

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Johnson v. Watts Regulator Co.

Johnson · No. No. 95-1002 · Decided August 23, 1995

SUMMARY

The United States Court of Appeals for the First Circuit affirmed a district court judgment concerning whether an employer-sponsored group insurance program fell within the Department of Labor's ERISA safe harbor regulation, 29 C.F.R. § 2510.3-1(j). The court held that endorsement depends on whether an objectively reasonable employee would conclude, based on the employer's conduct, that the employer exercised control over the program or made it part of the company's benefit package. Applying clear-error review, the court upheld the finding that Watts Regulator Company had not endorsed the program.

OPINION

PER CURIAM.

USCA1 Opinion UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
_____ No. 95-1002 JAMES JOHNSON, Plaintiff, Appellee, v. WATTS
REGULATOR COMPANY, ET AL., Defendants, Appellants. _____
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW
HAMPSHIRE [Hon. Joseph A. DiClerico, Jr., U.S. District Judge] _____
_____ Before Selya, Circuit Judge, _____ Campbell, Senior
Circuit Judge, _____ and Cyr, Circuit Judge. _____
_____ Eleanor H. MacLellan, with whom Sean M. Dunne, Ross M.
_____ Weisman, and Sulloway & Hollis were
on brief, for appellants. _____ Christopher J. Seufert, with whom Seufert
Professional _____ Association was on brief,
for appellee. _____ August 23, 1995
_____ SELYA, Circuit Judge.

This appeal requires us to SELYA, Circuit Judge. _____ address, for the first time, a
"safe harbor" regulation promulgated by the Secretary of Labor (the Secretary) as a means of
exempting certain group insurance programs from the strictures of the Employee Retirement
Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1461. Determining, as we do, that the
district court appropriately applied the regulation, and discerning no clear error in the court's
factual findings on other issues in the case, we affirm the judgment below.

I. BACKGROUND I. BACKGROUND Plaintiff-appellee James Johnson worked as a forklift operator at the Webster Valve division of defendant-appellant Watts Regulator Co. (Watts) in Franklin, New Hampshire. While so employed, plaintiff elected to participate in a group insurance program made available to Watts' employees by defendant-appellant CIGNA Employee Benefit Company d/b/a Life Insurance Company of North America (CIGNA).

Under the program plaintiff received insurance protection against accidental death, dismemberment, and permanent disability. He paid the premium through a payroll deduction plan. Watts, in turn, remitted the premium payments to CIGNA.

On June 15, 1990, while a participant in the program, plaintiff sustained a severe head injury in a motorcycle accident. He remained disabled for the ensuing year, and, having crossed the policy's temporal threshold, he applied for benefits on July 17, 1991. CIGNA turned him down, claiming that he retained the residual capacity to do some work. Plaintiff then sued Watts and CIGNA in a New Hampshire state court.

Postulating the existence of an ERISA-related federal question, the defendants removed the action to the district court. Following an evidentiary hearing, the district court ruled that ERISA did not pertain. See *Johnson v. Watts Regulator Co.*, No. 92-508-JD, 1994 WL 258788 (D.N.H. May 3, 1994). Nevertheless, the court denied plaintiff's motion to remand, noting diverse citizenship and the existence of a controversy in the requisite amount.

See 28 U.S.C. 1332(a). The parties subsequently tried the case to the bench. The judge heard the evidence, perused the group policy, applied New Hampshire law, found plaintiff to be totally and permanently disabled, and awarded the maximum benefit, together with attorneys' fees and costs. See *Johnson v. Watts Regulator Co.*, No. 92-508-JD, 1994 WL 587801 (D.N.H. Oct. 26, 1994).

This appeal ensued. II. THE ERISA ISSUE II. THE ERISA ISSUE The curtain-raiser question in this case involves whether the program under which Johnson sought benefits is subject to Title I of ERISA. Confronting this issue requires that we interpret and apply the Secretary's safe harbor regulation, 29 C.F.R. 2510.3-1(j) (1994).

We divide this part of our analysis into four segments. First, we explain why the curtain-raiser question matters. Second, we limn the applicable standard of review. Third, we discuss the regulation itself and how it fits into the statutory and regulatory scheme. Fourth, we scrutinize the record and test the district court's conclusion that the program is within the safe harbor.

A. The ERISA Difference. A. The ERISA Difference. From the earliest stages of the litigation, a controversy has raged over the relationship, if any, between ERISA and the group insurance program underwritten by CIGNA. This controversy stems from perceived self-interest: if ERISA applies, preemption is triggered, see 29 U.S.C. 1144(a), and, in many

situations, the substitution of ERISA principles (whether derived from the statute itself or from federal common law) for state-law principles can make a pronounced difference.

