA plans. *See id.* at 1375 (even if the multiple employer trust is not an ERISA plan, the subscribers have adopted an ERISA plan for its employees). Regardless of the decision reached by this Court as to whether the Associations are ERISA Section 3(5) employers, the subject matter of the action is subject to ERISA and Business Health Trust, as a fiduciary of the Association Health Plans, is empowered to request declaratory relief under ERISA. *Id; see also* ERISA Section 502(a)(3). The Commissioner states no law to the contrary as there is none. In fact, the Department of Labor opinion letter that the Commissioner relies upon to reject Premera's filing reaches the same conclusion that even if the sponsor lacks ERISA Section 3(5) status, the employers that

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use the arrangement have nevertheless adopted ERISA plans for their employees. DOL Advisory Opin. 2008-07A.

2. Regardless of whether there is concurrent jurisdiction, this Court has ERISA jurisdiction and the jurisdiction is exclusive over declaratory actions.

In the Commissioner's opposition, the Commissioner begins to concede that there is ERISA jurisdiction by suggesting there is concurrent jurisdiction. *See* Dkt. # 29 at 14-15. However, contrary to the Commissioner's suggestion, Plaintiffs are not arguing that state laws regulating insurance are preempted by ERISA. *See* Dkt. # 29 at 16. Plaintiffs are well aware that ERISA expressly provides to the contrary. Nevertheless, as this Court is also well aware, a plan that holds an insurance contract subject to state regulation is still an ERISA plan upon which the Plaintiffs can seek a declaratory action. *See Z.D., ex. rel. J.D. v. Group Health Cooperative*, 829 F.Supp. 2d 1009 (W.D. Wash. 2011). The state law requirements are read into and become part of the plan, but jurisdiction over the dispute is still under ERISA. *Id.* Plaintiffs' argument is simply that the statement that "associations or member group to which the policy is issued must be an employer under 29 U.S.C. 1002(5)" is not a state law regulating insurance, but rather is a statement of state deference to federal law, which is also part of the policy terms.[1] It is the federal law definition of "employer" that is enforceable as a plan term. If the statute instead read, "the Employer must meet the requirements of ERISA Section 3(5), as well as the following additional requirements established by the Washington legislature," such a provision may constitute a law governing insurance to which the Commissioner's

[1] The Commissioner's argument at oral argument on Plaintiffs' Motion for Temporary Restraining Order, Dkt. #28, that the reference to ERISA is similar to referencing ERISA in a tariff statute is fatally flawed, i.e. a tariff on ERISA 3(5) employers that import peanuts would not be subject to ERISA. That statement is true as the activity, importing peanuts, is not an activity protected by ERISA. In contrast, in the instant case, the statute requires that the term of any large group association medical plan contain the term that the plan must be sponsored by an ERISA 3(5) employer. Having now referenced terms and requirements of an ERISA Plan, the Commissioner has

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opinion may be entitled to some deference. But where the state law merely incorporates the federal terms by reference, the federal term controls and there is no deference to a state agency.

In addition, to be a state law governing insurance, the provision must involve the shifting of risk between the carrier and the insured. *See Kentucky Ass'n of Health Plans Inc. v. Miller*, 538 U.S. 329, 342 (2003) (state law must affect the risk pooling between the carrier and the insured). The provision governing ERISA Section 3(5) status does not govern the shifting of risk between the carrier and the insured. The provision is merely a requirement as to who can sponsor a properly rated and filed contract.

Even if there is concurrent jurisdiction, contrary to the Commissioner's suggestion this Court must hear Plaintiffs' claim. The general rule of law is that an ERISA fiduciary can move for a federal declaration of its ERISA status and that this federal court cannot dismiss for lack of jurisdiction even when concurrent jurisdiction exists. *See Angoff*, 88 F. 3d 1270-71. Moreover, once ERISA jurisdiction is established, declaratory and injunctive procedures under ERISA are limited to the exclusive jurisdiction of the federal courts. *Id.* at 1270; ERISA Section 502(e)(1). Therefore, this Court must hear this declaratory action.

