

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RAYMOND A. BERG, et al.,)
)
 Plaintiffs)
)
 v.)
)
 S. D. WARREN COMPANY, d/b/a)
 SAPPI FINE PAPER NORTH)
 AMERICA,)
)
 Defendant)

Docket No. 98-401-P-H

RECOMMENDED DECISION ON PLAINTIFFS' MOTION TO REMAND

The plaintiffs, Raymond A. Berg and twelve other former employees of the defendant, move this court to remand this action to the Maine Superior Court (Cumberland County), from which it was removed by the defendant pursuant to 28 U.S.C. §§ 1441 and 1446. The plaintiffs filed a prompt objection to the notice of removal filed by the defendant. A scheduling order was issued, but has been stayed pending the outcome of this motion. Endorsement, Docket No. 5.

The two counts of the complaint filed in state court allege breach of contract and misrepresentation. Complaint (Docket No. 1-A) ¶¶ 20-26. The complaint alleges that each of the plaintiffs entered into written contracts for termination of their employment with the defendant in October or November 1996. *Id.* ¶¶ 14, 16. According to the plaintiffs, each contract included a promise that payments made to the employee after termination of his or her employment would be credited as employment under the S. D. Warren Hourly and Salaried Company Retirement Plans, and

the defendant also made this representation orally. *Id.* ¶¶ 16-17. The plaintiffs further allege that after they had executed the contracts and their employment had been terminated, the defendant informed them on January 15, 1997 that “credited employment” under the Plans would not continue through the extended period of salary payment. *Id.* ¶ 19. At that time, the defendant assertedly told the plaintiffs that section 4.2 of the Plans specifically excluded any period of severance pay from “credited employment” for purposes of determining a retirement benefit under the Plans. *Id.*

The plaintiffs claim that they will receive “a substantially reduced monthly retirement benefit amount” compared to that which they anticipated when they entered into the contracts. *Id.* ¶¶ 22, 26.

The defendant contends that both of the plaintiffs’ claims are preempted by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1001 *et seq.* See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987) (action removable from state court if claims preempted by ERISA, even if only state-law claims are pleaded). If the court finds that to be the case, the plaintiffs have indicated that they intend to amend the complaint to allege ERISA claims. Plaintiffs’ Request for Stay of Scheduling Order and/or Objection to the Scheduling Order (Docket No. 4) ¶ 3. The plaintiffs of course argue that their state-law claims are not preempted by ERISA.

ERISA’s preemption provision is found at 29 U.S.C. § 1144(a): “[T]he provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.” “State law” is defined to include any state action “having the effect of law.” 29 U.S.C. § 1144(c)(1). Neither the plaintiffs nor the defendant contend that any employee benefit plan that might be involved in this case is exempt under 29 U.S.C. §

1003(b).

The Supreme Court has addressed ERISA preemption on several occasions, as has the First Circuit. It is clear that state-law claims for breach of contract and misrepresentation may be preempted by ERISA under certain circumstances. *E.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (breach of contract); *Degnan v. Publiker Indus., Inc.*, 83 F.3d 27, 29 (1st Cir. 1996) (misrepresentation).

“ERISA preemption analysis . . . involves two central questions: (1) whether the plan at issue is an ‘employee benefit plan’ and (2) whether the cause of action ‘relates to’ this employee benefit plan.” *McMahon v. Digital Equip. Corp.*, 162 F.3d 28, 36 (1st Cir. 1998). “A law ‘relates to’ a covered employee benefit plan . . . if it [1] has a connection with or [2] reference to such a plan.” *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 324 (1997) (additional internal quotation and other marks and citations omitted). A common-law cause of action “premised on the existence of an ERISA plan” is preempted. *Id.*

The plaintiffs do not contend that the defendant’s retirement plans¹ are not employee benefit plans within ERISA’s definition. They vigorously dispute the defendant’s assertion that the termination agreements are employee benefit plans and take the position that, in any event, their claims do not relate to any such plan. The plaintiffs assert that they seek damages from the defendant as their employer, not from the retirement plans or the defendant as administrator of the plans. Plaintiffs’ Objection to Removal and Request to Remand to State of Maine, Superior Court, Cumberland County (“Motion to Remand”) (Docket No. 6) at [2]. This distinction, the plaintiffs

¹ The complaint refers to retirement “plans.” The defendant’s submissions all refer to a single retirement plan.

suggest, along with their interpretation of *Dillingham*² as narrowing the scope of the “relate to” language of section 1144 to that of “ordinary field and conflict preemption,” *id.* at [3], means that their claims in this case are not preempted by ERISA. The plaintiffs also interpret this court’s opinion in *Stetson v. PFL Ins. Co.*, 16 F.Supp.2d 28 (D. Me. 1998), as rejecting any “expansive” construction of the “relate to” requirement.³ *Id.* at [5].

The plaintiffs cite no authority to support their argument that their characterization of the relevant status of the defendant from whom they seek damages, or their characterization of the nature of those damages, should govern the ERISA preemption analysis, and my own research has not located any. As a practical matter, adoption of such a standard would effectively eliminate ERISA preemption in many cases where it has already been found to apply. Under the circumstances, I find this argument to be unpersuasive.

The defendant relies on *Carlo* and *McMahon*. The plaintiffs respond that *Carlo* has in effect been overruled by *Dillingham* and that both cases are distinguishable. I disagree with both

² The plaintiffs cite only to Justice Scalia’s concurring opinion in *Dillingham*. Motion to Remand at [4], [5] n.2. While concurring opinions from justices of the Supreme Court do not constitute binding precedent, they often serve to illuminate or expand the text of the Court’s opinion in a helpful manner. In this case, I find the Court’s opinion sufficient to show how *Dillingham* should apply to the issues raised. Indeed, the portion of Justice Scalia’s concurrence quoted by the plaintiffs is best characterized as a plea to his colleagues to depart in the future from the “fair application” of the Court’s recent ERISA case law that he concurs with in this case. 519 U.S. at 335. See generally *Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998) (where dicta from concurring opinion in recently decided case may appear to weaken precedent, Supreme Court directs lower courts nevertheless to follow directly applicable precedent).

³ The plaintiffs also rely on *Greenblatt v. Budd Co.*, 666 F. Supp. 735 (E.D.Pa. 1987). Motion to Remand at [6]-[8]. While describing the *Greenblatt* court’s reasoning as “cogent arguments against preemption in misrepresentation cases,” the First Circuit effectively rejected the holding in *Greenblatt* in *Carlo v. Reed Rolled Thread Die Co.*, 49 F.3d 790, 793-94 (1st Cir. 1995), and I see no reason to conclude that the First Circuit’s viewpoint has changed. Accordingly, I will not consider *Greenblatt* further.

contentions.

In *Carlo*, the plaintiffs filed suit in state court alleging breach of contract and negligent misrepresentation. 49 F.3d at 792. Carlo was a former employee of the defendant who had accepted an early retirement offer based on the defendant's representation of the amount of the monthly payment he would receive from the employer's retirement plan. *Id.* Six months later, the employer determined that the monthly amount was approximately twenty percent less than Carlo had been led to expect and offered to allow Carlo to continue to work. *Id.* Carlo retired four months later and then sued his employer. *Id.* Like the plaintiffs here, Carlo argued that he was not seeking coverage under the retirement plan but only damages directly from the employer and was not suing his employer as administrator of the retirement plan. *Id.* at 793. The First Circuit found that the claims related to the retirement plan because the damages sought consisted in part of the extra pension benefits allegedly promised to the plaintiffs, making some part of the claim "ultimately depend[ent] on an analysis of the" retirement plan. *Id.* at 794. Because the court's inquiry must be directed to the plan, the claims have a connection with or reference to that plan. *Id.* The First Circuit relied on *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990), in reaching this conclusion. *Id.* The plaintiffs attempt to distinguish *Carlo* on the basis that the employer in that case "gained absolutely no benefit from its innocent mistake," made "no promise of a strictly employment benefit," and offered to put the plaintiff back into the position he held before the offer was made. Plaintiffs' Reply to Defendant's Objection to Plaintiffs' Objection to Removal, etc. ("Plaintiffs' Reply") (Docket No. 8) at [2]-[3]. None of these facts or characterizations of facts is sufficiently

relevant to the First Circuit's holding in *Carlo* to allow a different result here.⁴

Nor does *Dillingham* require this court to disregard *Carlo*. In *Dillingham*, the Court's unanimous opinion reiterates its earlier holdings that ERISA's preemption provision is "clearly expansive" and has "a broad scope." 519 U.S. at 324. "[W]here the existence of ERISA plans is essential to the [state] law's operation . . . that 'reference' will result in pre-emption." *Id.* There, the Court found that the state statute at issue did not make reference to ERISA plans because a program operating under the statute need not necessarily be an ERISA plan. *Id.* at 328. In the case at hand, however, the existence of the employer's retirement plans is essential to the plaintiffs' claims. Nothing further is required, and nothing in *Dillingham* is inconsistent with the outcome in *Carlo*.