For example, ERISA preemption may cause potential state-law remedies to vanish, see, e.g., *Carlo v. Reed Rolled Thread Die Co.*, 49 _____ F.3d 790, 794 (1st Cir. 1995); *McCoy v. Massachusetts Inst. of _____ Technology*, 950 F.2d 13, 18 (1st Cir. 1991), cert. denied, 504 _____ U.S. 910 (1992), or may change the standard of review, see, e.g., _____ *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1988), _____ or may affect the admissibility of evidence, see, e.g., *Taft v. _____ Equitable Life Ins.*

Co., 9 F.3d 1469, 1471-72 (9th Cir. 1993), or _____ may determine whether a jury trial is available, see, e.g., *Blake _____ v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th _____ Cir. 1990).

We are uncertain which of these bogbarts has captured the minds of the protagonists in this case. But exploring that question does not strike us as a prudent use of scarce judicial resources. Given the marshalled realities the parties agree 4 that the ERISA difference is of potential significance here; they successfully persuaded the district court to that view; and it is entirely plausible under the circumstances of this case that the applicability vel non of ERISA makes a meaningful difference we _____ refrain from speculation about the parties' tactical goals and proceed directly to a determination of whether the court below correctly concluded that state law provides the rule of decision.

B. Standard of Review. B. Standard of Review. _____ The question of whether ERISA applies to a particular plan or program requires an evaluation of the facts combined with an elucidation of the law. See, e.g., *Kulinski v. Medtronic Bio- _____ Medicus, Inc.*, 21 F.3d 254, 256 (8th Cir. 1994) (explaining that _____ the existence of an ERISA plan is a mixed question of fact and law); *Peckham v. Gem State Mut.*, 964 F.2d 1043, 1047 n.5 (10th _____ Cir.

1992) (similar). For purposes of appellate review, mixed questions of fact and law ordinarily fall along a degree-of- deference continuum, ranging from plenary review for law- dominated questions to clear-error review for fact-dominated questions. See *In re Extradition of Howard*, 996 F.2d 1320, 1327- _____ 28 (1st Cir. 1993). Plenary review is, of course, nondeferential, whereas clear-error review is quite deferential.

See *id.* Both standards are in play here. _____ The interpretation of a regulation presents a purely legal question, sparking de novo review. See, e.g., *Strickland _____ v. Commissioner, Me. Dep't of Human Serv.*, 48 F.3d 12, 16 (1st _____ Cir. 1994); *Liberty Mut. Ins. Co. v. Commercial*

Union Ins. Co., _____ 5 978 F.2d 750, 757
(1st Cir.

1992). Once the meaning of the regulation has been clarified, however, the "mixed" question that remains the regulation's applicability in a given case may require factfinding, and if it does, that factfinding is reviewed only for clear error.

To that extent, the existence of an ERISA plan becomes primarily a question of fact. See *Wickman v. _____ Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir.), _____ cert. denied, 498 U.S. 1013 (1990); *Kanne v. Connecticut Gen. _____ Life Ins. Co.*, 867 F.2d 489, 492 (9th Cir. 1988), cert. denied, _____ 492 U.S. 906 (1989).

C. Statutory and Regulatory Context. C. Statutory and Regulatory Context. _____ Congress enacted ERISA to protect the interests of participants in employee benefit plans (including the interests of participants' beneficiaries). See 29 U.S.C. 1001(a) & (b); _____ see also *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, _____ 1230 (1995); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 15-16 _____ (1987).

ERISA safeguards these interests in a variety of ways, e.g., by creating comprehensive reporting and disclosure requirements, see 29 U.S.C. 1021-1031, by setting standards of _____ conduct for fiduciaries, see *id.* 1101-1114, and by _____ establishing an appropriate remedial framework, see *id.* 1131- _____ 1145. An integral part of the statutory scheme is a broadly worded preemption clause that, in respect to covered employee benefit plans, sets to one side "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State."

Id. 1144(a). The purpose of the preemption clause _____ 6 is to enhance the efficient operation of the federal statute by encouraging uniformity of regulatory treatment through the elimination of state and local supervision over ERISA plans. See _____ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *McCoy*, _____ 950 F.2d at 18.

For an employee welfare benefit plan or program to come within ERISA's sphere of influence, it must, among other things, be "established or maintained" by an employer,¹ an employee organization, or both. See 29 U.S.C. 1002(1); see also _____ *Wickman*, 908 F.2d at 1082 (enumerating necessary components of an _____ ERISA plan); *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th _____ Cir.

1982) (en banc)(same). The parties agree that the group insurance program that CIGNA wrote for Watts' employees, covering accidental death, dismemberment, and permanent disability, qualifies as a "program" of employee welfare benefits as that term is used in the statute. See generally 29

U.S.C. 1002(1). _____ Hence, the ERISA question reduces to whether the program is one "established or maintained" by an employer.

To address this very requirement, the Secretary of Labor, pursuant to 29 U.S.C. 1135 (authorizing the Secretary to promulgate interpretive regulations in the ERISA milieu), promulgated a safe harbor regulation describing when (and to what extent) an employer or a trade union may be involved with an _____ 1The statute also requires that the employer be "engaged in commerce" or in an industry or activity affecting commerce.

29 U.S.C. 1003(2). It is undisputed that Watts meets this criterion. 7 employee welfare benefit program without being deemed to have "established or maintained" it. See 40 Fed. Reg. 34,527 (1975) ____ (explaining the rationale underlying the safe harbor regulation); see also *Silvera v. Mutual Life Ins. Co.*, 884 F.2d 423, 426 (9th _____ Cir.

1989); see generally Ronald J. Cooke, ERISA Practice and _____
_____, Procedure 2.06 (1994). The regulation provides in relevant _____
part that the term "employee welfare benefit plan" shall not include a group or group-type
insurance program offered by an insurer to employees or members of an employee organization,
under which: (1) No contributions are made by an employer or employee organization; (2)
Participation [in] the program is completely voluntary for employees or members; (3) The sole
functions of the employer or employee organization with respect to the program are, without
endorsing the program, to permit the insurer to publicize the program to employees or members,
to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer;
and (4) The employer or employee organization receives no consideration in the form of cash or
otherwise in connection with the program, other than reasonable compensation, excluding any
profit, for administrative services actually rendered in connection with payroll deductions or dues
checkoffs.

29 C.F.R. 2510.3-1(j). A program that satisfies the regulation's standards will be deemed not to have been "established or maintained" by the employer. The converse, however, is not necessarily true; a program that fails to satisfy 8 the regulation's standards is not automatically deemed to have been "established or maintained" by the employer, but, rather, is subject to further evaluation under the conventional tests.

See ____ Hansenv. Continental Ins. Co., 940 F.2d 971, 976 (5th Cir. 1991). ____
____ Here, we need not proceed beyond the regulation itself. The safe harbor
dredged by the regulation operates on the premise that the absence of employer involvement
vitiates the necessity for ERISA safeguards.

In theory, an employer can assist its work force by arranging for the provision of desirable coverage at attractive rates, but, by complying with the regulation, assure itself that, if it acts only

as an honest broker and remains neutral vis-a-vis the plan's operation, it will not be put to the trouble and expense that meeting ERISA's requirements entails. Failure to fulfill any one of the four criteria listed in the regulation, however, closes the safe harbor and exposes a group insurance program, if it otherwise qualifies as an ERISA program, to the strictures of the Act.

See *Qualls v. Blue Cross of Cal.*, _____ Inc., 22 F.3d 839, 843 (9th Cir. 1994); *Fugarino v. Hartford Life _____ & Accident Ins. Co.*, 969 F.2d 178, 184 (6th Cir. 1992), cert. _____ denied, 113 S. Ct. 1401 (1993); *Memorial Hosp. Sys. v. Northbrook _____ Life Ins. Co.*, 904 F.2d 236, 241 n.6 (5th Cir. 1990); *Kanne*, 867 _____ F.2d at 492. In the instant case, the first, second, and fourth criteria are not in dispute. Plaintiff paid the premium without the employer's financial assistance; the decision to purchase the coverage was his and his alone; and Watts received no forbidden 9 consideration.

We concentrate, therefore, on the regulation's third facet. This is a fitting focus, as the Department of Labor has called the employer neutrality that the third facet evokes "the key to the rationale for not treating such a program as an employee benefit plan...." 40 Fed. Reg. 34,526.

In dealing with the regulation, courts have echoed the agency's view of the importance of employer neutrality. See, ___ e.g., *Hensley v. Philadelphia Life Ins. Co.*, 878 F. Supp. 1465, _____ 1471 (N.D. Ala. 1995); *du Mortier v. Massachusetts Gen. Life Ins. _____ Co.*, 805 F. Supp. 816, 821 (C.D.