3. A disapproval of Premera's rate filing is not before this Court.

While the Court cannot dismiss for lack of jurisdiction, neither should the Court stay this action in deference to the State. Premera has indicated that it does not intend to contest the Commissioner's disapproval of its rate filing applications for the Association Health Plans, *see* Birmingham Decl., ¶ 2, and the Commissioner has indicated in his Answer that Plaintiffs lack standing to challenge the disapproval. Dkt. # 9 at 9. Moreover, the Commissioner agrees that he made no binding determination on the ERISA Section 3(5) issue in his review of the

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now let the elephant into the room and the matter is, in fact, covered by ERISA.

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Premera filing. There is also no duplicate proceeding, as the issue of the policy and the rating mechanism used by the carrier is independent of who can sponsor the policy. Lastly, there is no issue of state concern as the statute has expressly adopted the federal definition contained in ERISA Section 3(5).

In the instant case, Plaintiffs did not file this action to challenge the Commissioner's findings with respect to the 2014 Premera filings. Plaintiffs filed this action because the Commissioner sent Ms. Daudon, a letter indicating that Plaintiffs' organizational structure would not satisfy the requirements of ERISA Section 3(5). *See* Birmingham Decl. ¶ 5, Ex. C. The Commissioner indicated to this Court that he intends to disapprove each Association's status as an ERISA Section 3(5) employer. Therefore, there is a legitimate controversy between the parties that does not involve the Premera filing and over which this Court has jurisdiction.

While the Commissioner argues that Business Health Trust should bring its claim at the administrative level, in a brief filed yesterday before the Administrative Hearings Unit, the Commissioner argued just the opposite.

> First, [Business Health Trust ("BHT")] is not alleging any harm of its own. Instead, it is alleging harm to the 13 associations that were created by the Chamber. BHT has filed this hearing demand, and alleges standing as a fiduciary of the 13 trusts created by the Chamber's 13 associations. Other than the Employment Retirement Income Security Act (ERISA), BHT has not pointed to any statute that gives BHT standing to bring claims on behalf of third parties. However, ERISA only gives limited authority to fiduciaries to bring clams in Federal Court. Fn. 5. 29 U.S.C. § 1132(a)(1)(B), and (e)(1). Therefore BHT as a fiduciary cannot assert standing to bring a claim in an administrative action under ERISA. *See* excerpt, Birmingham Decl., § 9, Ex. G.

Therefore, the Commissioner is clearly being disingenuous when he states he made "no section 3(5) determination" and that "all claims raised in this suit can be heard and adjudicated in an administrative proceeding." *See* Dkt. # 1 at 1. This Court clearly has

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jurisdiction over this issue and the Commissioner essentially concedes this point by arguing concurrent jurisdiction. Therefore, this Court should declare that (1) this matter is subject to ERISA; (2) due to the request for declaratory and injunctive relief, this Court has exclusive jurisdiction; and (3) Plaintiffs may seek a declaratory judgment with respect to the status of the Associations as ERISA Section 3(5) employers.

B. Preliminary Injunction is appropriate under the unique facts of this case.

Plaintiffs recognize that this Court may be reluctant to enjoin the actions of a state official. However, while a stay may not generally be necessary, it is appropriate under the unique facts of this case: (1) Plaintiffs are entitled to a determination as to whether the sponsoring Associations are ERISA Section 3(5) employers; (2) without such a determination, Plaintiffs are effectively barred from contracting with any carriers for group health coverage; (3) Plaintiffs cannot conduct a competitive business in the small group market; (4) facts, and not mere speculation, support the argument that employer-members will not transition back to Plaintiffs' plans in 2015 if prematurely forced to transition to small-group coverage; and (5) the state court lacks both jurisdiction and the expertise necessary to deal with Plaintiffs' claims.

The Commissioner states in his Opposition Brief, Dkt. #29, that Plaintiffs' allegations rest on a mischaracterization of the decision the Commissioner will make and acknowledges that each of the 13 Associations is free to partner with Premera or another carrier with respect to policies offered in 2015. Dkt. #29 at 11. The Associations have, in fact, marketed and sold a 2015 Premera policy which is not scheduled to be filed until February 12, 2015. As previously indicated, the policy, as of January 1, 2015, covered 661 employers and 14,000 participants. Dkt. #11 at ¶ 4. Provided that each Association is free to maintain its 2015 policy, pending this

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Court's determination, Plaintiffs will not seek to enjoin the 2014 determination at the federal level.