Similarly, this court's decision in *Stetson* is not inconsistent with *Carlo* or *Dillingham*. In *Stetson*, the plaintiff brought suit in state court alleging breach of contract, intentional and negligent infliction of emotional distress, and violations of state statute by an insurance sales agent who sold a group health insurance policy to the plaintiff's employer. 16 F.Supp.2d at 29. Citing *Dillingham*, and discussing *Carlo* at length, *id.* at 31-32, this court applied the factors upon which the Eighth Circuit relied in *Wilson v. Zoellner*, 114 F.3d 713 (8th Cir. 1997), a case in which a claim of negligent misrepresentation against an insurance agent was found not to be preempted by ERISA, to determine that the *Stetson* plaintiff's claims were not preempted, 16 F.Supp.2d at 33. This

⁴ The same is true of the First Circuit's opinion in *Degnan*. In that case, the plaintiff alleged that his employer induced him to take early retirement by promising to revise its retirement plan so as to make him immediately eligible for full benefits. 83 F.3d at 28. After he retired, the employer discontinued payment of full benefits after eighteen months. *Id.* The plaintiff brought suit in state court, alleging misrepresentation. The First Circuit found the case indistinguishable from *Carlo* and upheld the trial court's finding that the claim was preempted by ERISA. *Id.* at 29.

conclusion was based on the following factors: (i) the plaintiff did not seek benefits under the policy nor any recovery from the plan; (ii) the plaintiff's claim would not affect relations among the employer, the plan, the plan fiduciaries, and the beneficiaries; (iii) there would be no administrative impact from the recovery, because the insurance policy at issue was no longer in effect; (iv) and the misrepresentations occurred before the policy took effect, so the plaintiff was not an ERISA beneficiary at the time and the defendant insurer was not an ERISA administrator. *Id.* at 33-34. In the instant case, the plaintiffs were ERISA plan beneficiaries at the time of the operative events and the defendant was an ERISA fiduciary. The claims will affect relations between them. There will clearly be an administrative impact from any recovery. The alleged misrepresentation took place after the defendant's retirement plans were already in effect.⁵ In *Stetson*, this court determined that a finding that the claims made there were not preempted by ERISA was not inconsistent with *Carlo*. Here, where the facts are indistinguishable from those in *Carlo*, the same conclusion applies.

Finally, the plaintiffs rely on *James v. Fleet/Norstar Fin. Group, Inc.*, 992 F.2d 463 (2d Cir. 1993), to support their argument that preemption will mean that they cannot obtain any redress for their alleged injuries and that such an outcome will undermine the goals of ERISA, presumably suggesting that ERISA must not be so interpreted. The First Circuit addressed such an argument in *Carlo* and, despite the fact that ERISA preemption "often leaves plaintiffs remediless," found

⁵ The plaintiffs also rely on *Stetson* to argue that they may recover for the alleged misrepresentation in state court because the misrepresentation was made before they signed the termination agreements, so that the question whether the termination agreements were themselves employee benefit plans under ERISA need not be reached. This question arises only if the plaintiffs' claims do not relate to the retirement plans, which clearly are employee benefit plans within the meaning of ERISA's definitions. The defendant's citation of *McMahon* also addresses this question. Since I find that both of the plaintiffs' claims relate to the retirement plans, it is not necessary to reach this issue.

“nevertheless” that ERISA preempted the plaintiff’s claims for breach of contract and misrepresentation. 49 F.3d at 794. Even if the plaintiffs here will ultimately be determined to be remediless by a finding of ERISA preemption, despite their expressed intention to file an amended complaint raising claims under ERISA, preemption is still required by applicable precedent.

“[A] state law cause of action is expressly preempted by ERISA where a plaintiff, in order to prevail, must prove the existence of, or specific terms of, an ERISA plan.” *McMahon*, 162 F.3d at 38. *See also Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994) (“There is simply no cause of action if there is no [ERISA] plan.”) Here, the plaintiffs, in order to prevail, must prove the specific terms of the retirement plans, which are ERISA plans.

For the foregoing reasons, I recommend that the plaintiffs’ motion to remand be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 18th day of February, 1999.

*David M. Cohen
United States Magistrate Judge*