**Concurring opinion issued January 19, 2012**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-10-00113-CV**

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**TYCO VALVES & CONTROLS, L.P., AND TV&C GP HOLDINGS, INC., Appellants**

**V.**

**ARSENIO COLORADO, STEVEN CRAIG, UMIT DAVULCU, RICHARD GONZALES, LANNY HEINRICH, LEONARD HILL, ANDY HUYNH, CHRIS KAHRIG, LAY KEONAKHONE, GREG LAMBOUSY, TUNG LE, CHRIS LUCKEY, FERNANDO MACIAS, JORGE MARTINEZ, RAUL MARTINEZ, KENNETH NASH, JIMMY PHOUMLAVANH, AND SOUK VONGSAMPHANH, Appellees**

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**On Appeal from the 125th District Court**
**Harris County, Texas**
**Trial Court Case No. 2008-19895**

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## CONCURRING OPINION

I concur only in the judgment of reversing and rendering a take-nothing judgment in favor of Tyco. The contract claims arising from non-payment of severance "relate to" an employee benefit plan governed by ERISA, and therefore the claims are substantively foreclosed by that statute's broad preemptive scope. A take-nothing judgment should be rendered because no other legal theory supports the employees' claims.

The Tyco International (US) Inc. Severance Plan for U.S. Employees was adopted effective January 1, 2004. The Gimpel employees do not dispute that they were covered by this ERISA-governed severance plan at the time of its adoption.[1] Tyco's severance plan was amended and restated as of February 1, 2005. Consistent with ERISA's requirement that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan," 29 U.S.C. § 1102(b)(3), the plan provided that it

[1] ERISA applies to any employee benefit plan established or maintained by an employer engaged in commerce. *See* 29 U.S.C. § 1003(a)(1). Severance plans are included within the definition of employee welfare benefit plans. *See id.* § 1002(1) (defining "employee welfare benefit plan" and "welfare plan" to include, among other things, "any plan, fund, or program . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants . . . benefits in the event of . . . unemployment"); 29 C.F.R. § 2510.3-1(a)(3) (definition of "welfare plan" includes "those plans which provide holiday and severance benefits, and benefits which are similar").

would continue until terminated pursuant to its own terms, and also that it could be amended by the board of directors of Tyco International Ltd. or by the board's delegee. The plan language effective as of February 1, 2005 also recited that its purpose was "to provide Eligible Employees with certain compensation and benefits as set forth in the Plan in the event the Eligible Employee's employment with the Company or a Subsidiary is terminated due to an Involuntary Termination."

Tyco entered into Retention Incentive Agreements with the appellees in connection with planning for the transfer and sale of the assets of the Gimpel Unit. Under the terms of the RIAs, each employee who signed an agreement and remained "an Active Employee of Tyco for the entire Retention Period" would become entitled to a "retention incentive bonus." The RIAs only referenced the payment of severance "in the event that the Employee is not offered Comparable Employment with Tyco." In that event, the RIAs provided for payment of "the standard Severance in accordance to the severance schedule associated with the closure of this facility."

The RIAs do not provide any independent basis for determining the amount to be paid as the "standard Severance," and they do not identify "the severance schedule associated with the closure of this facility." The Gimpel employees' contract claims thus depend on a combination of the RIAs and some other

document that supplies the terms of the severance benefit. The Gimpel employees contend that the referenced schedule is not Tyco's severance plan, but instead it is a separate one-page document created in the summer of 2006 by Holly Kriendler, then the newly hired director of human resources for Tyco's Americas region. However, a cause of action may not be based upon written modifications of an ERISA plan that are not and do not purport to be a formal amendment of a plan following the procedures required by section 1102(b)(3). *See Borst v. Chevron Corp.*, 36 F.3d 1308, 1323 (5th Cir. 1994); *Greathouse v. Glidden Co.*, 40 S.W.3d 560, 567 (Tex. App.—Houston [14th Dist.] 2001, no pet.). The appellees do not contend that Kriendler was the board's delegee for purposes of amending the ERISA plan (the undisputed evidence showed this was Tyco's senior vice president for human resources), nor do they contend that Kriendler's schedule was a valid amendment of the Tyco ERISA plan. If the West Gulf Bank Severance schedule was not the "severance schedule associated with the closure of this facility" on its own terms, it did not become such by operation of the RIAs. Accordingly, the Gimpel employees' contract claims may not be based upon terms supplied by the so-called West Gulf Bank Severance schedule.[2]

[2] Nor is the West Gulf Bank Severance schedule the proper basis for analyzing the question of ERISA preemption. The majority's analysis is simply misplaced to the extent it relies upon Kriendler's one-page schedule to define the contested severance benefit.

Instead, the only applicable "severance schedule associated with the closure of this facility" that could provide the basis for determining "the standard Severance" referenced by the RIAs was Tyco's ERISA-governed severance plan. The Gimpel employees' contract claims therefore "relate to" an ERISA plan.[3] A state-law claim "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96–97, 103 S. Ct. 2890, 2900 (1983). State-law claims "having an effect on employee benefit plans relate to such plans and are therefore preempted by ERISA." *Cathey v. Metro. Life Ins. Co.*, 805 S.W.2d 387, 390 (Tex. 1991). The contract claims at issue have the forbidden connection because the RIAs reference and borrow terms from Tyco's severance plan,[4] yet they also

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[3] *See* 29 U.S.C. § 1003(a) (describing scope of ERISA's application to employee benefit plans). "ERISA preemption applies not only to state laws but to all forms of state action dealing with the subject matters covered by this federal statute." *Cathey v. Metro. Life Ins. Co.*, 805 S.W.2d 387, 390 (Tex. 1991) (citing 29 U.S.C. § 1144(c)(1)).

[4] Notably, the Gimpel employees' claimed damages are the same as would be due if severance were being claimed (and the appellees were eligible to receive benefits) under Tyco's ERISA plan. This factor has been relied upon by other courts in concluding a claim was preempted by ERISA. *See, e.g., Epps v. NCNB Tex.*, 7 F.3d 44, 45 (5th Cir. 1993) ("When a court must refer to an ERISA plan to determine the plaintiff's retirement benefits and compute the damages claimed, the claim relates to an ERISA plan."); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989); *Greathouse v. Glidden Co.*, 40 S.W.3d 560, 569 (Tex. App.—Houston [14th Dist.] 2001, no pet.). My conclusion that Gimpel employees' claims are preempted by ERISA is therefore bolstered by the fact that the employees' damages were

purport to modify the eligibility parameters of the severance benefit provided under that plan. Because they received continued employment by Dresser Rand, the Gimpel employees were not eligible for severance under the Tyco severance plan after the sale of the Gimpel Unit. As the Tyco ERISA severance plan explained:

> An Eligible Employee will not be eligible to receive severance benefits under any of the following circumstances:
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> . . . .
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> (ix) The Eligible Employee's employment with the Employer terminates as a result of a sale of . . . assets of the Employer . . . and the Eligible Employee accepts employment . . . with the purchaser . . . . The payment of Severance Benefits in the circumstances described in this subsection (ix) would result in a windfall to the Eligible Employee, which is not the intention of the Plan.

Tyco's severance plan thus specifically withheld severance benefits from employees who accepted employment from a purchaser, describing severance payments in such a circumstance as an unintended "windfall." The appellees contend that they are nevertheless entitled to receive the "standard Severance" despite accepting employment with Dresser Rand, relying upon the different eligibility language of the RIAs because they were not "offered Comparable

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based upon their stipulation at trial about "the calculated amount of severance" under the terms of Tyco's ERISA plan.

Employment with Tyco." ERISA preempts any state-law contract claim that would modify the terms of the plan in this unauthorized fashion.[5]

The foregoing analysis of how the contract claims relate to an ERISA plan also explains why the employees' state-law contract claims for payment of severance are not entirely independent of an ERISA plan. The employees' contract claims therefore cannot be analyzed under as if they were entirely independent of an ERISA plan, as has been the case in other circumstances in which a standalone severance agreement has been enforced because it was independent of the employer's separate ERISA plan providing severance benefits.[6]

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[5] *See* 29 U.S.C. § 1144(a) (providing for ERISA conflict preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C. § 1003(a)] and not exempt under [29 U.S.C. § 1003(b)]").

[6] *See, e.g.*, *Gresham v. Lumbermen's Mut. Casualty Co.*, 404 F.3d 253, 259 (4th Cir. 2005) (relying upon "substantial differences" between contract benefit and ERISA plan benefit and absence of indication that the contractual benefit would be paid from funds allocated to the ERISA plan); *Crews v. Gen. Am. Life Ins. Co.*, 274 F.3d 502, 505 (8th Cir. 2001) (relying upon "significant differences between the company's existing plan and the promised benefits, as well as the lack of any evidence linking them to each other"). *Eide v. Grey Fox Tech. Servs. Corp.*, 329 F.3d 600 (8th Cir. 2003), is distinguishable because the disputed benefits in that case "were not to be delivered pursuant to" the relevant ERISA plan; instead, they were to be paid as a lump-sum payment. *Eide*, 329 F.3d at 605–06. In contrast, the claimed severance benefit under the RIAs was to be paid "in accordance to the severance schedule associated with the closure of this facility"—an ERISA plan which provided a severance benefit paid in the form of "salary continuation" constituting "Base Salary . . . in equal installments over the Severance Period, per normal payroll cycles." The Gimpel employees

Finally, the judgment in favor of the Gimpel employees cannot be affirmed by treating their claims as if they were claims for benefits under an ERISA plan. In some circumstances a state-law contract claim preempted by ERISA can be recharacterized as an enforcement action to obtain benefits under ERISA. *See* 29 U.S.C. § 1132(a)(1)(B), (e)(1); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S. Ct. 1542, 1547 (1987). But even if we recharacterized the contract claims under the RIAs as claims for benefits under the Tyco severance plan, as explained above, the employees would not be entitled to severance payments because they were expressly excluded under the terms of the Tyco plan.[7]

Because I conclude that the Gimpel employees' claims are preempted by ERISA, and they may not be recharacterized as viable claims for benefits under ERISA, I concur only in the ultimate judgment of reversing the trial court's

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therefore cannot rely upon the absence of any administrative scheme regulating the payment of benefits over time to distance themselves from ERISA's preemptive scope, as did the claimants in *Eide*. *See id.* at 605 (citing *Fort Halifax Packing Co. v. Coyne*, 481 U.S. 1, 107 S. Ct. 2211 (1987)).

[7] The problem is not that the claim would not be "cognizable under ERISA," as Justice Keyes characterizes my analysis, but simply that any such claim would necessarily fail under the facts of this case.

judgment and rendering judgment that the Gimpel employees take nothing from Tyco.[8]

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Sharp, dissenting in part.

Justice Massengale, concurring only in the judgment.

[8] Upon a determination that a state-law claim is preempted by ERISA, Texas courts have entered or approved judgments that render a take-nothing judgment. *See, e.g.*, *Gorman v. Life Ins. Co.*, 752 S.W.2d 710, 714 (Tex. App.—Houston [1st Dist.] 1988), *aff'd in relevant part and rev'd on other grounds*, 811 S.W.2d 542 (Tex. 1991); *Greathouse*, 40 S.W.3d at 570–71 (holding that state-law claims for severance pay were preempted by ERISA and affirming trial court's entry of take-nothing judgment). Two justices have agreed on this judgment of reversal and rendition of a take-nothing judgment, in satisfaction of TEX. R. APP. P. 41.1(a).