With respect to the 2015 policy, if the Commissioner issues a formal finding immediately after the February 12, 2015, filing that the Associations are not ERISA Section 3(5) employers, the harm to Plaintiffs will be irreparable and immediate. The Commissioner's disapprovals are not confidential or private; they are public records. It is irrelevant that there is a "period of planning and transition" prior to sending discontinuance notices to consumers. The business model of the Associations will effectively end when the Commissioner enters his formal disapproval.[2]

Without reassurance that this issue is being examined by the federal court and that the participants can remain on the policy pending this Court's determination, member-employers currently on the 2015 policy are likely to quickly transition to new policies to minimize the loss of deductibles and co-pays due to the Commissioner's actions. Once member-employers and their participants transition off the policy in 2015, they are unlikely to transition back if this Court later finds that the Associations are truly ERISA 3(5) employers. The Commissioner contends that such an assertion is merely speculation; however, anyone familiar with the healthcare reform debate knows that inertia is the major reason that participants stay with a policy or carrier. It is, therefore, extremely unlikely that once someone transitions off the Premera policy, they would transition back within the same year even to save the cost of increased premiums as they would face new deductibles, co-pays and providers.

[2] The Commissioner points out that there is nothing in the Association bylaws or trust agreements to prevent the Association Health Plans from offering small group health plans. Dkt. #29 at 13. While true, Plaintiffs' business model is the large-group market. Because small employers can purchase small-group coverage directly from the carrier, Plaintiffs cannot competitively participate in the small-group market.

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1 Additionally, the Commissioner's position that Plaintiffs are free to partner with a
2 different carrier for 2015 and to re-submit evidence of their employer status remedies a difficult
3 dilemma for the carrier. WAC 284-170-958(2) requires a carrier to make a good faith
4 determination of the employer's ERISA section 3(5) status before offering an association a
5 large-group contract. It would be difficult for a carrier to reach a good faith determination that
6 the Associations are ERISA Section 3(5) employers when there is a contrary finding by the
7 Commissioner in the 2014 Premera rate filing application. Without reassurance from the
8 Commissioner and this Court, the issue of whether Premera would even file the 2015
9 application would have been an open issue. With reassurance that Premera can file its 2015
10 policy for the Associations, and assurance that the Commissioner's determination on ERISA
11 Section 3(5) status is stayed pending this Court's determination, the 2014 filing is no longer an
12 issue. The purpose of the injunction requested is not to interfere with the Commissioner's
13 duties, but merely to preserve the status quo, until this Court makes its decision.
14
15 With respect to whether the Plaintiffs will ultimately prevail on the merits, the Plaintiffs
16 incorporate their opening brief arguments on this issue, Dkt # 17, but the Court should keep
17 two facts in mind: First, the Commissioner correctly recognized the structure of the
18 Association Health Plans in 2013, and then abruptly changed his opinion. Second, the
19 Commissioner's sudden change of mind was based on a Department of Labor Advisory letter to
20 the Bend, Oregon Chamber of Commerce. *See* DOL Advisory Opin. 2008-07A. Since the date
21 of the negative Department of Labor advisory opinion, the Bend Chamber has restructured its
22 health plan in the same manner as the Plaintiffs' plans and its member associations are now
23 operating as ERISA Section 3(5) employer associations. *See* Birmingham Decl., ¶ 8, Ex. F.
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We have outlined the reasons why we will prevail on the ERISA 3(5) issue in our opening brief and we are certain that this Court will so hold in this case.

IV. CONCLUSION

We ask the Court to declare that this Court does in fact have ERISA jurisdiction; that federal jurisdiction is exclusive over issues involving declaratory action or injunctive relief; that Plaintiffs are entitled to pursue a declaratory action with respect to the status of the Associations as ERISA Section 3(5) employers before this Court; that Plaintiffs are likely to succeed on the merits with respect to their claim and that a preliminary injunction be granted against the Commissioner preventing any action or determination of the Employer's 3(5) status, with respect to Premera's 2015 rate filing application for the Association Health Plans, pending this Court's determination. Should the Court decide not to enjoin the Commissioner, this Court, nevertheless, has exclusive jurisdiction over this matter and should proceed with making a determination as to each Association's ERISA section 3(5) status, as this case cannot be dismissed for lack of jurisdiction.

DATED this 6th day of February, 2015.

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CERTIFICATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington, that on February 6th, 2015, I electronically filed the attached **Plaintiffs' Reply In Support of Motion for Declaratory and Injunctive Relief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 6th day of February, 2015.

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