

November 19, 2020

Honorable Eugene Scalia
Secretary of Labor
200 Constitution Avenue NW, C-138
Washington DC 20210

Re: *Data Marketing Partnership, LP v. United States Department of Labor*

Dear Secretary Scalia:

On behalf of the members of the National Association of Insurance Commissioners (NAIC), we are writing to express our deep concern with the recent judicial decision in *Data Marketing Partnership, LP v. DOL*, which could open the door to the unregulated sale of health insurance under the guise of an “employee benefit plan.” NAIC strongly supports your Department’s long-standing efforts to prevent such abuses and we urge you to appeal this ill-advised decision.

NAIC represents the chief insurance regulators in the 50 states, the District of Columbia, and the five United States territories. Under the state-based system of insurance regulation, Congress has delegated to the States the authority to oversee interstate as well as intrastate insurance markets, so that we have the responsibility for ensuring that when insurance is sold in our respective states the insurer is both able and willing to keep its promises to its customers. All insurance companies doing business in the United States must meet stringent financial and market conduct requirements and are subject to regular examination to verify that they are in compliance.

This case involves a scheme to exploit the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) which exempt *bona fide* self-insured employee benefit plans from insurance regulation. There is a long history of attempts to evade insurance regulation by fraudulently claiming this exemption and the Department of Labor (Department) and state regulators have worked hard to shut such operations down. The latest attempt, by Data Marketing Partnership (DMP) and other affiliated enterprises, sells health coverage to the general public by inviting customers to become “limited partners” who then become eligible to pay for membership in the partnership’s “benefit plan.” Although DMP characterizes its customers as “working owners,” their limited partnership gives them no meaningful ownership stake in the business and the only “work” they perform is to install a tracking app on their phones which allows the partnership to sell their personal data to third parties.¹

The facts of this case bring to mind previous attempts to abuse ERISA to evade insurance laws. For example, the decade after ERISA was enacted saw a proliferation of Multiple Employer Welfare Arrangements (MEWAs), which claimed to provide small employers with a way to band together to access health coverage on terms similar to large employers, without being subject to insurance regulation. However, that promise was not the reality. MEWAs were plagued by insolvencies. Solvency is a challenge for MEWAs because they are, by their very nature, an unstable risk pool. They do not have the consistency of membership like a true large employer (a feature DMP shares with MEWAs). Opportunistic third-party promoters saw MEWAs as profit-making opportunities. They claimed ERISA preemption of state laws, whether or not the MEWA qualified as an ERISA plan. MEWA promoters took advantage of the regulatory void and made money at the expense of their participants. These insolvencies, whether through malice or incompetence, resulted in significant sums of unpaid claims and the loss of health insurance for participants. In 1983, in response to these troubling market conditions, Congress enacted the Erlenborn-Burton

¹ In its court filings, DMP acknowledged that “neither DMP nor the other entities managed by [the parent company] have enrolled sufficient numbers of partners to reach the quantity of electronic data necessary to generate profitable offers to purchase the data.”

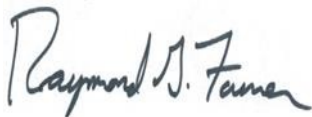
Amendment to expand and clarify the power of states to establish, apply and enforce state insurance laws with respect to MEWAs. Some promoters of fraudulent MEWAs responded by reconfiguring their plans as sham “collective bargaining agreements” to take advantage of an exemption in the Erlenborn-Burton amendment. The results were predictable, and the Department of Labor responded by issuing regulation setting standards for *bona fide* labor union plans.

As the Department recognized in Advisory Opinion 2020-01A, DMP is not a *bona fide* ERISA plan, but simply a scheme to try to avoid regulatory oversight of “the commercial sale of insurance outside the context of employment-based relationships.” However, DMP and its parent company brought suit to challenge the opinion in the U.S. District Court for the Northern District of Texas,² which ruled on September 28 that the Department’s opinion was arbitrary and capricious and that the Department had no authority to consider whether the customers’ purported ownership interests are “nominal” or “material,” whether or not the customers engaged in “meaningful” work, or whether they had any realistic expectation of earning income from that work. Indeed, the court ruled that it did not matter whether or not Data Marketing Partners is a “legitimate business enterprise” at all.

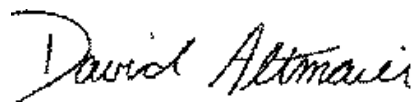
If schemes like this are allowed to proliferate consumers will again be at serious risk, as they have been in the past. We have the legal framework in place to protect consumers, but only if the courts understand and interpret these laws correctly. This decision strikes a blow both to your Department’s efforts to enforce ERISA and to our efforts to enforce state insurance laws. While the court’s opinion that state law is preempted is not legally binding on the states, none of which were parties to the case, it acts as both a powerful marketing tool for insurance schemes that can cite it as “proof” that they have no obligation to comply with laws requiring them to have the funds necessary to pay claims, to charge fair premiums and pay adequate benefits, and to market their plans honestly to consumers. The ability to cite this decision as a defense to state enforcement actions will complicate our ability to prosecute such cases effectively, even though the dicta purporting to preempt state regulation were beyond the court’s jurisdiction.

We deeply appreciate the long history of cooperation between our respective agencies and stand ready to provide whatever assistance you might need in the areas where we have shared or complementary responsibilities.

Sincerely,



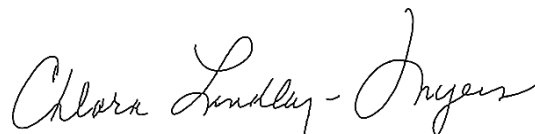
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