[Cite as *W. & S. Life Ins. Co. v. Owens*, 2015-Ohio-1188.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

THE WESTERN & SOUTHERN LIFE INSURANCE COMPANY,	:	APPEAL NO. C-140255 TRIAL NO. A-1302190
Plaintiff-Appellant,	:	
vs.	:	*O P I N I O N.*
EARL E. OWENS,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 31, 2015

Frost Brown Todd LLC, David A. Skidmore, Jr., and *Gerron L. McKnight,* for Plaintiff-Appellant,

The Blessing Law Firm and *David S. Blessing,* for Defendant-Appellee.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Plaintiff-appellant The Western & Southern Life Insurance Company ("W&S") appeals from the trial court's entry dismissing its complaint against its former employee, defendant-appellee Earl E. Owens. W&S had brought claims under Ohio's common law for breach of contract, promissory estoppel, and unjust enrichment. It sought damages it argues were incurred when Owens breached the terms of W&S's top hat deferred-compensation retirement plan by working for one of W&S's competitors. Owens sought to dismiss the claims as being expressly preempted by the federal Employee Retirement Income Security Act, commonly known as ERISA. Because W&S's state-law claims were directly related to the terms of the top hat plan and their resolution necessarily required evaluation of the plan and the parties' performance under it, the trial court properly determined that W&S's claims were preempted.

{¶2} W&S alleged in its complaint that Owens had worked for W&S since 1976. In 2006, as an incentive for being one of its best sales associates, W&S offered Owens participation in its top hat plan. The plan permitted Owens to defer compensation earned while working for W&S until retirement, and then to receive annual payments of that compensation over a period of three years. Section 4.7 of the plan also contained a forfeiture provision—Owens' right "to receive future payments" under the plan would be forfeited if he worked for one of W&S's competitors during the three-year period.

{¶3} After his 2010 retirement, W&S paid several installments to Owens totaling over $46,700. In 2011, W&S learned that Owens may have violated the plan's noncompete provision. W&S claimed that Owens had forfeited his right to receive the deferred compensation. It refused to make the last $22,000 payment, and ultimately brought this suit to recover the benefits it had already paid.

{¶4} Owens moved to dismiss the complaint on grounds that the trial court lacked subject-matter jurisdiction over the state-law claims, which were preempted under ERISA. In a well-reasoned, seven-page decision, the trial court dismissed W&S's suit, finding that W&S's state-law claims were expressly preempted by ERISA. W&S appealed the entry of dismissal.

{¶5} Raising a single assignment of error, W&S contends that the trial court erred in dismissing its state common-law claims for breach of contract, promissory estoppel, and unjust enrichment. W&S argues that its deferred-compensation plan is a top hat plan, and therefore is not governed by the substantive provisions of ERISA. Its common-law claims, stemming from Owens' alleged violation of the top hat plan's noncompete provisions, do not conflict with or interfere with the purposes of ERISA and are not preempted. W&S also asserts that because of its status as a top hat plan provider, it cannot assert the federal civil remedies afforded to fiduciaries, employees, and other beneficiaries bringing suit for benefits. Affirming the trial court's ruling and denying it the ability to pursue state-law remedies would leave W&S without a means to enforce its rights under the plan.

{¶6} Owens argues that W&S's claims clearly require evaluation of the terms of the top hat plan, and directly affect the relationship among the parties to the plan. The claims thus "relate to" the top hat plan, which W&S admits is an employee-benefit plan. Therefore, W&S's claims are subject to the express preemption provision of ERISA.

{¶7} Subject-matter jurisdiction is the power conferred on a court to adjudicate a particular matter on its merits and to render an enforceable judgment in the action. *See Morrison v. Steiner*, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. A motion to dismiss for lack of subject-matter jurisdiction made pursuant to Civ.R. 12(B)(1) requires the court to determine whether the complaint raised a cause of action cognizable by the forum in which it was filed. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). Thus, if W&S's claims are preempted under ERISA, the trial court lacks subject-matter jurisdiction and would not be able to adjudicate the claims raised in its complaint. *See Machlup v. TIAA-CREF Individual & Institutional Serv.*, 2013-Ohio-2704, 991 N.E.2d 1235, ¶ 9 (8th Dist.).

{¶8} This court reviews the trial court's ruling on subject-matter jurisdiction de novo, relying upon the same record before the court below, but without giving deference to its legal conclusions based on that record. *Dikong v. Ohio Supports, Inc.*, 2013-Ohio-33, 985 N.E.2d 949, ¶ 9 (1st Dist.).

{¶9} In 1974, Congress passed ERISA to provide a comprehensive and uniform regulatory regime for employee-benefit plans. *See Aetna Health Inc. v. Davila*, 542 U.S.

