

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FLOYD COLEMAN,

NO. CIV. S-03-1549 LKK/KJM

Plaintiff,

O R D E R

v.

STANDARD LIFE INSURANCE
COMPANY,

TO BE PUBLISHED

Defendant.

_____ /

Plaintiff brings this action seeking recovery of disability benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. (ERISA) and state contract law. This matter comes before the court on defendant's motion to dismiss plaintiff's state law claims on ERISA preemption grounds. I decide the matter on the basis of the papers and pleadings filed herein, and after oral argument.

////
////
////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I.

THE COMPLAINT

The plaintiff, Floyd Coleman, is employed as a probation officer by the County of Sacramento and was insured through a group long-term disability benefit policy issued by defendant Standard Insurance Company on behalf of the Sacramento County Probation Association, an employee association. Plaintiff alleges that he applied for and received long-term disability benefits under the policy on August 18, 1998, based on his knee condition and chronic back pain. Plaintiff further alleges that defendant informed him, on or about June 7, 2000, that "his case was being closed because he did not qualify for the 'any occupation' disability requirements since he could perform sedentary jobs." Complaint, ¶ 8. The "any occupation" standard applied after 24 months of disability. After exhausting Standard's internal review process, plaintiff filed this civil action.

The complaint alleges a cause of action under 29 U.S.C. § 1132(a), the civil enforcement provision of ERISA, based upon plaintiff's allegations that defendant has withheld long-term disability benefits under an "employee welfare benefit plan" within the meaning of ERISA. The complaint also includes two claims for relief under state law, for breach of contract and for breach of the implied covenant of good faith and fair dealing, and a request for punitive damages. Defendant has moved to dismiss the state law claims under Fed. R. Civ. P. 12(b)(6), arguing that both the contract law claims and the request for punitive damages are

1 preempted by ERISA.

2 **II.**

3 **STANDARDS**

4 On a motion to dismiss, the allegations of the complaint must
5 be accepted as true. See Cruz v. Beto, 405 U.S. 319, 322 (1972).
6 The court is bound to give the plaintiff the benefit of every
7 reasonable inference to be drawn from the "well-pleaded"
8 allegations of the complaint. See Retail Clerks Intern. Ass'n,
9 Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746, 753 n. 6 (1963).
10 Thus, the plaintiff need not necessarily plead a particular fact
11 if that fact is a reasonable inference from facts properly alleged.
12 See id.; see also Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963)
13 (inferring fact from allegations of complaint).

14 In general, the complaint is construed favorably to the
15 pleader. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). So
16 construed, the court may not dismiss the complaint for failure to
17 state a claim unless it appears beyond doubt that the plaintiff can
18 prove no set of facts in support of the claim which would entitle
19 him or her to relief. See Hishon v. King & Spalding, 467 U.S. 69,
20 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In
21 spite of the deference the court is bound to pay to the plaintiff's
22 allegations, however, it is not proper for the court to assume that
23 "the [plaintiff] can prove facts which [he or she] has not alleged,
24 or that the defendants have violated the ... laws in ways that have

25 ////

26 ////

1 not been alleged." Associated General Contractors of California,
2 Inc. v. California State Council of Carpenters, 459 U.S. 519, 526
3 (1983).

4 **III.**

5 **ANALYSIS**

6 Section 514(a) of ERISA provides that the statute "shall
7 supersede any and all State laws insofar as they may now or
8 hereafter relate to any employee benefit plan . . ." 29 U.S.C.
9 § 1144(a). Adopting a plain meaning approach, the Supreme Court
10 initially held that a state law claim "relates to an employee
11 benefit plan" within the meaning of the preemption provision "if
12 it has a connection with or reference to such a plan." Shaw v.
13 Delta Air Lines, Inc., 463 U.S. 85, 87 (1983); Pilot Life Ins. Co.
14 v. Dedeaux, 481 U.S. 41 (1987). Over time, that approach proved
15 unworkable, and the law changed accordingly. Cf. Oliver Wendell
16 Holmes, The Common Law (1881) at 5 ("The life of law has not been
17 logic; it has been experience."). As the Ninth Circuit has
18 explained, the interpretation of the preemption clause has "evolved
19 from a plain language interpretation . . . to a more pragmatic
20 interpretation in which courts seek to preserve the goals of
21 Congress." Botsford v. Blue Cross and Blue Shield, 314 F.3d 390
22 (9th Cir. 2002); see N.Y. State Conf. Of Blue Cross & Blue Shield
23 Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) ("We simply
24 must go beyond the unhelpful text and the frustrating difficulty
25 of defining [§ 1144(a)'s] key term ["relating to"], and look
26 instead to the objectives of the ERISA statute as a guide to the

