IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

GARNET TURNER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO: 2:13-cv-685-WKW
	)	
ALLSTATE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

TURNER PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION RELIEF

The Turner Plaintiffs, by and through their undersigned counsel, hereby move for preliminary injunctive relief pursuant to Fed.R.Civ.P. 65(a) and 29 U.S.C. § 1132(a)(3) (ERISA). The Klass Plaintiffs support this motion. The Klass complaint has been consolidated in this proceeding. The requested injunction is needed to prevent irreparable injury to the Plaintiffs.

The Plaintiffs seek a preliminary injunction requiring Defendant Allstate Insurance Company ("Allstate") to continue their paid life insurance benefit after December 31, 2015, which is the date the benefit ends, according to action Allstate took in 2013.[1] The relief is due until the Plaintiffs obtain permanent and final relief

1/ Should this motion be decided in the Plaintiffs' favor after December 31, 2015, the injunction which issues should require Allstate to immediately reinstate the benefit.

for the benefit. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1265 (11th Cir. 2001) ("'The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated.'" (quoting Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1284 (11th Cir. 1990)). No class has been certified in the case, so at this juncture, only the named Turner Plaintiffs seek the preliminary relief. They anticipate that the Plaintiffs named in Klass may join this motion.

FACTUAL BACKGROUND

1. The Turner Plaintiffs are seventeen (17) retirees of Allstate. For themselves and all retirees similarly situated, they seek relief for a breach of fiduciary duty arising from a series of misrepresentations and omissions regarding their previously promised life insurance benefit as retirees. Doc. 44 (Second Amended Complaint). They allege and show on the basis of exhibits to their complaint, Docs. 44-1 through 44-17, that Allstate failed to act with the care, skill, prudence, and diligence required of a fiduciary when it (1) represented to the Plaintiffs orally and in writing that their life insurance benefit would be paid by Allstate for life, (2) concealed in those representations the material fact that Allstate reserved a right to end the paid benefit, and (3) fostered the retirees' reliance on the representations until they became too old to reasonably obtain the insurance at their own expense.

Eleventh Circuit law allows the Plaintiffs to proceed against Allstate based on this pattern of misrepresentations. Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065 (11th Cir. 2004).

2. There is no dispute that, as alleged, Allstate acted in 2013 to end the retirees' paid life insurance benefit effective December 31, 2015. Doc. 44 at ¶ 64. That action "revealed the Defendant's true intention and revealed the falsity of its express oral and written representations to the retirees that the benefit would be for life." Doc. 71 at 12 (ECF page number). Allstate denies that the action was an act of a fiduciary, labeling it instead a plan amendment or plan termination, and it denies that (a) the alleged misrepresentations and omissions were acts of fiduciaries, (b) the alleged misrepresentations were in fact misrepresentations, and (c) the Plaintiffs' claims were timely filed within the ERISA statute of limitations. Doc. 64 (brief in support of motion to dismiss the Second Amended Complaint). These denials are pending on Allstate's motion to dismiss, Doc. 63.

3. Just as the Plaintiffs exhibit evidence to their Second Amended Complaint, Allstate exhibits evidence to its pending motion to dismiss. It exhibits the plans it relies on and which it contends are part of the pleadings. The plans it exhibits predate the July, 2013 announcement that the paid insurance benefit would end, and they are dated 2009 and earlier (1995, 1992, 1991, and 1990). None is dated July,

2013, and none of them show an amendment or termination in 2013. Those facts help establish that, as opposed to a plan amendment or plan termination, the cancellation of the paid benefit is an act by the fiduciary (a) to decide "the rights and eligibility of participants or any other persons, and to remedy ambiguities, inconsistencies or omissions," and (b) "to determine eligibility for and entitlement to Plan services in accordance with the terms of the Plan." Doc. 63-3 at 4 (language from the 1995 plan exhibited by the Defendant).

4. The Plaintiffs' exhibits to the Second Amended Complaint show that retirees were told and misled to believe that the benefit would be paid by Allstate for life. The evidence of Plaintiff Theodore Spiewak exemplify that conclusion. The Second Amended Complaint state the allegations for him. Doc. 44 at ¶¶ 11, 42-45. Those allegations are backed by evidence, true for all 17 Turner Plaintiffs, against which Allstate has offered no evidence of any kind except the plans it exhibits. The Plaintiffs, therefore, have met both their pleading burden and furnished evidence to support preliminary injunctive relief.

