IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LYNAM,
Appellant,
vs.
HEALTH PLAN OF NEVADA, INC.; SIERRA HEALTH SERVICES, INC.; SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.; SIERRA HEALTH-CARE OPTIONS, INC.; UNITED HEALTHCARE INSURANCE COMPANY; AND UNITED HEALTHCARE SERVICES, INC.,
Respondents.

No. 56165

FILED

MAR 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Appellant Donald Lynam received managed health care from respondents Health Plan of Nevada, Inc., Sierra Health Services, Inc., Sierra Health and Life Insurance Company, Inc., United Healthcare Insurance Company, and United Healthcare Services, Inc. (collectively HPN).[1] Lynam received health coverage under his employer's group health benefit plan.

In January 2007, Lynam was referred to the Endoscopy Center of Southern Nevada, the Gastroenterology Center of Nevada, and the doctors employed by or associated with the Gastroenterology Center of

[1]Respondents, allegedly, are health maintenance organizations, managed care organizations (MCO), and insurers doing business in Nevada.

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Nevada (collectively ECSN), by HPN for treatment. Lynam claimed that as a result of ECSN's unsafe practices, he was infected with hepatitis C during his treatment at ECSN.

Lynam insisted that HPN knew or should have known of ECSN's unsafe practices and that HPN should have terminated its relationship with ECSN and warned its members of the unsafe practices. He asserted that HPN had a duty to exercise reasonable care and was negligent per se because it did not have a quality assurance program in place as required by NRS Chapter 695G and NAC Chapter 695C. Lynam pleaded claims of negligence and breach of the implied covenant of good faith and fair dealing.[2]

In response to Lynam's complaint, HPN filed a motion to dismiss, asserting that Lynam's claims were not enforceable through private action, and even if they were, Lynam's claims were preempted by the relevant provisions of the Employee Retirement Income Security Act (ERISA), specifically sections 502(a) and 514(a). 29 U.S.C. §§ 1132(a),

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[2]Lynam asserted a claim of negligence by way of common-law negligence and negligence per se. Although he pleaded them as separate causes of action, they are not separate causes of action. Negligence per se simply serves as a method of establishing the duty and breach elements of a negligence claim. Cervantes v. Health Plan of Nevada, 127 Nev. ___, ___ n.4, 263 P.3d 261, 264 n.4 (2011). Because Lynam's negligence and negligence per se claims are based on his claim that HPN failed to evaluate, audit, monitor and supervise its providers, the question of whether the theories are preempted by ERISA is answered through the same analysis. Munda v. Summerlin, 127 Nev. ___, 267 P.3d 771 (2011). We therefore do not consider the negligence claims separately.

Lynam also claimed a breach of the implied covenant of good faith and fair dealing. Because this merely restates his negligence claim in the guise of a bad faith claim, we do not consider this claim separately.

1144(a) (2006). The district court granted HPN's motion and held that Lynam's claims were preempted by ERISA. Lynam now appeals the district court's order of dismissal.

Discussion

The standard of review for an order granting a motion to dismiss is rigorous, and this court construes the pleadings liberally, draws every fair inference in favor of the non-moving party, and accepts all factual allegations of the complaint as true. See Simpson v. Mars Inc., 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). Ultimately, we will uphold a district court's decision to dismiss a plaintiff's complaint only if "it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief." Id.

Dismissal of Lynam's state law claims was erroneous

As part of a comprehensive pension reform, Congress enacted ERISA, 29 U.S.C. §§ 1001-1461, with expansive preemption provisions making regulation of employee benefit plans "'exclusively a federal concern.'" Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981)). ERISA section 514(a) preempts all state laws that "relate to" any employee benefit plans. 29 U.S.C. § 1144(a); Cleghorn v. Blue Shield of California, 408 F.3d 1222, 1225 (9th Cir. 2005). Although ERISA section 514(a)'s "relate[d] to" language is sweeping, congressional intent is the touchstone of any preemption analysis; federal laws are presumed not to preempt state or local laws regulating matters that fall within the traditional police powers of the state. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655-56 (1995).