1 scope of the state law that Congress understood would survive.”).
2 Courts must now look “both to the objectives of the ERISA statute
3 as a guide to the scope of the state law that Congress understood
4 would survive, as well as the nature of the effect of the state law
5 on ERISA plans.” Eglehoff v. Eglehoff, 532 U.S. 141, 147 (2001).
6 Given the open-ended nature of this inquiry, the direction in which
7 the various purposes of the statute point in a particular case is
8 often difficult to discern. In this case, however, the substantive
9 issues are relatively straightforward; the only real disagreement
10 concerns a procedural question.

11 Defendants argue that plaintiff’s state law claims are clearly
12 preempted because the plaintiff admits in his complaint that the
13 relevant policy was part of an ERISA plan and that his state law
14 claims seek recovery of benefits under that plan and punitive
15 damages arising out of defendants’ processing of his claims under
16 the plan. Indeed, plaintiff does specifically allege that the
17 policy is part of an “employee welfare benefit plan” as defined by
18 29 U.S.C. § 1002 and that he is a participant in that plan.
19 Complaint, ¶¶ 26 and 27.

20 There is a great temptation to grant defendant’s motion and
21 get on with the case. Plaintiff’s two-and-a-half page opposition
22 brief does not cite or discuss any legal authority, and does not
23 even touch upon the complex thicket of ERISA preemption doctrine.
24 Nevertheless, plaintiff manages to stumble upon a persuasive
25 argument. Plaintiff maintains that the ERISA claim and state law
26 claims are plead alternatively in the complaint, that he has not

1 conceded that the plan is indeed an ERISA plan since the allegation
2 is made only in the alternative, and that defendant has the burden
3 to prove that this policy arose out of an ERISA plan. In response,
4 defendant argues that plaintiff must be held to his allegation
5 because, on a motion to dismiss, plaintiff's allegations must be
6 treated as true and the court may not consider new facts alleged
7 in plaintiff's opposition papers. See Schneider v. California
8 Dept. of Corrections, 151 F.3d 1194, 1197 (9th Cir. 1998).

9 Although plaintiff failed to mention it in his brief or at
10 oral argument, Rule 8 of the Federal Rules of Civil Procedure
11 provides the starting point for evaluating plaintiff's argument.
12 That rule, in relevant part, provides:

13 A party may set forth two or more statements of a claim
14 or defense *alternately or hypothetically*, either in one
15 count or defense or in separate counts or defenses.
16 When two or more statements are made in the alternative
17 and one of them if made independently would be
18 sufficient, the pleading is not made insufficient by the
insufficiency of one or more of the alternative
statements. A party may also state as many separate
claims or defenses as the party has *regardless of*
consistency and whether based on legal, equitable, or
maritime grounds.

19 Fed. R. Civ. P. 8(e)(2) (emphasis added). "Our circuit has held
20 that '[i]n light of the liberal pleading policy embodied in Rule
21 8(e)(2) . . . a pleading should not be construed as an admission
22 against another alternative or inconsistent pleading in the same
23 case.'" McCalden v. California Library Ass'n, 955 F.2d 1214, 1219
24 (9th Cir. 1990) (quoting Molsbergen v. United States, 757 F.2d
25 1016, 1019 (9th Cir. 1985)); see also Oki America v. Microtech
26 Intern Inc., 872 F.2d 312, 314 (9th Cir. 1989) ("[O]ne of two

1 inconsistent pleas cannot be used as evidence in the trial of the
2 other because a contrary rule would place a litigant at his peril
3 in exercising the liberal pleading . . . provisions of the Federal
4 Rules." (internal quotation marks omitted); In re Tamen, 22 F.3d
5 199, 204 (9th Cir. 1994). These readings are consistent with both
6 the language of Rule 8 and "the general purpose of the Federal
7 Rules," which is "to minimize technical obstacles to a
8 determination of the controversy on its merits." United States ex
9 rel. Atkins v. Reiten, 313 F.2d 673, 675 (9th Cir. 1963).

