

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

RAUL SANTOVENIA,

CASE NO. 99-0403-CIV-SEITZ  
Magistrate Judge Brown

Plaintiff,

v.

PROVIDENT LIFE AND ACCIDENT  
INSURANCE COMPANY,

Defendant.

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT TO DETERMINE THE GOVERNING LAW  
AND TO STRIKE DEFENDANT'S FIFTH AFFIRMATIVE DEFENSE**

*I. Introduction*

This action arose as the result of the wrongful termination of Mr. Santovenia's monthly disability insurance proceeds pursuant to the terms of a policy issued by Provident Life and Accident Insurance Company (hereinafter "Provident"). Mr. Santovenia filed suit under Florida State law alleging that Provident breached its insurance contract with him by discontinuing payment of his monthly disability compensation. Provident's fifth affirmative defense claims that this case is governed by ERISA<sup>1</sup>, which preempts Mr. Santovenia's state law claims. This has created a threshold question in this case regarding the governing body of law that needs to be answered before the core issues of this case can be properly addressed.

Mr. Santovenia owned a garment manufacturing company when he purchased his policy from Provident. All premium payments for the policy were made by Mr.

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<sup>1</sup> The Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*

Santovenia personally. None of his employees were covered under his policy nor were they eligible to be covered. This an individual policy governed under the laws of the State of Florida. Provident has attempted to inject ERISA into this case in an attempt to limit its potential liability due to the protections afforded an insurance company by the federal statute. Provident set up a “task force” for this very purpose. However, there is no factual or legal basis that would allow ERISA to apply to this case.

## II. Facts

Mr. Santovenia established Fabric Fair, Inc. in the late 1970’s. In addition to being the sole owner<sup>2</sup>, Mr. Santovenia was the President and CEO of this children’s clothing manufacturing company. His company was his primary source of income. Mr. Santovenia purchased a disability insurance policy<sup>3</sup> from Provident to guard him financially in the event that he became disabled and could no longer earn a living. The policy only covered him and all the premiums were paid out of his personal account<sup>4</sup>. This was an individual policy.

Mr. Santovenia became disabled in 1993 due to a major depressive disorder. Provident acknowledged his disability and paid him monthly until the end of 1997. Mr. Santovenia filed suit pursuant to the Florida Insurance Code claiming a breach of contract. Provident’s answer to the complaint contained the following affirmative defense:

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<sup>2</sup> See, Personal History Interview, “5 (b) % of ownership? 100%”, attached as **Exhibit A**. Also see, Affidavit of Raul Santovenia which has been filed in support of this motion.

<sup>3</sup> The policy and application are attached as **Exhibits B and C** respectively.

<sup>4</sup> The application specifically asked whether his employer would pay the premium. See, Exhibit C, question 11 (a). Mr. Santovenia checked the “no” box. Furthermore, Provident’s internal “Policy Data Sheet” states that the “Bill Method” is “Direct”. The Policy Data Sheet is attached as **Exhibit D**. Also see, Affidavit of Raul Santovenia.

### **Fifth Defense**

The subject policy was issued as part of an employee benefit plan established, maintained, and endorsed by Plaintiff's employers and, therefore, is exclusively regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001-1461, which preempts Plaintiff's claims.

Answer and Affirmative Defenses to Complaint, p. 3.

This was the first time ERISA was ever associated with Mr. Santovenia's policy. Provident's "Home Office Form D<sup>5</sup>" states that the contract type is individual (as opposed to group). The claim was handled out of the Individual Disability Claims department<sup>6</sup>. If this policy was a group policy covered by ERISA, Provident would have assigned the claim to its Group Disability Claims department. Nowhere in the policy is there a statement regarding the insured's ERISA rights as required by ERISA. Neither Provident nor Fabric Fair, Inc. ever complied with any of ERISA's reporting and disclosure sections. There is no Summary Plan Description as required by ERISA. There is nothing whatsoever to indicate that the policy is governed by ERISA.

### **III. Summary Judgment Standard**

A moving party is entitled to summary judgment if the pleadings, affidavits and other supporting papers show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R.Civ.P., 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986). "The burden of establishing the absence of a genuine issue of material fact is on the party seeking summary judgment." United of Omaha Life Ins. Co. v. Sun Life Ins. Co. of America, 894 F.2d 1555, 1557 (11<sup>th</sup> Cir. 1990)(citations omitted). "He does not necessarily need to put on

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<sup>5</sup> Attached as **Exhibit E**.

<sup>6</sup> See, August 11, 1997 letter from "Dan Cody, Claims Representative, Individual Disability Claims", attached as **Exhibit F**.

evidence to negate his opponent's claim; he may simply point to portions of the pleadings, admissions, answers to interrogatories, and depositions which, along with any affidavits, show the absence of a genuine issue of material fact." Kennedy v. Allied Mutual Ins. Co., 952 F.2d 262, 265 (9<sup>th</sup> Cir. 1991). Once this burden has been met, the adverse party must show there remains a genuine issue for trial. Fed.R.Civ.P., 56(e). "The court must view all evidence in the light most favorable to the non-movant and must resolve all reasonable doubts about the facts in favor of the non-movant." United of Omaha Life Ins. Co., 894 F.2d at 1558.

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 91 L.Ed. 2d 202, 106 S.Ct. 2505 (1986). "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." Id at 252. " If a review of the evidence presented reveals that the non-movant has failed to produce evidence sufficient to support a jury verdict in his favor, then summary judgment should be granted." United of Omaha Life Ins. Co., 994 F.2d at 1558.

#### IV. An Employee Benefit Plan was Never Established

The establishment of an ERISA plan is a mixed issue of law and fact. Kennedy, 952 F.2d at 265; accord, Johnson v. Watts Regulator Co., 63 F.3d 1129, 1132 (1<sup>st</sup> Cir. 1995). "The burden of establishing the existence of an ERISA plan is on [the insurer]." Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1121 fn. 2 (9<sup>th</sup> Cir. 1997). A bare assertion that ERISA applies, without supporting facts, is insufficient as a matter of law

to bring a case within ERISA's sphere of influence. Mitchell v. Investors Guaranty Life Ins. Co., 861 F.Supp. 1039, 1040 (N.D. Ala. 1994).

“For an employee welfare benefit plan or program to come within ERISA's sphere of influence, it must, among other things, be ‘established or maintained’ by an employer, an employee organization, or both.”

Johnson, 63 F.3d at 1132; accord, Donovan v. Dillingham, 688 F.2d 1367, 1370 (11<sup>th</sup> Cir. 1982).

Mr. Santovenia's company did not establish an employee benefit plan. Mr. Santovenia simply bought an insurance policy for himself. The mere fact that he owned the company does not mean that he “established” a plan. If this were true, then the owner of a company could never purchase an individual policy governed by state law. Further evidence that an ERISA plan was not established is the fact that Provident billed Mr. Santovenia directly and the premiums were paid by him personally. His company was never billed for the premiums nor did it ever pay a premium. His company played no role in the creation or administration of the policy. The non-existence of an ERISA plan is further bolstered by the fact that Mr. Santovenia was the only person covered by the policy.

The policy itself also supports the fact that an ERISA plan was not established. It is evident from language of the policy that neither Provident nor Mr. Santovenia contemplated the establishment of an ERISA plan. The policy is completely devoid of any mention of ERISA<sup>7</sup> and none of the ERISA reporting requirements were met.

“Furthermore, throughout the entire period of coverage, MGLIC also treated the plan as if it was governed by state law and thus never complied with any ERISA reporting or disclosure requirements. Although the failure to comply with ERISA's reporting and disclosure requirements

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<sup>7</sup> ERISA requires that plan participants and beneficiaries be advised in both the plan and the summary plan description of their rights under ERISA. A summary plan description was never even written.

does not remove a plan from ERISA coverage, it is nonetheless relevant to who had established and was administering the plan.

Defendants have not presented any evidence that the employer established or maintained the plan. The employer did not arrange a group insurance program. The few ministerial activities undertaken by the employer here do not rise to establishment or maintenance of the plan. Since, there is not sufficient evidence to support a finding that the employer here established or maintained the plan, as a matter of law, the plan does not fall within the statutory definition of an ERISA plan.”

du Mortier v. Massachusetts General Life Ins. Co., 805 F.Supp. 816, 820 (C.D. Calif. 1992).

V. ERISA Cannot Govern a Policy That Only Covers an Owner of a Company

Even if Mr. Santovenia’s policy did fall within the statutory definition of ERISA, it would be exempted from coverage under 29 C.F.R. § 2510.3-3. Mr. Santovenia is not an employee under ERISA.

“Employees. For purposes of this section: (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse.”

29 U.S.C. § 2510.3-3 (c).

Mr. Santovenia wholly owned Fabric Fair, Inc. and he was the only individual covered by the policy.

“Plans without employees. For purposes of title I of the Act and this chapter, the term ‘employee benefit plan’ shall not include any plan, fund or program, . . . , under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called ‘Keogh’ or ‘H.R. 10’ plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I.”

29 C.F.R. § 2510.3-3 (b).

The policy does not cover any employees; therefore, it is not an employee benefit plan.

“Thus, in order to establish an ERISA employee welfare benefit plan, the plan must provide benefits to at least one employee, not including an employee who is also the owner of the business in question.

...

Slamen argues that the disability insurance policy he purchased from Paul Revere in 1985 was not an ERISA plan because he wholly owned the dental practice and was the only person covered under the disability insurance policy. Thus, by virtue of § 2510.3-3 (c)(1), he argues that he could not be considered an employee for purposes of determining whether the disability insurance policy was an ERISA plan. We agree. Slamen’s disability insurance policy covered only himself. No employees received any benefits under the plan and there is nothing in the record showing that the disability insurance policy bears any relationship to the health and life insurance benefits that Slamen provides to his employees.”

Slamen v. Paul Revere Life Ins. Co., 166 F.3d 1102, 1104-5 (11<sup>th</sup> Cir. 1999); also see, Matinchek v. John Alden Life Ins. Co., 93 F.3d 96, 100-101 (3<sup>rd</sup> Cir. 1996)(“[W]e cannot conclude that Congress intended that ERISA would protect a sole owner’s ‘employee’-type benefits (e.g. , insurance coverage benefits) from his or her own actions carried out as an ‘employer.’ Congress clearly intended ‘employer’ and ‘employee’ to be mutually exclusive definitions under ERISA.”); Meredith v. Time Ins. Co., 980 F.2d 352, 358 (5<sup>th</sup> Cir. 1993)(“When the employee and employer are one and the same, there is little need to regulate plan administration. Moreover, the Department of Labor’s construction of ERISA accords with the Supreme Court’s adoption of comm-law principles of agency. It would appear axiomatic that the employee-employer relationship is predicated on the relationship between two different people.”); Kwatcher v. Massachusetts Employees Pension Fund, 879 F.2d 957, 959 (1<sup>st</sup> Cir. 1989)(“employer and employee are plainly meant to be different animals . . . the twain shall never meet.”).

## VI. Conclusion

Provident never really believed that Mr. Santovenia’s policy was governed by ERISA. There is actually something sinister afoot. Provident has instituted a nationwide litigation tactic in order to influence the settlement of claims. Mr. Santovenia filed his claim in 1993. Two years later in 1995, Provident established a “task force” to “initiate active measures to get new and existing policies covered by ERISA<sup>8</sup>.” The reasons for this improper litigation strategy, as stated by Provident, are clear.

“[S]tate law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the

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<sup>8</sup> The October 2, 1995 Provident Internal Memorandum is attached as **Exhibit G**.

amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact on Provident from having policies covered by ERISA could be significant.”

Mr. Santovenia’s policy was set up as an individual disability policy and it only covered the owner of a business. The policy is not an employee benefit plan governed by ERISA. The governing body of law in this case is Florida State law and this Court should enter an Order to this effect.

*Respectfully submitted,*

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BY: \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served via facsimile and U.S. mail this \_\_\_\_ day to January, 2000 to: Roger Kobert, Esq., Shutts & Bowen LLP, 201 So. Biscayne Blvd., 1500 Miami Center, Miami, Florida 33131 (305) 381-9982.

*Respectfully submitted,*

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