5. The retirees, once their paid benefit ends on December 31, 2015, will suffer irreparable injury. Plaintiff Spiewak exemplifies that conclusion. He is 77 years old, has been retired from Allstate since January 1, 1995 (Doc. 44 at ¶ 42), and the cost to him to continue the benefit at his own expense after December 31, 2015

would be $666.00 monthly. Doc. 44-10 (ltr. noting his date of birth); Doc. 44-9 (ltr. specifying "the amount of [his] free coverage," namely a $100,000 paid life insurance benefit); Exhibit 1, attached hereto (2013 ltr. and table showing his monthly cost to maintain that benefit after cancellation, per $1,000 increment); Exhibit 2, attached hereto (2015 ltr. and table showing his monthly cost to maintain that benefit after cancellation, per $1,000 increment). Such a monthly expense is prohibitive, stripping Mr. Spiewak and his family of a policy that cannot be replaced affordably.

6. On and after January 1, 2016, absent relief, Mr. Spiewak will bear the risk of having no life insurance protection in the event of his death, or he will have only that amount of life insurance he can afford. Other of the Plaintiffs have been similarly notified. Exhibit 3, attached hereto. The resulting risk to these retirees, once materialized, spells irreparable harm.

RULES OF DECISION

ERISA requires a plan fiduciary to discharge its duty "solely in the interests of the participants and beneficiaries" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a). When that duty is breached, ERISA arms the beneficiaries with equitable relief to remedy the loss resulting from

the breach. 29 U.S.C. § 1132(a)(3); Jones, 370 F.3d at 1071-74.

Preliminary injunctive relief is equitable relief. The decision to grant or deny it "is within the sound discretion of the district court." Palmer v. Braun, 287 F.3d 1325, 1329 (11th Cir. 2002). In general, the relief is due if a plaintiff demonstrates the following: (1) a substantial likelihood of success on the merits of his or her claim; (2) a substantial threat that irreparable injury will occur absent issuance of the injunction; (3) the threatened injury outweighs the potential damage the requested injunction may cause the non-moving party; and (4) the injunction would not be adverse to the public interest. Palmer, 287 F.3d at 1329; McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); Cate v. Oldham, 707 F .2d 1176 (11th Cir.1983); Shatel Corp. v. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352 (11th Cir.1983).

Because this is an ERISA case, an additional rule of decision applies here, and it eases the Plaintiffs' burden under the foregoing authorities. Allstate bears the burden of proving that the breach of fiduciary duty established by the record has not caused, or will not cause, the retirees' loss of the insurance benefit. That additional rule of decision arises from ERISA and applies here by analogy to other ERISA cases.

The duty of a fiduciary under ERISA is derived from the common law of trusts. Tibble v. Edison Int'l, __ U.S. __, __. 2015 WL 2340845 at *4 (May 18, 2015);

Varity Corp. v. Howe, 516 U.S. 489, 496-497 (1996); Tatum v. RJR Pension Inv. Comm., 761 F.3d 346, 357 (4th Cir. 2014) ("ERISA's fiduciary duties 'draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment'. . . . Thus, in interpreting ERISA, the common law of trusts informs a court's analysis."), cert. denied, 135 S. Ct. 2887 (2015); see also Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989) (applying trust-law principles to determine the appropriate standard of judicial review). Accordingly, the Court is bound to apply principles of trust law to decide this case and this motion. Accord Tibble, 2015 WL 2340845 at *4.

Under the ERISA precedent above, when an ERISA plaintiff makes a prima facie case of a breach of fiduciary duty, "the burden of contradicting it or showing a defense will shift to the trustee." Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 871, at 156-157 (rev. 2d ed. 1995). The trustee so burdened means the accused ERISA fiduciary, as this fuller statement of the law shows:

> Under the common law of trusts, "when a beneficiary has succeeded in proving that the trustee has committed a breach of trust and that a related loss has occurred, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach." 4 Restatement (Third) of Trusts § 100 cmt. f, at 69 (2012); see, e.g., George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 871, at 156-157 (rev. 2d ed. 1995) ("If the beneficiary makes a prima facie case, the burden of contradicting it or showing a defense will shift to the trustee.").

* * * *

> This longstanding trust-law principle rests on the view that "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty." Estate of Stetson, 345 A.2d 679, 690 (Pa. 1975); see, e.g., Nedd v. United Mine Workers of Am., 556 F.2d 190, 211 (3d Cir. 1977) (same). In the face of a breach of fiduciary duty and a related loss, trustees are "under the burden of showing facts and circumstances to establish they are without fault in the matter." In re Richardson's Will, 266 N.Y.S. 388, 390 (N.Y. Sur. Ct. 1928); cf. Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 599 (1921) (applying same rule in the context of a breach of a "fiduciary nature" occasioned by transactions between corporate boards having common members).
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> This trust-law burden-shifting rule furthers ERISA's purposes. ERISA "protect [s] *** the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. 1001(b), by imposing trust-law fiduciary duties and authorizing accompanying remedies. . . . A contrary rule would insufficiently deter ERISA fiduciaries from engaging in wrongful conduct and insufficiently protect beneficiaries' interests, and it would create significant barriers to recovery for conceded fiduciary breaches. See Pet. App. 29.

Brief for the United States as Amicus Curiae (May 26, 2015), No. 14-656, RJR Pension Investment Committee v. Tatum, 2015 WL 3397989 at **9-10 (emphasis added), cert. denied 135 S.Ct. 2887 (2015).[2] This amicus brief addressed the petition for review filed by the fiduciary found to have breached its duty in the Fourth Circuit decision Tatum v. RJR Pension Inv. Comm. cited above. These trust-law principles apply across ERISA cases, as indicated in Tibble, Varity Corp, and Tatum, and they are not limited to the Tatum facts. See Tatum, 761 F.3d at 362-63 ("We have

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2/ Exhibit 4, attached hereto, is this amicus brief.

previously recognized the burden-shifting framework in an analogous context," and "explain[ing] that '[i]t is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably.'" (citation omitted)).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The determination whether the Plaintiffs have shown a substantial likelihood of success on their claims -- the first element generally required for preliminary injunctive relief -- is informed first by the ERISA authorities above. Those authorities establish, inter alia, that "as between innocent beneficiaries and a defaulting fiduciary, the latter should bear the risk of uncertainty as to the consequences of its breach of duty." 2015 WL 3397989 at **9-10 (Brief for the United States as Amicus Curiae, ante). Accord Tatum, 761 F.3d at 363 ("It is generally recognized that one who acts in violation of his fiduciary duty bears the burden of showing that he acted fairly and reasonably." (citation omitted)).

Allstate, not the Plaintiffs, should have to adduce evidence that the Plaintiffs will not suffer "the consequences of its breach of duty," and that "it acted fairly and reasonably." 2015 WL 3397989 at **9-10; Tatum, ante. It has adduced no such evidence and unless and until it does, the Plaintiffs, on the strength of their exhibits

to the Second Amended Complaint and their exhibits here, meet their burden on the likelihood-of-success requirement for preliminary relief. They have made the required prima facie case. 2015 WL 3397989 at *9 (quoting The Law of Trusts and Trustees § 871, at 156-157 (rev. 2d ed. 1995)).

They meet their burden for other reasons. The Supreme Court's recent Tibble decision rejects any application of ERISA's six-year statute of limitation which does not account for the fiduciary duty owed. 135 S. Ct. at 1827-28. That limitation period is one of the Defendant's main arguments for dismissal, but Tibble is unaddressed in its motion to dismiss and accompanying brief. Docs. 63-64. For Allstate to prevail on the motion, according to Tibble, it would need to support its argument by reference to the accrual of the Plaintiffs' claims under the common law of trusts. It chose not to try to make that argument. That omission or failure, together with the Plaintiffs' response in opposition to the motion, indicates the substantial likelihood that the retirees will prevail on the defense. They meet their burden for preliminary relief with respect to the defense.

Allstate also defends on the ground that there are no actionable misrepresentations. For that argument, it isolates a phrase from a prior mooted brief and asks the Court, on that basis, to construe the Second Amended Complaint in its favor, specifically to find that there are no misrepresentations. Doc. 64 at 23, 27 n.6.

That request defies the allegations of misrepresentations which the retirees (a) plead in detail and multitude, and (b) establish by evidence (the exhibits of their pleading). The request defies the rule of decision which controls disposition of the pending motion. Under that rule, the allegations must be taken as true and construed in favor of the Plaintiffs. Kawa Orthodontics, LLP v. Sec'y, U.S. Dep't of the Treasury, 773 F.3d 243, 245 (11th Cir. 2014) ("[W]e 'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'"); accord Tomberlin v. Clark, 1 F. Supp. 3d 1213, 1222-23 (N.D. Ala. 2014). Accordingly, there is a substantial likelihood that the Plaintiffs will prevail on this defense, and they meet their burden for preliminary relief with respect to the defense for that reason.

The evidence of omissions by Allstate are likewise pled in detail and exhibited to the Second Amended Complaint, and this evidence speaks for itself. The exhibits demonstrate a substantial likelihood that the Plaintiffs will prevail on these allegations. The omissions, added to the misrepresentations, more than meet the Plaintiffs' burden under Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071-74 (11th Cir. 2004), to demonstrate a pattern of misrepresentations. Taken together, this evidence shows both a breach of the fiduciary's duty of "care, skill, prudence, and diligence," Tibble, 135 S. Ct. at 1828, and supports the retirees'

response to the Defendants' statute of limitation argument.

Other defenses Allstate mounts against the claims are addressed in the factual background above and in the Plaintiffs' response to the pending motion to dismiss, which they adopt and incorporate here. The point of that adoption and incorporation is the same as above: Allstate has not carried its burden under ERISA to prove that the retirees will not suffer a loss from the breach of duty alleged.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF ALLSTATE IS NOT PRELIMINARILY ENJOINED.

"An injury is irreparable if it cannot be undone through monetary remedies" or "if damages would be difficult or impossible to calculate." Scott v. Roberts, 612 F.3d 1279, 1295 (11th Cir. 2010) (internal quotation marks and citations omitted).

The injury to the retirees is clear and certain. Absent relief, the Plaintiffs will lose the paid life insurance protection they were promised and upon which they reasonably relied after retiring. Doc. 71 at 17. They are forced to bear the resulting risk that any of them could die before the remaining Plaintiffs win permanent and final relief which restores the protection. That risk, once materialized, is irreparable harm. A money remedy would not undo it. Scott, ante. Some retirees may be able to afford to replace the benefit in whole or in part out of their own pocket, beginning

January 1, 2016,[3] but many like Mr. Spiewak will not be able to. The $666.00 monthly expense he would incur to replace it establishes that.

If arguendo any of these facts is uncertain, Allstate bears the risk of the uncertainty (not the Plaintiffs), according the burden-shifting precedent which favors the retirees as ERISA beneficiaries. The uncertainty spells irreparability for that reason and also because the harm to a beneficiary who dies without the paid insurance would be impossible to calculate in dollars. Scott, ante. The Plaintiffs, therefore, meet this requirement for preliminary relief.

III. THE BALANCE OF HARMS STRONGLY FAVORS THE ISSUANCE OF AN INJUNCTION.

Prior to filing this motion, the Plaintiffs requested that Allstate meet with their counsel and furnish evidence which would allow the retirees to roughly calculate the burden on the Defendant to continue the paid benefit on a preliminary basis, i.e., after December 31, 2015. Allstate denied that request. The Defendant has not otherwise adduced evidence of a burden on it to continue the benefit, whereas the financial burden on the Plaintiffs as individual beneficiaries is shown, as is the risk of irreparable harm they face from the breach of fiduciary duty. This requirement of

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3/ Final relief for retirees who in fact replace the benefit would include restitution of the amount of money they were forced to spend to replace it.

preliminary relief favors the Plaintiffs accordingly.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

The last factor in the Court's analysis–whether the requested injunction would be adverse to the public interest–also weighs strongly in favor of Plaintiffs. Public interest favors a preliminary injunction enjoining Allstate from ending Plaintiffs' life insurance policies on December 31, 2015. As an ERISA case, the purpose of ERISA is notable when discussing public interest. ERISA was enacted "to protect . . . the interests of participants in employee benefit plans and their beneficiaries…by establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans . . . and providing for appropriate remedies…and ready access to the Federal Courts." Jones v. Am. Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir. 2004) (quoting Varity Corp. v. Howe, 516 U.S. 489, 513 (1996) (quoting ERISA § 2(b), 29 U.S.C. § 1001(b))). In enacting ERISA, Congress explicitly noted the public interest in protecting employee benefit plans including "the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . ." 29 U.S.C. § 1001 (a) (emphasis added). In addition to the seventeen (17) named Plaintiffs, upon

information and belief, at least 10,000 former Allstate employees or agents will soon lose their promised retiree life insurance benefits if this injunction is not granted. These retirees relied on the promised benefit in planning their retirement and their estate. Due to their advanced age and fixed income status, they will be unable to replace the life insurance policy they were promised by Allstate. Public interest clearly favors a preliminary injunction.

For these reasons, the balance of equities tips sharply in favor of issuing a preliminary injunction.

REQUEST FOR HEARING

The Plaintiffs request oral argument on this motion.

CONCLUSION

The Plaintiffs have met all of the requirements for a preliminary injunction. This motion is due to be granted for that reason, and the Plaintiffs request that the Court issue as its Order that Defendant Allstate continue their paid life insurance benefit after December 31, 2015.

Respectfully submitted by:

BY: /s Taylor C. Bartlett

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CERTIFICATE OF SERVICE

I certify that on November 16, 2015, a copy of the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send notice of such filing to the following counsel of record:

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