A "'law relate[s] to a covered employee benefit plan if it (1) has a connection with, or (2) reference to such a plan.'" California Div. of Labor

Standards Enforcement v. Dillingham Constr., N. A., Inc., 519 U.S. 316, 324 (1997) (quoting District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 129 (1992)). In Cervantes v. Health Plan of Nevada, we held that only the "connection with" prong of Dillingham's analysis is applicable when determining if Nevada's quality assurance laws and regulations are preempted, and that ERISA section 514(a) only preempts the application of NRS Chapter 695G in limited circumstances.[3] Cervantes, 127 Nev. at ___, ___ P.3d at ___ (stating that "Nevada's quality assurance laws and regulations are not preempted by ERISA section 514's 'reference to' prong of preemption analysis"). We concluded that ERISA would preempt the application of NRS Chapter 695G to a managed care organization (MCO) or HMO if they had merely facilitated the selection of providers by the ERISA Plan; however, preemption would not apply if the MCO or HMO had "leased out its existing network of providers." Id. Furthermore, if the ERISA plan had simply purchased an insurance plan from a MCO or HMO, ERISA Section 514 preemption would not apply and

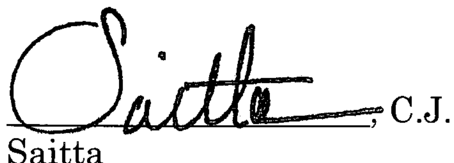
[3]Although Lynam and amici discuss the application of ERISA section 502 preemption in their briefs, section 502 is not relevant to this appeal. ERISA section 502 created a comprehensive civil enforcement scheme and preempts any state-law cause of action that "duplicates, supplements, or supplants the ERISA civil enforcement remedy." Davila, 542 U.S. at 209. In this case, the district court relied solely on Bui v. AT&T, 319 F.3d 1143 (9th Cir. 2002), for the proposition that selection and retention of service providers are administrative decisions within the context of ERISA preemption. Based on this reasoning, the district court concluded that Lynam's claims arise from an administrative decision of an ERISA plan, and are preempted by ERISA. See id. Because the district court did not rely on section 502, we do not consider its application in this case.

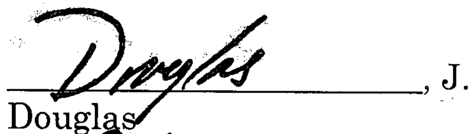
Corrections made per order filed on 4/11/12.

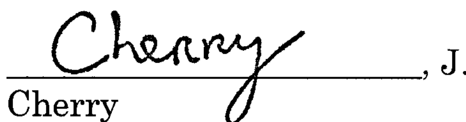
the MCO or HMO would be subject to NRS 695G regulations. Cervantes, 127 Nev. at ___, 263 P.3d at 267-68.

In this case, Lynam alleged that he was insured by one of HPN's insurance plans. If Lynam is able to prove that HPN merely leased out their network providers or issued an insurance policy, then Lynam's claims would not be preempted by ERISA, and HPN would be subject to regulation under NRS 695G. Lynam then would potentially have viable claims against HPN. Therefore, because it is possible that HPN may be liable to Lynam for his injuries, the motion to dismiss due to preemption was erroneously granted. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[4]


_______________, C.J.
Saitta


_______________, J.
Douglas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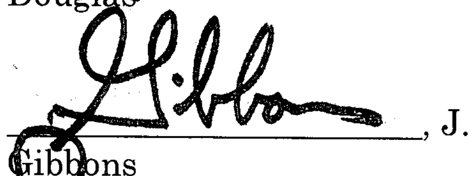
Cherry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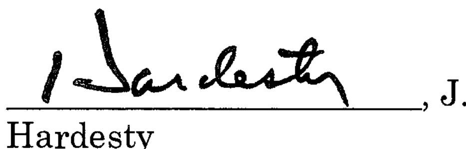
Gibbons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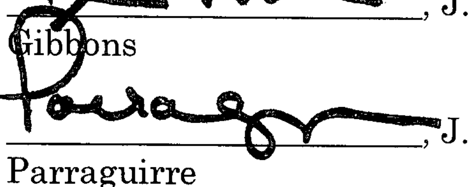
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Parraguirre

[4]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Doug Smith, District Judge
Lansford W. Levitt, Settlement Judge
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