10 The fact that the complaint in this case does not explicitly
11 designate the ERISA and contract law actions as having been plead
12 in the alternative is not dispositive. Under Rule 8, plaintiff
13 "need not use particular words to plead in the alternative" as long
14 as "it can be reasonably inferred that this is what [he was]
15 doing." Holman v. Indiana, 211 F.3d 399, 407 (7th Cir.), cert.
16 denied, 531 U.S. 880 (2000); see also Pair-A-Dice Acquisition
17 Partners, Inc. v. Board of Trustees of the Galveston Wharves, 185
18 F.Supp.2d 703, 708 n.6 (S.D. Tex. 2002) ("Although [plaintiff]
19 fails to use the term 'promissory estoppel' to describe its theory
20 of recovery . . . the Court assumes that [plaintiff intended to
21 plead promissory estoppel as an alternative theory of recovery] and
22 will consider the merit of such argument."); Steel Warehouse of
23 Wisconsin Inc. v. Caterpillar Inc., 1990 WL 304266, at *3 (N.D.
24 Ill. Nov. 13, 1990) (allowing leave to amend complaint to clarify
25 alternative pleading because Rule 8(a) "does not state that a party
26 must explicitly identify alternative pleadings, and the court will

1 not dismiss plaintiff's complaint on that basis").

2 In the ERISA context, in particular, there will often be good
3 reason for alternatively pleading state and federal claims. When
4 there is some doubt over whether ERISA is applicable under a given
5 set of facts, especially where there is doubt about whether a
6 particular plan is in fact an ERISA plan, proceeding in any other
7 way can be hazardous for the plaintiff. If the plaintiff brings
8 only state law claims and the court determines there is an ERISA
9 plan, the state law claims are preempted. But if the plaintiff
10 brings only an ERISA claim and the plan turns out *not* to be an
11 ERISA plan, the plaintiff is also out of luck. Thus, ERISA
12 preemption often presents the sort of situation for which Rule 8's
13 alternative pleading provision is designed. To use the ERISA
14 allegation in paragraphs 26 and 27 of plaintiff's complaint as the
15 sole evidence against his state claims would seem to fly in the
16 face of the Ninth Circuit's admonition that "a pleading should not
17 be construed as an admission against another alternative or
18 inconsistent pleading in the same case." Molsbergen, 757 F.2d at
19 1019.

20 Despite the language and purpose of Rule 8, several district
21 courts have held that alternative pleading cannot stand in the way
22 of a motion to dismiss state law claims on ERISA preemption
23 grounds. See Cox v. Eichler, 765 F.Supp. 601 (N.D. Cal. 1990);
24 Wilson Land Corp. v. Smith Barney, Inc., 1999 WL 1939270 (E.D.N.C.
25 May 17, 1999) ("The undersigned recognizes the right of a plaintiff
26 to plead in the alternative but does not believe that Plaintiffs

1 can use this device to circumvent ERISA preemption.”). In Cox, for
2 example, Judge Patel rejected an argument that is materially
3 indistinguishable from plaintiff’s:

4 Plaintiffs are asking for “two bites of the apple”: if
5 ERISA preempts their state law claims but plaintiffs do
6 not prevail on their ERISA claim, they want to preserve
7 the opportunity to try again under the preempted state
8 law theories. However, plaintiffs may not assert
9 preempted state law claims, *even in the alternative*; if
10 ERISA operates to preempt plaintiffs’ state law claims,
11 preemption is mandatory. “[P]laintiff[s] cannot use the
12 rules allowing alternative pleading as a defense to
13 defendant[s]’ motion to dismiss.” Pane v. RCA Corp.,
14 667 F.Supp. 168, 172 (D.N.J. 1987), *aff’d*, 868 F.2d 631
15 (3d Cir. 1989).

16 Id. at 605 (emphasis added). This quoted language is the full
17 extent of the analysis in Cox, and it fails to explain why it would
18 be inappropriate, despite Rule 8, to allow a plaintiff “two bites
19 of the apple.”¹ In Pane v. RCA Corp., 667 F.Supp. at 171-72, the
20 case on which Cox relies, the analysis is similarly terse:

21 The parties in the instance [sic] case vigorously
22 disagree as to whether plaintiff’s state law claims are
23 pre-empted. Plaintiff urges that, at this preliminary

24 ¹ Indeed, allowing a plaintiff two bites at the apple, or put
25 another way, allowing a plaintiff to pursue two contradictory
26 theories in case one does not work out, is what Rule 8 is all
about. As Judge Reinhardt has recently remarked, cliches such as
“two bites at the apple” in legal writing “too often provide a
substitute for reasoned analysis.” Eminence Capital, LLC v. Aspeon,
Inc., 316 F.3d 1048, 1053 (9th Cir. 2003) (Reinhardt, J.,
concurring) (“Metaphors enrich writing only to the extent that they
add something to more pedestrian descriptions. Cliches do the
opposite; they deaden our senses to the nuances of language so
often critical to our common law tradition. The interpretation and
application of statutes, rules, and case law frequently depends on
whether we can discriminate among subtle differences of meaning.
The biting of apples does not help us . . . A cliché like ‘three
bites at the apple’ provides a formalistic rule that does not
account for the particularities of an individual case.”).

1 stage in the proceedings, he can plead alternative
2 grounds of relief, pursuant to Fed.R.Civ.P. 8(e) (2) and
3 17(a), even if those grounds are mutually exclusive.
4 However, if ERISA operates to pre-empt a plaintiff's
5 state law claims, such pre-emption is mandatory . . .
6 Therefore, plaintiff cannot use the rules allowing
7 alternative pleading as a defense to defendant's motion
8 to dismiss.

9 Id. at 171-72. There is, however, at least one significant
10 distinction between the two cases. In Pane, unlike in Cox, the
11 court had already denied the defendant's motion to dismiss
12 plaintiff's ERISA claim. Under those circumstances, dismissal of
13 the alternative state law claims as preempted may not have been
14 entirely premature or unjust, since there was at least some reason
15 to believe that the dismissal would not leave plaintiff entirely
16 without a remedy. See Ventimiglia v. Gruntal & Co., Inc., 1989 WL
17 251402 (S.D.N.Y. 1989), at *8 n.2 ("Here, defendants have disputed
18 the applicability of ERISA, but have not yet moved to dismiss that
19 claim. Thus, it would be both premature and inequitable for the
20 Court to dismiss the state law claims on preemption grounds.");
21 Tappe v. Alliance Capital Management, 177 F.Supp.2d 176, 188
22 (S.D.N.Y. 2001) (rejecting alternative pleading as a defense where
23 external evidence regarding connection to ERISA plan had been
24 presented; "Whether ERISA preempts Tappe's state law claims does
25 not depend on whether he brings an ERISA claim; it depends on
26 whether his claims 'relate to' an employer's severance plan.").

27 In the instant case, there has been no determination as to
28 whether ERISA applies, and defendant has presented no evidence of
29 its own to that effect other than citations to allegations in the

1 complaint. If courts routinely granted motions to dismiss under
2 these circumstances, plaintiffs would be forced to hazard a guess
3 as to whether their plan is properly covered by ERISA, and would
4 suffer dismissal of their complaint if the guess turned out to be
5 incorrect. As one district court has recognized, this approach
6 is contrary to both the letter and spirit of the Federal Rules.
7 "The reason for [employing alternative pleading in ERISA cases] is
8 plain enough. Given the uncertainties concerning [whether the plan
9 in question is an ERISA plan and the scope of ERISA preemption],
10 it would be foolish to put all of one's eggs in either the ERISA
11 or the state law basket . . . Rule 8(e)(2) permits such alternative
12 pleading to avoid precisely such dilemmas. Plaintiffs at this
13 early stage are not bound for purposes of their state law claims
14 by their alternative allegation that there was an ERISA plan."
15 Aiena v. Olsen, 69 F.Supp.2d 521, 531 (S.D.N.Y. 1999).
16 Notwithstanding the approach followed by the courts in Cox, Pane,
17 Wilson Land Corp., and Tappe, Rule 8 dictates that the proper
18 course is to allow plaintiff to go forward with both his federal
19 and state law claims.

20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is hereby DENIED.

IT IS SO ORDERED.

DATED: October 14, 2003.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT