IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IOWA ASSOCIATION OF BUSINESS AND INDUSTRY, an Iowa Non-Profit Corporation, Plaintiff, vs. EFCO CORP., Individually and on Behalf of a Class of Others Similarly Situated, Defendant.	**No. 4:04-cv-40270** **O R D E R**

This matter comes before the Court on Plaintiff's Motion for Class Certification and Defendant's Motion for Appointment of Class Counsel. A hearing on the motions was held on October 15, 2004. Upon request of the Court, the parties submitted supplemental briefing on the issue of the Court's subject-matter jurisdiction. The Court is satisfied that the parties have been fully heard on the issues raised in the motions and by the Court. The matter is fully submitted and ready for disposition. Plaintiff Iowa Association of Business and Industry ("ABI") is represented by Mollie Pawlosky and Russell Samson; Defendant EFCO Corporation ("EFCO") is represented by Mark McCormick and David Charles.

FACTS

ABI, formerly Iowa Manufacturers Association, was established in 1903, as a non-profit corporation and trade association. ABI membership is open to individuals and businesses operating in the state of Iowa and currently has 1500 members.

Defendant EFCO, formerly Economy Forms Corporation, has been a member of ABI since 1943.

In 1946, ABI began a program making available to its members group life, long term disability, medical, and other types of insurance coverage. Members paid the premiums for these policies.[1] Principal Mutual Holding Company[2] ("Principal") underwrote the health, life, and long term disability benefits through a group policy, Policy No. -257. The policy was issued in the name of ABI.[3]

On March 31, 2001, Principal's board of directors adopted a plan of demutualization. Relevant to this litigation, Principal policyholders who held an "eligible policy or contract" from March 31, 2000,[4] through the date of demutualization received stock as a result of Principal's demutualization. Principal determined ABI was an eligible policyholder of Policy No. -275 and as a result 870,393 shares of Principal

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[1] In the Complaint, ABI denies knowing whether members' employees paid any premiums.

[2] Principal Mutual Holding Company is the parent company of Principal Life Insurance Company f/k/a Principal Mutual Life Insurance Company f/k/a Bankers' Life Company.

[3] Prior to the 1984 name change to ABI, the policy was in the name of IMA.

[4] The Complaint misstates this date.

> To be eligible for compensation under Iowa law, a policyholder must own an eligible Principal Life policy or contract from March 31, 2000 (one year prior to the Board of Directors' adoption of the plan) continuously until the effective date of the demutualization.

See Principal.com, The Principal Group Files Plan of Demutualization, May 29, 2001, available at, http://www.principal.com/about/news/demutualization_filing.htm.

Financial Group ("PFG") stock were issued to ABI; subsequent dividends were paid on those shares. After receiving the shares, ABI secured an investment advisor for management of the stock. ABI was advised that it would not be prudent for an entity with fiduciary responsibility to retain the 870,393 shares as a single asset. Accordingly, ABI sold the stock and invested the proceeds in a diversified portfolio. Those proceeds ("Proceeds") are the subject of this litigation.

In June 2003, the Employee Benefits Security Administration ("EBSA") of the United States Department of Labor ("DOL") contacted ABI regarding the 870,393 shares of PFG stock. Aware that there would be potential claims to the Proceeds, ABI established a trust for the Proceeds and initiated the instant action. ABI provided EBSA the requested information to the extent available, including a copy of the Complaint filed in this litigation.

PROCEDURAL BACKGROUND

On May 13, 2004, ABI filed its Class Action Complaint, seeking a declaratory judgment that the Proceeds are neither ERISA[5] plan assets nor common law trust assets, and that ABI is not required to distribute the Proceeds to current or former members of ABI.

On June 14, 2004, Defendant EFCO answered the complaint, contending ABI is not entitled to any of the Proceeds. EFCO asserts the Proceeds should be paid

[5] ERISA refers to Employee Retirement Income Security Act of 1974.

directly to current or former members of ABI, and in some cases members' employees, who paid the policy premiums. In the event the Court sustains its position, EFCO asks the Court to retain jurisdiction to determine how the Proceeds should be allocated.

On July 26, 2004, ABI moved to certify the defendant class. EFCO responded, agreeing that there are other members similarly situated and that class certification is appropriate. On August 11, 2004, EFCO moved for appointment of class counsel and asked that attorney fees be paid out of the Proceeds. ABI resisted EFCO's motion to the extent that fees should be paid out of the Proceeds.

A hearing on the motions was set for October 15, 2004. Prior to the hearing, the Court asked the parties to be prepared to address the question of whether federal question jurisdiction existed based on the face of ABI's complaint. The Court pointed out that ABI asserts therein that federal jurisdiction is pursuant to ERISA, but simultaneously denies that the plan and Proceeds are subject to ERISA. At the hearing, the Court and counsel discussed the issue of federal jurisdiction, and thereafter the parties submitted supplemental briefing on the issue.

On December 8, 2004, the DOL filed a motion to intervene pursuant to Federal Rule of Civil Procedure 24(a) ("Rule 24"(a)), which states,

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a

> practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a).

The Secretary of the DOL ("Secretary") asserts she has an unconditional right to intervene because ABI brought this action as a fiduciary, pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(h) ("§ 502") which states in pertinent part,

> A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary [of the Department of Labor][6] and the Secretary of the Treasury by certified mail. *Either Secretary shall have the right in his discretion to intervene in any action*, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

29 U.S.C. § 1132(h) (emphasis added). The Secretary also asserts a right to intervene under Rule 24(a)(2) claiming she has an interest in the fair adjudication of the Proceeds. In the alternative, the Secretary asserts that if she does not have a right to intervene pursuant to Rule 24(a), she should be granted permissive intervention pursuant to Rule 24(b)(2), which allows intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ.

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[6] As defined within the meaning of the ERISA, "Secretary" refers to the Secretary of Labor. 29 U.S.C. § 1009(13).

P. 24(b)(2). The Secretary claims that she has a counterclaim with questions of law or fact in common with the present action regarding the status of a portion of the demutualization proceeds as ERISA plan assets.

EFCO does not resist the intervention. ABI, on the other hand, resists the intervention to the extent that granting the motion *as a matter of right* pursuant to Rule 24(*a*)(*1*) based on ERISA is itself a determination of this Court's subject-matter jurisdiction. Accordingly, ABI consents to the DOL's intervention to the extent it is permissive pursuant to Rule 24(*b)(2*) rather than as a matter of right pursuant to Rule 24(*a*).

DISCUSSION

The parties and the Court have struggled with the perplexing jurisdictional issues created by the posture of this unusual case. It is the obvious desire of the litigants to present this case in federal court, and this Court welcomes the parties and their counsel. However, the Court's jurisdiction must be demonstrated before the Court is empowered to take action on substantive issues and the merits of the case.

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction.

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 378 (1994). "Ordinarily, determining whether a particular case arises under federal law turns on the 'well-pleaded

complaint' rule." Aetna Health Inc. v. Davila, --- U.S. ---, 124 S. Ct. 2488, 2494 (2004) (quoting Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 9-10 (1983)). Federal-question jurisdiction exists if the federal question appears on the face of the well-pleaded complaint and not as an anticipated defense. Okla. Tax Comm'n v. Graham, 489 U.S. 839, 840-41 (1989) ("The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint' rule. '[W]hether a case is one arising under [federal law], in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.'"); Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of Miss. in Iowa, 207 F.3d 488, 489 (8th Cir. 2000).[7]

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[7] There are exceptions to the well-pleaded complaint rule such as when "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7 (2003). ERISA is such a statute, however, a claim is "preempted" under ERISA in two instances: when a plaintiff brings a purely state law claim that involves the benefits of an ERISA plan and 1) the statutory language of the remedy provisions of ERISA expressly provides a federal remedy; or 2) the legislative history of ERISA unambiguously intended to treat those actions as arising under federal law. Id. at 7 (citing Metropolitan Life v. Taylor, 481 U.S. 58, 65 (1987)). The "exception" does not apply in the present case since ABI is not trying to "escape" federal preemption by artful pleading in the form of a state law claim, rather ABI is asserting a federal claim while simultaneously denying the basis for such a claim.

Without question, the Court has jurisdiction to determine its own jurisdiction. United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947). However, the fact that the parties are amenable to suit in federal court does not resolve the problem. Finley v. United States, 490 U.S. 545, 559 (1989) ("A party beyond the reach of a federal court's process may voluntarily submit to its jurisdiction over his person, but he cannot create subject-matter jurisdiction – by waiver, estoppel, or the filing of a lawsuit – over a non-Article III case."). The Court has an obligation to assure itself that subject-matter jurisdiction exists in every case. Bradley v. Am. Postal Workers Union, AFL-CIO, 962 F.2d 800, 802 n.3 (8th Cir. 1992) ("Federal courts are courts of limited jurisdiction, and the 'threshold requirement in every federal case is jurisdiction.'") (quoting Sanders v. Clemco Indus., 823 F.2d 214, 216 (8th Cir. 1987)).

Conceding that the Court must assure itself of jurisdiction before it may proceed, ABI suggests the Court allow the parties to conduct jurisdictional discovery and then hold an evidentiary hearing. ABI asserts that this approach will satisfy the Court's prerequisite to establish jurisdiction while having a preclusive effect on any collateral attacks on the issue of whether the Proceeds are ERISA funds.

Although EFCO acknowledges that a determination of jurisdiction would result in the adjudication of the merits of ABI's claims, EFCO apparently objects to ABI's

suggested approach. EFCO asserts that as the putative class representative, it should not be the only defendant litigating the jurisdiction issue. EFCO offers that the only difference in proceeding with class certification before a determination of jurisdiction is the cost and expense of certifying the classes and therefore asks the Court to certify the class before proceeding with jurisdictional discovery. The Court finds the difference in proceeding with class certification and the related legal and factual determinations to be far greater; more than a matter of convenience and expense, it is a matter of authority of the Court to so act.

Counsel has not provided, nor has the Court found, any authority that would allow it to proceed with class certification, with the attendant determinations of the legal rights of the parties, before assuring itself of subject-matter jurisdiction. In fact, the practice of assuming this kind of "hypothetical" jurisdiction in order to proceed has been rejected by the Supreme Court.

> The Ninth Circuit has denominated this practice – which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits – the 'doctrine of hypothetical jurisdiction.'
> . . . .
> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. '*Without jurisdiction the court cannot proceed at all in any cause*. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (emphasis added) (quoting Ex parte McCardle, 7 Wall. 506, 514 (1868)).[8]

ABI asserts that because the jurisdictional question and the merits question are so intertwined, the Court's *refusal* to exercise jurisdiction would also amount to a decision on the underlying merits. The Court disagrees and, to the contrary, makes

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[8] Along with EFCO's objection to proceeding with jurisdictional discovery as the only defendant, an additional jurisdictional barrier, not yet addressed by the parties, is noted by the Court. In the complaint, ABI asserts its claim falls under 29 U.S.C. § 1132(a)(3)(B)(ii), which states in pertinent part,

> A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief . . . (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

29 U.S.C. § 1132(a)(3)(B)(ii).

There is no question that ABI is not a participant or beneficiary; accordingly, ABI only has standing under ERISA's civil enforcement provision if it is a fiduciary within the meaning of ERISA. An entity is "a fiduciary with respect to [an ERISA] plan to the extent . . . [it] exercises any discretionary authority or discretionary control respecting management of [the] plan [or] has any discretionary authority or discretionary responsibility in the administration of [the] plan." 29 U.S.C. § 1002(21)(A). See also, Sonoco Prods. Co. v. Physicians Health Plan, Inc., 338 F.3d 366, 373 (4th Cir. 2003) ("[A] plan sponsor acts in a fiduciary capacity only to the extent that its claims relate to carrying out its fiduciary responsibilities.").

Although ABI acknowledges it is the plan sponsor and that it has "certain" fiduciary duties, it seeks to have the Proceeds declared its *own* property, denying any benefit to plan participants and beneficiaries, and is therefore not exercising any discretionary authority or responsibility in *administering* the plan. The assertions ABI makes in its complaint challenge the definition of fiduciary within the meaning of ERISA; therefore, the Court questions ABI's standing to sue under ERISA. See, e.g., id. (reasoning a plan sponsor may act in its own interest, and when it is seeking redress of injury *it* suffered as the plan sponsor, it was not acting as fiduciary within the meaning of ERISA).

no determination herein on the merits. In the present case, the Court's lack of jurisdiction is based on the face of ABI's complaint and not on the underlying merits of its claim. In the complaint, ABI asserts the plan and Proceeds are not subject to ERISA. ABI's only other claim is based on a state common law trust theory. ABI asserts this Court's jurisdiction is based on a federal question but clearly *denies* the presence of any such claim on the face of the complaint. Accordingly, the Court finds that this case cannot be maintained because ABI has failed to state a cause of action under a federal statute or the Constitution of the United States on the face of the well-pleaded complaint. The Court cannot and does not make a finding regarding whether the plan or Proceeds are subject to ERISA.

In reaching the conclusions herein, the Court recognizes other procedural posturing of the case may have impacted the conclusions. Further, the Court recognizes subsequent litigation of the matter may result in a circular scenario. However, the Court is compelled to resolve the issue based upon what is, rather than what might have been or yet could be, before the Court.

CONCLUSION

For the foregoing reasons, the Court finds ABI's complaint fails to state a claim arising under a federal law. Therefore, this case must be **dismissed** pursuant to

Federal Rule of Civil Procedure 12(b)(1). Aetna Health Inc., --- U.S. ---, 124 S. Ct. at 2494. All pending motions (Clerk's Nos. 4, 7, 17, 24, 26) are **denied** as moot.

IT IS SO ORDERED.

Dated this 15th day of February, 2005.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT