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U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SAFECO LIFE INSURANCE)	
COMPANY, a corporation,)	
Plaintiff,)	Civil No. 92-331-MA (Lead)
)	Civil No. 92-512-MA
v.)	
OREGON MEDICAL INSURANCE)	
POOL, et al.,)	
Defendants.)	OPINION

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MARSH, Judge.

1 - OPINION

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1 Plaintiff SAFECO Life Insurance Company filed this action
2 seeking declaratory relief against the Oregon Medical Insurance
3 Pool (OMIP). The OMIP was established to provide access to and
4 funding for medical insurance for all residents of Oregon who are
5 denied medical insurance for the reasons provided in O.R.S.
6 735.615. Pursuant to O.R.S. 735.614, the OMIP attempted to assess
7 and collect funds upon certain "stop-loss" insurance policies
8 issued by SAFECO which cover self-funded ERISA plans or employers
9 (not individual participants in the plans).¹ SAFECO contends that
10 any assessment on stop-loss policies covering these plans
11 necessarily "relates" to ERISA, effectively "deems" self-funded
12 plans to be insurance companies in violation of ERISA, and hence
13 is preempted by ERISA. The OMIP, through Director Gary Weeks, has
14 demanded that SAFECO pay an assessment pursuant to O.R.S. 735.614
15 and SAFECO has refused to pay.

16 In addition, SAFECO asserts a supplemental claim, arguing that
17 neither SAFECO, the self-funded plans covered by them, nor the
18 beneficiaries of the plans are "insurers" as defined by O.R.S.
19 735.605(3). Immediately after this action was filed by SAFECO,
20 the State of Oregon filed an action in Marion County Circuit Court
21 seeking a declaration that OMIP is authorized to impose and
22 collect assessments from defendant for all persons covered under
23 a SAFECO self-insurance arrangement created in accordance with
24 ERISA. SAFECO removed the action to this court and on June 8,

25 ¹ Self-funded ERISA plans, unlike insured plans, do not
26 purchase insurance for their participants or provide benefits
through insurance policies.

1 1992, I denied OMIP's motion to remand and consolidated the two
2 cases. The parties have stipulated that there are no disputed
3 material issues of fact and, thus, have agreed to resolve the
4 legal dispute on cross-motions for summary judgment.

5 DISCUSSION

6 a. Preemption

7 The issue in this case is succinctly set forth in plaintiff's
8 motion for summary judgment: does ERISA preempt the OMIP as
9 applied to SAFECO, a stop loss re-insurer of self-funded ERISA
10 plans? The answer, which eluded the state legislators in their
11 discussions of the OMIP², turns upon the breadth of ERISA
12 preemption under the "deemer clause," the scope of ERISA's
13 insurance exemption and the continuing vitality of General Motors
14 v. California Bd. of Equalization, 815 F.2d 1305 (9th Cir. 1987)
15 following the Supreme Court's decision in FMC Corporation v.
16 Holliday, 111 S.Ct. 403 (1990).

17
18 ² The legislative history to the OMIP is particularly
19 interesting, if not very illuminating, in this case since the
20 Oregon legislature clearly anticipated that the legality of the
21 OMIP would be resolved in a federal court. According to Senator
22 Kitzhaber, the goal of the most recent legislative amendments to
23 the OMIP were to spread the costs of funding the OMIP more
24 equitably between insurance companies. The primary concern was
25 that self-insured pension plans, which constitute approximately
26 40% of the market, had not been included in the pool and thus the
remaining 60% of insurers were bearing the full burden of
supporting the OMIP. Acknowledging that ERISA would preclude a
direct state assessment against self-insured plans, the Oregon
legislature opted to reach the self-insureds by "taxing"
reinsurers like SAFECO and taking their chances in the courts:
"[w]ell you know the scenarios. You have a lawsuit, you may have
it over, you may not have it over, you may have a favorable
verdict, you may have an unfavorable verdict."

1 The basic framework for analysis of ERISA preemption in this
2 area is well established: first, I must determine whether the
3 state law at issue "relates to" an employee benefit plan; second,
4 I must determine if the state law regulates insurance such that it
5 fits within the insurance savings clause of § 1144(b)(2)(A); and
6 third, if the insurance savings clause applies, I must consider
7 whether the state law effectively 'deems' ERISA plans to be
8 insurance companies in violation of § 1144(b)(2)(B). See e.g.
9 General Motors, 815 F.2d at 1309-1310 (citations omitted). Under
10 the "deemer clause" an employee benefit plan governed by ERISA
11 shall not be "deemed" an insurance company, an insurer, or engaged
12 in the business of insurance for purposes of state law "purporting
13 to regulate" insurance companies or insurance contracts. See e.g.
14 FMC Corp. v. Holliday, 111 S.Ct. 403, 407 (1990).

15 Courts consistently emphasize the breadth of ERISA's
16 preemptive force. In Pilot Life Insurance Co. v. Dedeaux, 481
17 U.S. 41, 46 (1987), the Court noted that the preemptive scope of
18 ERISA is "intended to apply in the broadest sense in all actions
19 of State or local governments which have the force of law."
20 Section 514(a) of ERISA provides that "the provision of this title
21 . . . shall supersede any and all State laws insofar as they now
22 or hereafter relate to any employee benefit plan described . .
23 .and not exempt." (emphasis added).

24 However, ERISA preemption is not limitless. The Supreme Court
25 has noted that there are some state actions which "may affect
26 employee benefit plans in too tenuous, remote or peripheral a

1 manner to warrant a finding that the law 'relates to' the plan."
2 Shaw v. Delta Airlines, 463 U.S. 85, 100 n.21 (1983). Examples of
3 instances where a state law may affect an employee benefit plan
4 without "relating" to it include a state's general garnishment
5 statute even though used to satisfy judgments against ERISA plan
6 participants, Mackey v. Lanier Collection Agency & Serv., Inc.,
7 486 U.S. 825 (1988); and a state income tax levy against
8 individual benefits after the plan has determined the amount of
9 benefits to be distributed, Retirement Fund Trust of Plumbing v.
10 Franchise Tax, 909 F.2d 1266, 1281 (9th Cir. 1990).

11 The Supreme Court has noted that the preemption clause of
12 section 514(a) "was explicitly limited" by the insurance savings
13 clause of § 514(b)(2)(A). Metropolitan Life Ins. Co. v. Mass, 471
14 U.S. 724, 740 (1985). The insurance savings clause provides, in
15 language equally broad to that employed in 514(a), that ERISA
16 preserves any state law "which regulates insurance." The
17 difficulty in squaring these two broad preemptive statements was
18 recognized by the Court: "[W]hile Congress occasionally decides
19 to return to the States what it has previously taken away, it does
20 not normally do both at the same time." Id., at 741.

21 In Metro Life, the plaintiff issued group health policies
22 covering "insured" plans and argued that a state statute which
23 mandated minimum mental health care benefits for all group health
24 insurance policies was preempted by ERISA. The Court held that
25 the "common sense" view was that the statute was a law which
26 regulated a term of an insurance contract and thus, fell within

1 the insurance savings clause. Id. The Court looked to the
2 McCarran-Ferguson Act, by analogy, and noted that the law fell
3 within the traditional ambit of state insurance regulation since
4 it spread the risk of mental health care costs and imposed
5 requirements only on insurers, with the intent of affecting the
6 relationship between insurer and policyholder. Id., at 744.
7 Further, because the Court found that the law regulated the
8 insurer, not the plan, it also did not "relate" to an ERISA
9 benefit plan so as to be preempted under § 514(a). Id., at 742.
10 In conclusion, the Court noted that its decision necessarily drew
11 a distinction between insured and uninsured or "self-funded"
12 plans, "leaving the former open to indirect regulation while the
13 latter are not." Id., at 2380.

14 Following the Court's decision in Metro Life, the Ninth
15 Circuit, in an opinion authored by then Judge Kennedy, addressed
16 the issue of whether a state premiums tax assessed against an
17 insurer and calculated with reference to benefits paid by ERISA
18 plans was preempted by ERISA. General Motors, 815 F.2d 1305. The
19 State of California filed the action seeking to administer a tax
20 on gross premiums received by insurance companies doing business
21 in California. Pursuant to the insurance contracts, the plans
22 were required to reimburse the insurance companies for all premium
23 taxes. Thus, the defendants were the plan fiduciaries for insured
24 plans. In analyzing the state tax, the court first found that,
25 under the broad scope of preemption emphasized in Metro Life, the
26 state law "related to" an ERISA plan by computing the tax with

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1 reference to the benefits paid by the plan. Id., at 1309. Next,
2 the court determined that the state law fell within the insurance
3 savings clause, citing Metro Life's directive that the savings
4 clause "must be construed broadly." Id., at 1310, citing Metro
5 Life, 105 S.Ct. at 2389. Finally, the court held that the tax did
6 not implicate the "deemer clause" since it was imposed on
7 insurance companies, not benefit plans and had only an incidental
8 effect on the plans:

9 "Metropolitan so holds. Metropolitan left intact a
10 mandated benefit law that had significant effects on
11 Massachusetts plans. In so doing, it indicated that
12 state laws affecting benefit plans may escape preemption
13 if they fall directly on insurance companies as the tax
14 at issue does."

15 Id., at 1311.

16 Thereafter, in FMC v. Holliday, the Court again recognized
17 that ERISA permits state regulation of insured plans and prohibits
18 state regulation of self-funded plans under the preemption clause.
19 Holliday, 111 S.Ct. at 407-411. In Holliday, a self-funded health
20 care plan challenged the application of a Pennsylvania law
21 precluding subrogation in any action involving injuries sustained
22 in a motor vehicle accident. The state law directly conflicted
23 with a provision in the Plan which reserved to the Plan trustee
24 the right to collect against any recovery on amounts paid for
25 medical expenses. Id., at 406. The Court found that the anti-
26 subrogation law clearly had a "reference" to an ERISA benefit plan
and that it also fell within ERISA's insurance savings clause
since it directly controlled the term of an insurance contract by
invalidating any subrogation provision it may contain. However,

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1 the Court held that the deemer clause required that self-funded
2 ERISA plans be exempted from state laws that regulate insurance:
3 "[S]tate laws that directly regulate insurance are 'saved' but do
4 not reach self-funded employee benefit plans because the plans may
5 not be deemed to be insurance companies, other insurers, or
6 engaged in the business of insurance." Id., at 409. The Court
7 specifically noted that its conclusion was consistent with Metro
8 Life since the Massachusetts statute was never enforced against
9 benefit plans directly, but rather were only enforced against
10 insurance companies. Id.

11 The parties in this case do not dispute that the OMIP statutes
12 "relate to" ERISA plans, at least insofar as the assessments are
13 calculated by reference to ERISA plans. Further, for the purposes
14 of this motion, plaintiff "assumes" that the OMIP assessments
15 against it fall within the insurance savings clause. Thus, I must
16 determine whether the assessment statute, as applied to SAFECO,
17 effectively "deems" qualifying benefit plans to be insurance
18 companies.

19 Pursuant to Chapter 735 of the Oregon Revised Statutes, the
20 OMIP Account consists of funds appropriated by the legislature,
21 interest and "assessments and other revenues collected or
22 received" by the OMIP. Unlike death and taxes, assessments
23 against insurers are not inevitable but are only made at such time
24 that the Board determines that funds in the OMIP are insufficient
25 to meet expenses. O.R.S. 735.614(1). If the Board makes such a
26 determination, each "insurer's" assessment is determined by

1 multiplying the amount of funds needed by the fractional number of
2 "insureds." O.R.S. 735.614(2). Section 735.605(4)(b) defines
3 "insurer" to include "any reinsurer reinsuring medical insurance
4 in this state." Section 605(9) defines "reinsurers" as any
5 insurer providing reinsurance to any "person" providing medical
6 insurance. Section 605(5) defines "insured" as any resident
7 eligible to receive benefits from any insurer.

8 The law is clear that the existence of stop-loss insurance
9 does not convert a self-funded plan into an "insured plan."
10 United Food & Commercial Workers v. Pacyga, 801 F.2d 1157, 1161
11 (9th Cir. 1986). The parties have not cited, nor have I been able
12 to find, any case which addresses the unique situation presented
13 here-- that of a state regulation directed at an insurance policy
14 covering self-funded ERISA plans. General Motors, Metro Life and
15 Holliday address similar issues and lay down a "spectrum" against
16 which I can gauge the state regulation in this case, but I
17 emphasize that each of these cases is factually distinguishable.
18 In General Motors and Metro Life the laws which were "saved" under
19 the insurance clause related to insured plans and had no direct
20 impact upon the terms or administration of the plans. In
21 Holliday, although the state law was preempted as applied, it
22 attempted to impose a regulation directly upon the ERISA plan
23 administrator rather than the insurer and furthermore,
24 specifically contradicted a provision of the plan itself. See
25 also PM Group Life Ins. v. Western Growers Assur. Trust, 953 F.2d
26 543, 545-6 (9th Cir. 1992) (state coordination of benefits law

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1 preempted as applied to self-funded plans); and E-Systems, Inc. v.
2 Pogue, 929 F.2d 1100, 1101-2 (state tax on ERISA plan service fees
3 preempted). Thus, although these decisions provide guidance, none
4 provides a definitive answer.

5 Plaintiff argues that the Ninth Circuit's decision in GM was
6 "impliedly overruled" by the Supreme Court's decision in Holliday.
7 In reviewing these decisions, my attention was drawn to the fact
8 that both GM and Holliday relied extensively upon the Supreme
9 Court's earlier holding in Metro Life. In Justice O'Connor's
10 opinion in Holliday, which was joined by Justice Kennedy, the
11 Court distinguished Metro Life and expressly noted that its
12 decision was consistent with the holding in that case. Further,
13 the Court noted that it had granted certiorari to resolve a
14 conflict between the Third, Eighth and Seventh Circuits. In light
15 of the Court's reliance upon the same case relied upon by the
16 Ninth Circuit in GM, and its presumed knowledge of the existence
17 of GM given Kennedy's presence on the Court, I reject plaintiff's
18 suggestion that the Court expressly or implicitly overruled the
19 Ninth Circuit's decision in GM.³

20 Finally, although addressing the distinction between self-
21 funded and insured plans, the Court in Holliday emphasized that

22 ³ The only decision from the Ninth Circuit construing GM was
23 decided prior to Holliday. In Retirement Fund Trust of Plumbing
24 v. Franchise Tax, 909 F.2d 1206 (9th Cir. 1990), the court held
25 that a state income tax levy was not preempted by ERISA and did
26 not "relate to" an ERISA welfare plan. The court relied upon its
holding in GM and noted only that GM may have incorrectly
determined that the tax levy even "related to" ERISA since it
preceded the Supreme Court's decision in Mackey that state
garnishment procedures were not preempted. Id., at 1282.

1 its holding did not alter prior insurance savings clause analysis:
2

3 "An insurance company that insures a plan remains an
4 insurer for purposes of state laws purporting to regulate
5 insurance after application of the deemer clause. The
6 insurance company is therefore not relieved from state
7 insurance regulation."

8 Holliday, 111 S.Ct. at 409.

9 Based upon my reading of all of these cases, although the
10 factor of whether a plan is self-funded or insured is critical to
11 the ERISA preemption analysis following Holliday, it does not end
12 the inquiry when the state law operates directly against an
13 insurance company.

14 In this case, I am assuming, without deciding, that the OMIP
15 assessment "relates to" an ERISA plan insofar as the assessment
16 against SAFECO is calculated with reference to an ERISA plan. In
17 addition, I accept, as conceded by SAFECO, that the assessment
18 also falls within the broad exception to ERISA preemption in the
19 insurance savings clause. Applying the deemer clause to the
20 assessment statute in this case, I find that the Oregon statute
21 treats self-funded plans as insureds, not insurers, and does not
22 deem the self-funded plan as an insurer nor does it treat the plan
23 like an insurance company. Like the tax in GM, the assessment in
24 this case is levied directly against the insurance company and as
25 such, simply becomes part of the expense that SAFECO must pay in
26 order to conduct business within this state.

Like the state regulation in Metro Life, the OMIP assessments
operate to spread the risk of losses incurred by people who would

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1 otherwise be unable to obtain insurance and imposes the
2 requirement solely upon insurance companies, not the plans
3 themselves. Thus, although the insurance policy at issue in this
4 case was issued with respect to a self-funded plan, the assessment
5 still lies solely with the insurance company. Any effects upon a
6 self-funded plan are tenuous, at best. In fact, the effects on
7 plans in Oregon would actually be far less than those effects held
8 to be "tenuous" in Metro Life and GM since there is nothing in the
9 policy which requires the plan to reimburse SAFECO for the
10 assessment. Further, unlike the anti-subrogation law preempted in
11 Holliday, the assessment in this case does not contradict any term
12 within the plan, directly deplete plan resources or affect plan
13 administration.

14 b. Supplemental Claim

15 Because plaintiff's supplemental claim that the assessment was
16 improperly applied against it in contravention of the statute
17 raises a novel and potentially complex issue under state law, I
18 decline to exercise supplemental jurisdiction over the remaining
19 state claim. 28 U.S.C. § 1367(c)(1), (3).

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CONCLUSION

1
2 Based on the foregoing, I find that the OMIP assessment
3 against SAFECO is not preempted by ERISA. Plaintiff's
4 supplemental claim is remanded to the Multnomah County Circuit
5 Court. Accordingly, plaintiff's motion for summary judgment is
6 denied and defendants' motion for summary judgment is granted.

7 DATED this 1 day of September, 1992.

8 *Malcolm F. Marsh*
9 Malcolm F. Marsh
10 United States District Judge
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OREGON MEDICAL INSURANCE
POOL, et al.,

Defendants.

Civil No. 92-331-MA (Lead)
Civil No. 92-512-MA

ORDER

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MARSH, Judge.

1 - ORDER

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MARSH, Judge.

Based on the record, this action is dismissed.

DATED this 1 day of September, 1992.

Malcolm F Marsh
Malcolm F. Marsh
United States District Judge

2 - JUDGMENT