200, 208, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004). ERISA was intended "to protect the integrity of those plans and the expectations of their participants and beneficiaries" in anticipated retirement benefits. *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 929 (3d Cir.1985); *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). In addition, ERISA freed employers and plan providers from conflicting and inconsistent state and local regulation of retirement plans by prescribing a uniform set of requirements for employers who voluntarily provide employee-benefit plans. *See Shaw v. Delta Airlines*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

{¶10} ERISA meets the first goal by regulating plan reporting, disclosure, participation rights, vesting of rights, funding, and fiduciary duties, as well as claims procedures. *See* 29 U.S.C. 1021-1145. To achieve the second purpose, "ERISA includes expansive pre-emption provisions [in 29 U.S.C. 1144], which are intended to ensure that employee benefit plan regulation [is] 'exclusively a federal concern.' " *Aetna Health Inc.* at 208, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

{¶11} ERISA defines a top hat plan as an employee-benefit plan which, unlike most plans, "is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. 1051(2); *see Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250 (6th Cir.1989). Top hat plans provide a tax benefit to participants like Owens. A participant is taxed at the time he receives the deferred income, not at the time it is earned, and he may defer income well in excess of the contribution limits imposed on most retirement plans. Employers also derive benefits. They can take a deduction when the benefit is paid, and, as here, can attempt to subject compensation to forfeiture upon subsequent employment with a competitor. *See generally* Galati, *Note: The ERISA Hokey-Pokey: You Put Your Top Hat In, You Put Your Top Hat Out*, 5 Nev.L.J. 587 (2004). Both parties agree that W&S's deferred-compensation plan is a top hat employee benefit plan as defined under ERISA. *See Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 467 (6th Cir.2002); *see also Kemmerer v. ICI Am. Inc.*, 70 F.3d 281, 286-287 (3d Cir.1995).

{¶12} Under ERISA's comprehensive scheme, civil actions to enforce the terms of a benefit plan may only be brought by participants, beneficiaries, fiduciaries, the Secretary of Labor, and a state, in certain instances. 29 U.S.C. 1132(a). Any of these ERISA entities may bring an enforcement action in federal court. *See* 29 U.S.C. 1132(e)(1). We note that Owens, a plan beneficiary, has done so. Invoking his rights under ERISA, Owens has filed an action against W&S, in federal court in Louisiana, seeking to recover the remaining benefits that he contends are due under the plan.

{¶13} Plan participants and beneficiaries may also invoke concurrent jurisdiction in state court over actions to recover benefits and to determine rights under a plan. 29 U.S.C. 1132(A) and 1132(e)(1). As the provider of a top hat plan, W&S acknowledges that it is not a participant or a beneficiary under ERISA. Thus it may not invoke the jurisdiction of the federal courts to enforce its rights under the plan. And it may not bring those federal claims in an Ohio court. Therefore, W&S maintains that it lacks a federal remedy against Owens and must instead rely upon state-law claims for relief.

{¶14} Top hat plans benefit highly compensated employees who, like Owens, are presumed to have negotiating leverage with their employers, and to understand the risks attendant with unfunded plans. *See Bakri v. Venture Mfg. Co.*, 473 F.3d 677, 678 (6th Cir.2007), citing Department of Labor, Office of Pension & Welfare Benefit Programs, Opinion 90-14A, 1 (May 8, 1990). Because Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations, ERISA exempts top hat plan providers from the regulatory scheme applicable to most employee-benefit plans. *See Hutchinson v. Crane Plastics Mfg.*, S.D.Ohio No. 2:06-cv-297, 2005 U.S. Dist. LEXIS 43628 (Oct. 28, 2005). We note that ERISA expressly omits top hat plans from the nonforfeitability requirements applied to most other plans. *See* 29 U.S.C. 1051 and 1053; *see also Bryan v. Pep Boys*, E.D.Pa. No. 00-1525, 2001 U.S. Dist. LEXIS 9090 (June 29, 2001).

{¶15} W&S argues that because most substantive provisions of ERISA do not apply to top hat plans, ERISA does not necessarily preempt state-law claims regarding top hat plans. *See Pereira v. Cogan*, 200 F.Supp.2d 367, fn. 5 (S.D.N.Y.2002), citing *Gallione v. Flaherty*, 70 F.3d 724, 728-729 (2d Cir.1995); *contra Gallione* at 729 (noting that "[w]e need not definitively explore here the extent to which a pension claim based on

contract may be preempted by ERISA, because the record reveals that the contract claim was properly dismissable for lack of merit"). Since ERISA exempts top hat plans from most of its regulatory requirements, there is really no administrative scheme with which any state-law claims would conflict. Thus, W&S maintains, the principles of Ohio common law survive to determine W&S's rights under the plan.

{¶16} But while top hat plans are exempt from the strict fiduciary duties, standards of care, and detailed disclosure, vesting, and nonforfeitability requirements applicable to most employee-benefit plans, top hat plans are not exempt from ERISA's federal enforcement provisions. *See* 29 U.S.C. 1131-1145. In particular, ERISA's preemption provision "applies to every plan covered by ERISA, which necessarily includes top hat plans." *Loffredo v. Daimler AG*, 500 Fed.Appx. 491, 495 (6th Cir.2012); *See, e.g., Hockler v. Innovative Am. Mfg.*, S.D.Ohio No. 2:12-cv-209, 2012 U.S. Dist. LEXIS 80191 (June 11, 2012) (rejecting the no-conflict argument and applying the express language of ERISA to find that the plaintiff's eight state-law claims were preempted).

{¶17} ERISA's express preemption statute provides that ERISA "supersede[s] any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." (Emphasis added.) 29 U.S.C. 1144(a) and 1144(c)(1). The term "relate[s] to" is interpreted broadly to mean that a state-law cause of action is preempted if it has a connection with or reference to an employee-benefit plan. *See Richland Hosp., Inc. v. Ralyon*, 33 Ohio St.3d 87, 91, 516 N.E.2d 1236 (1987), citing *Shaw*, 463 U.S. at 98, 103 S.Ct. 2890, 77 L.Ed.2d 490. Any state-law cause of action "that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive" and is preempted. *Aetna Health Inc.*, 542 U.S. at 209, 124 S.Ct. 2488, 159 L.Ed.2d 312. But if the state action affects the benefit plan only peripherally or remotely, then ERISA preemption does not apply. *See Thurman v. Pfizer, Inc.*, 484 F.3d 855, 861 (6th Cir.2007); *see also Gromada v. Barrere*, 1st Dist. Hamilton No. C-040545, 2005-Ohio-1557, ¶ 11.

{¶18} This court has stated that ERISA preempts a state law when (1) the state claim is specifically designed to affect employee benefits; (2) the state claim is for the recovery of an ERISA plan benefit; (3) ERISA provides a specific remedy; or (4) the state

claim provides remedies for misconduct growing out of ERISA plan administration. *Gromada* at ¶ 13, citing *Halley v. Ohio Co.*, 107 Ohio App.3d 518, 522, 669 N.E.2d 70 (8th Dist.1995); *see Richland Hosp.*, at paragraph five of the syllabus (holding state common-law claims for willful and malicious misrepresentation of ERISA benefits preempted); *Machlup*, 2013-Ohio-2704, 991 N.E.2d 1235 (holding that ERISA preempts state breach-of-contract claims where resolution of the claims would require interpretation of the ERISA plan terms and an assessment of the plan administration); *Lindsay v. Cottingham & Butler Ins. Servs.*, 763 N.W.2d 568, 573 (Iowa 2009) (holding that ERISA preempts state common-law claims regarding the enforceability of noncompete forfeiture provisions in a top hat plan).

{¶19} In its preemption analysis, the United States Court of Appeals for the Sixth Circuit instructs courts to consider whether the remedy sought "is primarily plan-related." *Thurman v. Pfizer, Inc.*, 484 F.3d 855, 861 (6th Cir.2007). Under this focus, "if resolution of the state-law claim 'necessarily requires evaluation of the plan and the parties' performance pursuant to it, the claim is preempted.' " *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 557 (6th Cir.2012), quoting *Thurman* at 862.

{¶20} In the final analysis, it is not the label placed on a state-law claim that determines whether it is preempted, but whether the claim affects the recovery of an ERISA plan benefit. *See Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir.1991). If it does, the state-law claim is preempted.

{¶21} Here, W&S's breach-of-contract, promissory-estoppel, and unjust-enrichment claims stem from an alleged violation of the plan terms. Each claim makes specific reference to the plan terms and seeks a plan-related remedy. *See Thurman* at 861. The claims seek to affect recovery of benefits paid under the plan. *See Cromwell* at 1276; *see also Gromada*, 1st Dist. Hamilton No. C-040545, 2005-Ohio-1557, at ¶ 13. The resolution of these claims would necessarily require an evaluation of the plan and the parties' performance under the plan, and would ultimately affect the relation among the ERISA entities. *See Cataldo* at 557; *see also Machlup*, 2013-Ohio-2704, 991 N.E.2d 1235, at ¶ 14. W&S's state-law claims aim at the very heart of issues within the scope of ERISA's exclusive regulation and, if adjudicated, would affect the relationship between plan principals. W&S's claims "relate" to the top hat plan and are preempted by ERISA. *See* 29 U.S.C. 1144(a).

{¶22} Finally, W&S maintains that even if its claims relate to the top hat plan they ought not to be preempted. W&S admits that it cannot invoke federal ERISA remedies, and must instead rely upon state-law claims for relief. Permitting it to proceed with its state-law claims would not risk creating an alternate enforcement mechanism outside ERISA because W&S has no access to a federal enforcement mechanism in the first instance. *See Thurman*, 484 F.3d at 861. Nonetheless, to protect the paramount importance of federal uniformity in the interpretation of ERISA plans, the United States Supreme Court has stated that it is not relevant to an analysis of the scope of federal preemption that a party may be left without a remedy. *See Cromwell* at 1275-1276, citing *Caterpilla, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). We note that while W&S cannot assert claims for relief in Owens' federal suit in Louisiana, it can defend against his claims to future payments under the Top Hat plan. The assignment of error is overruled.

{¶23} Therefore, the trial court's judgment dismissing W&S's common-law claims for relief is affirmed.

Judgment affirmed.

HENDON, J., concurs.

FISCHER, J., concurs in judgment only.

Please note:

The court has recorded its own entry on the date of the release of this opinion.