Cal. 1992). But as the ___ regulation itself indicates, remaining neutral does not require an employer to build a moat around a program or to separate itself from all aspects of program administration. Thus, as long as the employer merely advises employees of the availability of group insurance, accepts payroll deductions, passes them on to the insurer, and performs other ministerial tasks that assist the insurer in publicizing the program, it will not be deemed to have endorsed the program under section 2510.3-1(j)(3).

See *Kanne*, _____ 867 F.2d at 492; *du Mortier*, 805 F. Supp. at 821. It is only _____ when an employer purposes to do more, and takes substantial steps in that direction, that it offends the ideal of employer neutrality and brings ERISA into the picture. See, e.g., *Kanne*, _____ 867 F.2d at 492-93 (holding that an employer group crossed the line when it established a trust entity in its name for purposes of plan administration); *Brundage-Peterson v. Compicare Health _____ Servs.*

Ins. Corp., 877 F.2d 509, 510-11 (7th Cir. 1989) (finding _____ 10 that an employer who determined eligibility, contributed premiums, and collected and remitted premiums paid for dependents did not qualify for the safe harbor exemption); *Shiffler v. _____ Equitable Life Assur. Soc. of U.S.*, 663 F. Supp. 155, 161 (E.D. _____

Pa. 1986) (finding that an employer that touted a group policy to employees as part of its customary benefits package, and that specifically endorsed the policy, did not qualify for the safe harbor exemption), *aff'd*, 838 F.2d 78 (3d Cir.

1988). This case _____ falls between these extremes, and requires us to clarify the standard for endorsement under section 2510.3-1(j)(3). The Department of Labor has linked endorsement of a program on the part of an employee organization to its engagement "in activities that would lead a member reasonably to conclude that the program is part of a benefit arrangement established or maintained by the employee organization."

Dep't of Labor Op. No. 94-26A (1994).² What is sauce for the goose is sauce for the gander. Thus, we believe that the agency, in a proper case, will link endorsement on an employer's part to its engagement in activities that would lead a worker reasonably to conclude that a particular group insurance program is part of a benefit arrangement backed by the company.

This conclusion is bolstered by the Department's stated rationale to the effect that a communication to employees _____²Opinion letters issued by the Secretary of Labor are not controlling even in the cases for which they are authored. See ____ *Reich v. Newspapers of New Eng., Inc.*, 44 F.3d 1060, 1070 (1st _____ Cir.

1995). Nonetheless, courts may derive guidance from them. See *id.* ____ ____ 11 indicating that an employer has arranged for a group or group- type insurance program would constitute an endorsement within the meaning of section 2510.3-1(j)(3) if, taken together with other employer activities, it leads employees reasonably to conclude that the program is one established or maintained by the communicator.

See *id.*; see also 40 Fed. Reg. 34,526 (explaining ____ ____ ____ that the current phrasing of the safe harbor provision replaced an earlier version requiring that the employer make no representation to its employees that the insurance program is a benefit of employment because critics found the earlier version "too vague and difficult to apply").

In short, the agency has suggested that the employees' viewpoint should constitute the principal frame of reference in determining whether endorsement occurred. The interpretation of the safe harbor regulation by the agency charged with administering and enforcing ERISA is entitled to substantial deference. See *Berkshire Scenic Ry. Museum, Inc.* ____ v. ICC, 52 F.3d 378, 381-82 (1st Cir.

1995); *Keyes v. Secretary ____ ____ of the Navy*, 853 F.2d 1016, 1021 (1st Cir. 1988). Here, _____ moreover, the respect usually accorded an agency's interpretation of a statute is magnified since the agency is interpreting its own regulation. See *Arkansas v. Oklahoma*, 503 U.S. 91, 112 ____ ____ (1992); *Puerto Rico Aqueduct & Sewer*

1994), cert. denied, 115 S. Ct. 1096 _____ (1995). So long as the agency's interpretation does not do violence to the purpose and wording of the regulation, or 12 otherwise cross into forbidden terrain, courts should defer. See ___ Martin v. OSHRC, 499 U.S. 144, 150 (1991); see also Stinson v. _____ United States, 113 S. Ct. 1913, 1919 (1993) (holding that an _____ agency's interpretation of its own regulations must be given controlling weight unless plainly erroneous, inconsistent with a federal statute, or unconstitutional); Kelly v. United States, _____ 924 F.2d 355, 361 (1st Cir.

1991) (similar). In this instance, we believe that deference is due. The Secretary's sense of the safe harbor regulation is consonant with both the regulation's text and the overlying statute. And, moreover, looking at the employer's conduct from the employees' place of vantage best ensures that employer neutrality remains a reality rather than a mere illusion.

Phrased another way, judging endorsement from the viewpoint of an objectively reasonable employee most efficaciously serves ERISA's fundamental objective: the protection of employee benefit plan participants and their beneficiaries.

We rule, therefore, that an employer will be said to have endorsed a program within the purview of the Secretary's safe harbor regulation if, in light of all the surrounding facts and circumstances, an objectively reasonable employee would conclude on the basis of the employer's actions that the employer had not merely facilitated the program's availability but had exercised control over it or made it appear to be part and parcel of the company's own benefit package.

D. Analysis. D. Analysis. _____ 13 Here, the district court interpreted the regulation correctly and concluded that the company had not endorsed the group insurance program. This conclusion is fact-driven, and, thus, reviewable only for clear error.³ See Cumpiano v. Banco _____ Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990); see also Fed. _____ R. Civ.

P. 52(a). Thus, the trier's findings of fact cannot be set aside unless, on reviewing all the evidence, the court of appeals is left with an abiding conviction that a mistake has been committed. See Dedham Water Co. v. Cumberland Farms Dairy, _____ Inc., 972 F.2d 453, 457 (1st Cir. 1992); Cumpiano, 902 F.2d at _____ 152-153.

Applying this deferential standard, we cannot say that the trial court's "no endorsement" finding is clearly erroneous. The anatomy of the court's determination is instructive. Based primarily on the testimony of two corporate officials Watts' benefits administrator and Webster Valve's employee

relations manager the court found that the company had _____.³ The question of endorsement vel non is a mixed question of ____ fact and law.

In some cases the evidence will point unerringly in one direction so that a rational factfinder can reach but one conclusion. In those cases, endorsement becomes a matter of law. Cf. *Griffin v. United States*, 502 U.S. 46, 55 n.1 (1991) _____ (discussing "adequacy on the proof as made" as meaning not whether the evidence sufficed to enable an alleged fact to be found, but, rather, whether the facts adduced at trial sufficed in law to support a verdict); *Anderson v. Liberty Lobby, Inc.*, _____ 477 U.S. 242, 251-52 (1986) (describing the appropriate mode of inquiry for directed verdicts and summary judgments).

In other cases, the legal significance of the facts is less certain, and the outcome will depend on the inferences that the factfinder chooses to draw. See, e.g., *TSC Indus., Inc. v. Northway, Inc.*, _____ 426 U.S. 438, 450 (1976); *In re Varasso*, 37 F.3d 760, 763 (1st _____ Cir. 1994).

In those cases, endorsement becomes a question of fact. This case is of the latter type. 14 made its employees aware of the opportunity to obtain coverage, but had stopped short of endorsing the program. CIGNA drafted the policy and, presumably, set the premium rates.

Although Watts distributed the sales brochure, waiver-of-insurance cards, and enrollment cards, those efforts were undertaken to help CIGNA publicize the program; the documents themselves were prepared and printed by CIGNA, and delivered by it to Watts for distribution. Watts recommended enrollment via a cover letter (reproduced as an appendix hereto) written on the letterhead of Watts Industries and signed by its vice-president for financial matters.

CIGNA typeset the letter and incorporated it into the cover page of the brochure. The letter explicitly informed Watts' employees that the enrollment decision was theirs to make. Watts nowhere suggested that it had any control over, or proprietary interest in, the group insurance program. And, finally, neither the letter nor any other passage in the brochure mentioned ERISA.

The district court also examined Watts' other activities concerning the program. Watts collected premiums through payroll deductions, remitted the premiums to CIGNA, issued certificates to enrolled employees confirming the commencement of coverage, maintained a list of insured persons for its own records, and assisted CIGNA in securing appropriate documentation when claims eventuated.

Watts' activities in this respect consisted principally of filling out the employer portion of the claim form, inserting statistical information maintained in Watts' personnel files (such as the insured's name, address, 15 age, classification, and date of hire), making various forms available to employees (e.g., claim forms),⁴ and keeping track of employee eligibility.

Watts would follow up on a claim to determine its status, if CIGNA requested that Watts do so, and would occasionally answer a broker's questions about a claim. In sum, Watts performed only administrative tasks, eschewing any role in the substantive aspects of program design and operation. It had no hand in drafting the plan, working out its structural components, determining eligibility for coverage, interpreting policy language, investigating, allowing and disallowing claims, handling litigation, or negotiating settlements.

In the last analysis, the district court found that Watts' cover letter fell short of constituting an endorsement. The court pointed out that neither the letter nor the brochure expressly stated that the employer endorsed the program. Apart from the letter, the court concluded that Watts had performed only ministerial activities, and that these activities (whether viewed alone or in conjunction with the cover letter) did not rise to the level of an endorsement.

We believe that this finding deserves our allegiance. Drawing permissible inferences from the evidence, the trial court could plausibly conclude on this scumbled record that an objectively reasonable employee would not have thought that Watts endorsed the group insurance program. Several considerations _____ 4CIGNA prepared and printed all such forms, and sent a supply of forms to Watts.

16 lead us in this direction. We offer a representative sampling. First, we think that endorsement of a program requires more than merely recommending it. An employer's publicly expressed opinion as to the quality, utility and/or value of an insurance plan, without more, while relevant to (and perhaps probative of) endorsement, will most often not indicate employer control of the plan.

Second, the administrative functions that Watts undertook fit comfortably within the Secretary's regulation. Activities such as issuing certificates of coverage and maintaining a list of enrollees are plainly ancillary to a permitted function (implementing payroll deductions). Activities such as answering brokers' questions similarly can be viewed as assisting the insurer in publicizing the plan.

Other activities that arguably fall closer to the line, such as the tracking of eligibility status, are completely compatible with the regulation's aims. Under the circumstances, the court lawfully could find that the employer's activities, in the aggregate, did not take the case out of the safe harbor.⁵ See, e.g., *Brundage-* _____ ⁵Appellants stress the fact that Watts unilaterally prepared and filed a Form 5500 with the Internal Revenue Service.

This is an example of the mountain laboring, but bringing forth a mouse. Such forms are informational in nature and are designed to comply with various reporting requirements that ERISA imposes. See _____ *Cooke*, *supra*, 3.10, at 3-34. But, there is no evidence to _____ suggest that Watts' employees knew of this protective filing, and it is surpassingly difficult for us to fathom how the filing makes a dispositive difference.

Although the inference that compiling the tax form demonstrated Watts' intent to provide an ERISA plan does not escape us, but cf. Kanne, 867 F.2d at 493 ____ (explaining that a brochure describing a plan as an ERISA plan evidences the intent of the employer to create an ERISA plan, but the same may not be said of the filing of a tax return), it is entirely possible, as the plaintiff suggests, that the form was 17 Peterson, 877 F.2d at 510 (assuming that steps such as _____ "distributing advertising brochures from insurance providers, or answering questions of its employees concerning insurance, or even deducting the insurance premiums from its employees' paychecks and remitting them to the insurers," do not force employers out of the safe harbor provision); du Mortier, 805 F. _____ Supp. at 821 (holding that activities such as maintaining a file of informational materials, distributing forms to employees, and submitting completed forms to the insurer, do not transcend the boundaries of the safe harbor).

In arguing for reversal, appellants rely on Hansen v. _____ Continental Ins. Co., a case that involved a similar situation. _____ In Hansen, as here, participation in the plan was voluntary, and _____ premiums were paid by the employees via payroll deduction. See _____ Hansen, 940 F.2d at 973.

The employer collected the premiums, _____ remitted them to the insurer, and employed an administrator who accepted claim forms and transmitted them to the carrier. See _____ id. at 974. In addition, the employees received a booklet _____ embossed with the employer's corporate logo that described the plan and encouraged employee participation.

The court found that the company had endorsed the plan. See id. _____ Despite the resemblances, there are two critical facts that distinguish Hansen from the case at bar. First, in Hansen _____ the corporate logo was embossed on the booklet itself, see id., _____ filed merely as a precaution.

In any event, this case turns on the employer's activities, not its intentions. 18 making it appear that the employer vouched for the entire brochure (and for the plan). Here, however, only Watts' letter bore its imprimatur.

Second, and perhaps more cogent, the booklet at issue in Hansen described the policy as the company's _____ plan, see id. ("our plan"), while here, the letter typeset onto _____ the booklet describes the policy as a plan offered by another organization.⁶ Though the appellants decry the distinction as merely a matter of semantics, words are often significant in determining legal rights and obligations.

See generally Felix _____ Frankfurter, Some Reflections on the Reading of Statutes 29 _____ (1947) ("Exactness in the use of words is the basis of all serious thinking.").

In the difference between "our plan" and "a plan" lies the quintessential meaning of endorsement. If a plan or program is the employer's plan or program, the safe harbor does not beckon. See, e.g., *Sorel v. CIGNA*, 1994 WL 605726, at *2 (D.N.H. _____ Nov. 1, 1994) (holding that statement describing policy as employer's plan on first page of plan description indicates endorsement); *Cockey v. Life Ins.*

Co. of N. Am., 804 F. Supp. _____ 1571, 1575 (S.D. Ga. 1992) (finding that when employer presents a program to its employees as an integral part of its own benefits _____ 6 There may also be a critical difference between our approach to the question of endorsement and that adopted in *Hansen*.

Although the *Hansen* court did not articulate its ratio _____ *decidendi*, at least one district court has come to the conclusion _____ that *Hansen* analyzed the situation from the standpoint of the _____ employer rather than the employee. See *Barrett v. Insurance Co.* _____ of N. Am., 813 F. Supp. 798, 800 (N.D. Ala. 1993).

This _____ possibility renders appellants' reliance on *Hansen* even more _____ problematic. 19 package, the safe harbor is unavailable); *Shiffler*, 663 F. Supp. _____ at 161 (finding endorsement because policy had been hawked to employees as a part of the company's benefits package); see also _____ Dep't of Labor Op. No. 94-26A, *supra* (advising that safe harbor _____ is unavailable when a union, *inter alia*, describes a group _____ insurance program as its program).

When, however, the employer separates itself from the program, making it reasonably clear that the program is a third party's offering, not subject to the employer's control, then the safe harbor may be accessible. See _____ *Hansen*, 940 F.2d at 977; *Kanne*, 867 F.2d at 493; *Hensley*, 878 F. _____ Supp. at 1471. This distinction is sensible. When an objectively reasonable employee reads a brochure describing a program as belonging to his employer, he is likely to conclude that, if he participates, he will be dealing with the employer and that he will therefore enjoy the prophylaxis that ERISA ensures in such matters.

When the possessive pronoun is eliminated in favor of a neutral article, however, the employee's perception is much more likely to be that, if he participates, he will be dealing directly with a third party the insurer and that he will therefore be beyond the scope of ERISA's protections.

To sum up, we are drawn to three conclusions. First, the district court did not clearly err in finding that *Watts* had not endorsed the group insurance program. Second, the court's fact-sensitive determination that the program fits within the parameters of the Secretary's safe harbor regulation is 20 sustainable.

Third, since ERISA does not apply, the court below did not blunder in scrutinizing the merits of plaintiff's contract claim through the prism of state law. III. THE DISABILITY ISSUE III. THE

DISABILITY ISSUE Appellant asseverates that, even if New Hampshire law controls, the judgment below is insupportable.

We turn now to this asseveration. The starting point for virtually any claim under a policy of insurance is the policy itself. Here, the applicable rider promises benefits to an insured who has been injured in an accident, whose ensuing disability is "continuous" and "total" for a year, and who thereafter remains "permanently and totally disabled."

The rider defines "continuous total disability" as a disability resulting from injuries sustained in an accident, "commencing within 180 days after the date of the accident," lasting for at least a year, and producing during that interval "the Insured's complete inability to perform every duty of his occupation." If an insured meets this benchmark, he must then prove that he is "permanently and totally disabled."

Under the policy definitions, this phrase signifies "the Insured's complete inability, after one year of continuous total disability, to engage in an occupation or employment for which [he] is fitted by reason of education, training, or experience for the remainder of his life." It is against this linguistic backdrop that we inspect appellants' assertion that the trial court erred in 21 finding plaintiff to be totally and permanently disabled.

A. Standard of Review. A. Standard of Review. _____ In actions that are tried to the court, the judge's findings of fact are to be honored unless clearly erroneous, paying due respect to the judge's right to draw reasonable inferences and to gauge the credibility of witnesses. See ___ Cumpiano, 902 F.2d at 152 (citing Fed. R. Civ. P. 52(a)); _____ Reliance Steel Prods.

Co. v. National Fire Ins. Co., 880 F.2d _____
_____ 575, 576 (1st Cir. 1989). A corollary of this proposition is that, when there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985); _____
_____ Cumpiano, 902 F.2d at 152.

In fine, when a case has been decided _____ on the facts by a judge sitting jury-waived, an appellate court must refrain from any temptation to retry the factual issues anew. There are, of course, exceptions to the rule.

For example, de novo review supplants clear-error review if, and to the extent that, findings of fact are predicated on a mistaken view of the law. See, e.g., *United States v. Singer Mfg. Co.*, _____
_____ 374 U.S. 174, 195 n.9 (1963); *RCI N.E. Servs. Div. v. Boston*
_____ Edison Co., 822 F.2d 199, 203 (1st Cir.

1987). This does not _____ mean, however, that the clearly erroneous standard can be eluded by the simple expedient of creative relabelling. See Cumpiano, _____ 902 F.2d at

154; Reliance Steel, 880 F.2d at 577.

For obvious _____ reasons, we will not allow a litigant to subvert the mandate of 22 Rule 52(a) by hosting a masquerade, "dressing factual disputes in 'legal' costumery." Reliance Steel, 880 F.2d at 577; accord Dopp _____ v. Pritzker, 38 F.3d 1239, 1245 (1st Cir. 1994), cert. denied, _____ 115 S. Ct. 1959 (1995).

B. Analysis. B. Analysis. _____ Appellants make two main arguments in regard to plaintiff's disability claim. First, in an effort to skirt Rule 52(a), they assert that the district court committed an error of law, mistaking the meaning of the phrase "permanently and totally disabled" as that phrase is used in the policy.

We reject the assertion as comprising nothing more than a clumsy attempt to recast a clear-error challenge as an issue of law in hope of securing a more welcoming standard of review. The policy itself defines the operative term, and the record makes pellucid that the district judge applied the term within the parameters of that definition. Appellants' second contention posits that the district court misperceived the facts, and that plaintiff was not sufficiently disabled to merit an award of benefits.

This contention also lacks force. The district court had adequate grounds for deciding that plaintiff was totally and permanently disabled. The evidence showed that plaintiff sustained a devastating brain injury, and that, throughout the year following his accident, a number of physicians found his disability to be continuous. By and large, plaintiff's condition did not improve significantly during that year (or thereafter, for that matter).

23 Without exception, the doctors concluded that he could never return to work as a forklift driver. To cap matters, the record contains ample evidence that the plaintiff's disability was permanent and blanketed the universe of occupations to which plaintiff a laborer with a high-school education might have aspired.

We need not cite book and verse. The court made detailed findings, crediting the conclusions of four doctors who judged plaintiff to be severely impaired, both mentally and physically.⁷ The court also credited an evaluation performed by Sherri Krasner, a speech and language pathologist, and the testimony of a vocational rehabilitation counselor, Arthur Kaufman, who offered an opinion that plaintiff was unable to work without constant supervision.

Kaufman stated that he did not know of a job suitable for a person in plaintiff's condition.⁸ _____ ⁷These experts included the attending physician (Dr. Martino), a neurologist (Dr. Whitlock), a clinical neuropsychologist (Dr. Higgins), and a psychologist (Dr. Toye). A fifth physician, Dr. Michele Gaier-Rush, also evaluated plaintiff. CIGNA chose Dr. Gaier-Rush as its medical examiner but neglected to provide her with any of plaintiff's plentiful prior medical records, despite their availability.

She concluded that plaintiff could not perform his usual job but could perform a job "requiring more mental capacity than physical capacity." She noted, however, that plaintiff had no formal training beyond high school, and conceded that "[t]his will probably be a permanent disability as there does not seem to have been a significant improvement in the past year."

Consequently, she found it doubtful that plaintiff could ever work again. 8While Kaufman did say that plaintiff might be able to do some gainful employment with "excessive supervision," and that plaintiff, like other patients with traumatic brain injuries, would probably benefit from vocational rehabilitation, Kaufman expressed doubt that plaintiff would ever overcome his impairment.

In short, he lacked the "capacity to retain... 24 On this record, the trial court's total disability finding is unimpegnable. Another wave of appellants' evidentiary attack targets the district court's finding that plaintiff's disability is permanent.

In this respect, appellants rely mainly on the physicians' recommendations for rehabilitative therapy as indicative of the potential for recovery. The district court, however, found appellants' inference unreasonable in light of the dim prospects for significant recovery, the duration of plaintiff's inability to work, and the policy's failure to require vocational rehabilitation as a precondition to the receipt of benefits.

These are fact-dominated issues, and the trial court is in the best position to calibrate the decisional scales. See *Cumpiano*, 902 F.2d at 152. Having examined the ____ record with care, we have no reason to suspect that a mistake was committed. See, e.g., *Duhaime v. Insurance Co.*, 86 N.H. 307, 308 ____ (1933) (explaining that, to be permanently disabled, an insured need not be in a condition of "utter hopelessness").

IV. CONCLUSION IV. CONCLUSION We need go no further. ERISA does not apply to the group insurance program at issue here. Moreover, the district court's factual findings survive clear-error review. Consequently, the court's resolution of the case stands. ____ employment." 25 Affirmed. Affirmed. ____ 26