

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RENEE L. BERGER : CIVIL ACTION  
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v. : :  
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LIVENGRIN FOUNDATION, et al. : NO. 00-CV-501

MEMORANDUM

**Padova, J.**

**March 27, 2000**

Plaintiff Renee Berger originally filed this action in the Court of Common Pleas of Berks County against U.S. Healthcare, Inc., the Livengrin Foundation, and Luis Tolentino. Defendant U.S. Healthcare, Inc., timely removed the action to this Court pursuant to 28 U.S.C. § 1441 (1994), and moved to dismiss all counts against it on the basis of complete preemption under section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1994). In response, Plaintiff timely filed a Motion to Remand. The Court held oral argument on the remand issues on March 23, 2000. For the following reasons, the Court grants Plaintiff's Motion.

**I. BACKGROUND**

Plaintiff's claims arise from the following facts alleged in

the Complaint. While she was employed as a teacher at the Little People Day Care in Wyomissing, Pennsylvania. Plaintiff Renee Berger ("Berger") obtained health insurance from U.S. Healthcare ("USHC") through her employer. At some point, Berger sought treatment for alcohol addiction from an entity named Chit Chat and/or the Caron Foundation (collectively "Chit Chat"), who recommended her for admission into its twenty-eight day inpatient treatment program. Rather than paying for coverage at Chit Chat, USHC referred Plaintiff for treatment at the Livengrin Foundation ("Livengrin") with whom USHC has a longstanding contract.

Livengrin did not recommend her for an inpatient program, but rather placed her in outpatient treatment. She met three times per week for one hour with her assigned counselor, Luis Tolentino. Over time, Tolentino allegedly coerced Berger into engaging in a sexual relationship and eventually cohabitating with him. During the course of the relationship, Tolentino allegedly sexually and physically assaulted, and verbally abused Berger. All the while, Berger remained addicted to alcohol and drugs. Since leaving Tolentino, Berger has engaged in other abusive relationships causing her to relapse back into her alcohol and substance addictions, and suffer from mental and emotional problems requiring extensive psychological treatment.

Plaintiff's Complaint alleges thirteen counts in which she seeks damages for the allegedly negligent treatment rendered by all

three Defendants. All thirteen counts are purportedly based in state law. The central issue before the Court is whether the Complaint is "as defendant see[s] it, merely an ERISA claim for denial of benefits masquerading as a medical malpractice action, or as plaintiff see[s] it, simply a state malpractice [and] negligence ... action that defendant cannot dress up as ERISA claims." Lancaster v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc., 958 F. Supp. 1137, 1138 (E.D.Va. 1997). If it is the former, the action was properly removed; if the latter, the Court must remand the case to the Court of Common Pleas of Berks County.

## II. LEGAL STANDARD

The propriety of removal is determined from a plaintiff's pleadings at the time of removal. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951). A defendant may remove a civil action filed in state court if the federal court would have had original jurisdiction to hear the matter. 28 U.S.C. § 1441(b) (1994); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir.), cert. denied, 498 U.S. 1085 (1991). Once the case has been removed, the court may remand if the removal is procedurally defect or subject matter jurisdiction is lacking. 28 U.S.C. § 1447(c) (1994). The defendant bears the burden of establishing removal jurisdiction and compliance with all pertinent procedural requirements. Boyer, 913 F.2d at 111. All doubts should be

resolved in favor of remand. Id.

To determine whether a complaint states claims which arise under federal law and hence are within a district court's original jurisdiction under 28 U.S.C. § 1331, the court begins with the well-pleaded complaint rule. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); Miller v. Riddle Mem'l Hosp., No. CIV. A. 98-392, 1998 WL 272167, at \*2 (E.D.Pa. May 28, 1998). Under the well-pleaded complaint rule, a claim arises under federal law only if a federal question is presented on the face of the plaintiff's properly pled complaint. Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 353 (3d Cir. 1995). Normally, a federal defense to a plaintiff's state law cause of action does not appear on the face of the complaint and is therefore insufficient to warrant removal. Id. However, an exception to the well-pleaded complaint rule exists where Congress has so completely preempted a particular area that any civil complaint raising that group of claims is necessarily federal in character. Metropolitan Life, 481 U.S. at 63-64.

The Supreme Court has determined that Congress intended the complete preemption doctrine to apply to state law causes of action that fit within the scope of ERISA's civil enforcement provision contained in section 502.<sup>1</sup> Metropolitan Life, 481 U.S. at 64-66;

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<sup>1</sup>ERISA is a federal statute designed to comprehensively regulate employee welfare benefit plans that "through the purchase of insurance or otherwise," provide medical care. Pilot

Dukes, 57 F.3d at 354-55. Complete preemption under ERISA section 502(a), therefore, is a jurisdictional concept. In re U.S. Healthcare, 193 F.3d 151, 160 (3d Cir. 1999). Only complaints that state claims within the scope of section 502 are removable to federal court. Id.

### III. DISCUSSION

USHC argues that this case was properly removed because the Court has original jurisdiction pursuant to 28 U.S.C. § 1331 over the claims against it alleged in the Complaint. Although counts II, V, VIII, XI, and XIII<sup>2</sup> purport to allege claims under Pennsylvania

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Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44 (1987). Section 502(a) of ERISA contains a civil enforcement mechanism which provides:

A civil action may be brought -

- (1) by a participant or beneficiary
  - (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
- (2) by the Secretary, or be a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
- (3) by a participant, beneficiary, or fiduciary
  - (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1994). Section 1109 creates personal liability for breach of fiduciary duty. 29 U.S.C. § 1109(a) (1994).

<sup>2</sup>Count II alleges that USHC was negligent in referring Plaintiff to Livengrin and overseeing her care. Count V seeks to hold USHC liable on a theory of agency or vicarious liability.

state negligence law, USHC maintains that they actually fall within the scope of section 502(a) of ERISA, 29 U.S.C. § 1132(a) as claims "to recover benefits due" under the terms of an ERISA employee benefit plan. Therefore, according to USHC, this Court has original jurisdiction over the action under the complete preemption exception to the well-pleaded complaint rule.

USHC first argues that Count II and VIII, purportedly alleging negligence, actually seek recovery for benefits that were due but erroneously withheld. Among the acts for which the Complaint asserts USHC was negligent is "[f]ailing to recommend, approve, and/or authorize a 28 day inpatient treatment program for Plaintiff," and "[a]dopting and/or enforcing rules, regulations and procedures which established disincentives for health care providers to provide complete and proper medical care under the circumstances of this case." (Compl. ¶ 107(k), (m)). The Complaint explains in an earlier section that Plaintiff had originally sought coverage for care from Chit Chat who recommended admission into its twenty-eight day inpatient treatment program, but USHC refused to cover such a program at Chit Chat. (Compl. ¶ 24-27). Instead, USHC referred her to Livengrin who recommended only an outpatient

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Count VIII asserts that USHC acted with gross negligence. Count XI claims that USHC breached its contractual and fiduciary duty to provide her with coverage for treatment at a competent facility. Lastly, Count XIII asserts that USHC acted in bad faith in violation of 42 Pa. Cons. Stat. Ann. § 8371 by failing to exercise reasonable care in referring her for treatment to Livengrin.

program. (Compl. ¶ 27). According to USHC, these allegations fundamentally claim that the plan erroneously withheld a benefit due, namely treatment in a twenty-eight day inpatient program. Thus, these Counts seek to enforce Plaintiff's rights under her plan.

Without conceding that her health plan was an employee benefit plan covered by ERISA, or that USHC's conduct in administering the plan is regulated by ERISA, Plaintiff primarily urges that the Complaint alleges only state law claims that fall outside the scope of section 502(a). According to Plaintiff, the Complaint involves a medical malpractice action and challenges only the quality of the benefits that USHC provided.

Section 502(a)(1)(B) claims are those to recover benefits due, to enforce rights, or clarify rights to future benefits under the terms of an ERISA plan. 29 U.S.C. § 1132(a)(1)(B); Dukes, 57 F.3d at 355. Claims to recover benefits due are primarily complaints that the plan administrator "withheld some quantum of plan benefits due." Dukes, 57 F.3d at 356. The Third Circuit has recognized a distinction between claims regarding the quantity and the quality of the benefits due under a plan. U.S. Healthcare, 193 F.3d at 161-62; Miller, 1998 WL 272167, at \*6. Claims concerning quantity of care revolve around the plan administrator's activities in determining eligibility for benefits or calculating and disbursing benefits. U.S. Healthcare, 193 F.3d at 162. Conversely, claims

regarding the quality of provided care attempt to hold the plan liable for its role as the arranger or provider of medical treatment, whether in terms of its decisions about the treatment of individual plaintiffs or adoption of certain treatment policies. Id. at 162-64.

Only the former, quantity claims, are completely preempted under ERISA section 502(a). Id. at 162. Claims about the quality of provided service are purely state law claims over which the district court has no removal jurisdiction. Id. at 162-63. To determine whether a complaint relates to the quality as opposed to the quantity of care, courts look to the face of the complaint for allegations that the plaintiff's injuries are due to the defendant's failure to provide or pay for certain benefits, or statements that a certain treatment is a benefit due under an employee benefit plan. See Spear v. Richard J. Caron Foundation, No. CIV. A. 99-0706, 1999 WL 768299, at \*2 (E.D.Pa. Sept. 28, 1999); DeLucia v. St. Luke's Hosp., No. CIV. A. 98-6446, 1999 WL 387211, at \*10-11 (E.D.Pa. May 25, 1999); Miller, 1998 WL 272167, at \*5; but see Lazorko v. Pennsylvania Hosp., No. CIV. A. 96-4858, 1998 WL 405055, at \*4 (E.D.Pa. June 30, 1998).

The Court concludes that the essence of Plaintiff's claims against USHC deal with USHC's responsibility for the substandard care Plaintiff received at Livengrin and the abuse she suffered at Tolentino's hands. Plaintiff does not allege that USHC refused to

cover a twenty-eight day inpatient program or that such a program is a benefit due under the plan. Rather, Plaintiff contests the medical propriety in failing to recommend placement in such a program and in selecting Livengrin as the care provider. Thus, the Complaint primarily attacks the quality of the medical benefits USHC provided to Berger. Any language indicating otherwise merely relates historical or contextual facts peripheral to Plaintiff's main claims. The Court reads the Complaint's allegations regarding USHC's disincentive policy as challenging the quality of medical care provided. See DeLucia v. St. Luke's Hosp., No. Civ. A. 98-6446, 1999 WL 387211, at \*4 (E.D.Pa. May 25, 1999). Thus, Plaintiff's claims under Counts II and VIII are not completely preempted by ERISA section 502(a).

USHC next argues that Count XI states a claim for breach of fiduciary or contractual duty that is completely preempted under either 29 U.S.C. § 1132(a)(1)(B) or 29 U.S.C. § 1132(a)(2),(3) (1994). The Court disagrees. Count XI does not request recovery of "benefits due ... under the rights of [her] plan." 29 U.S.C. § 1132(a)(1)(B) (1994). Similarly, the count seeks neither equitable relief for violations of ERISA or the plan's terms, see 29 U.S.C. § 1132(a)(3) (1994), nor the disgorgement of profits made from a personal breach of the fiduciary duties described in the statute. See Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-43 (1985)(interpreting 29 U.S.C. §§ 1109, 1132(a)(2)). The essence

of the count relates to USHC's failure to provide competent care.

Lastly, USHC argues that courts have traditionally construed claims brought pursuant to Pennsylvania's bad faith insurance statute, 42 Pa. Cons. Stat. Ann. § 8371 (West 1999), to be preempted by ERISA. The Court rejects USHC's position because it confuses defensive preemption under ERISA section 514(a) with complete preemption under section 502(a).<sup>3</sup> Only the latter creates removal jurisdiction. Dukes, 57 F.3d at 355. Section 514(a) preemption is a substantive defense, U.S. Healthcare, 193 F.3d at 160, which does not by itself create removal jurisdiction, Dukes, 57 F.3d at 355. Hence, the district court lacks removal jurisdiction over state law claims that fall outside of the scope of section 502 even if they are preempted by section 514(a). Id.

Contrary to USHC's assertion, courts in this district have only interpreted the bad faith statute to be subject to section 514(a) preemption, not complete preemption. See Garner v. Capital Blue Cross, 859 F. Supp. 145, 147-48 (M.D.Pa.), aff'd, 52 F.3d 314 (3d Cir.), cert. denied, 516 U.S. 870 (1995); Tutolo v.

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<sup>3</sup>Section 514(a) states ERISA's preemptive effect as follows:  
Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede 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.

29 U.S.C. § 1144(a) (1994).

Independence Blue Cross, No. CIV. A. 98-CV-5928, 1999 WL 274975, at \*2-3 (E.D.Pa. May 5, 1999)(Kelly, J.)(listing cases). Furthermore, Count XIII's allegations mirror those made in Counts II and V by challenging the quality of the medical benefits USHC provided. Thus, for the reasons previously discussed, Count XIII is not subject to complete preemption under section 502(a).

Since complete preemption, and hence removal jurisdiction, is proper only where an ERISA plan beneficiary challenges the administrative denial of a medical benefit due under the plan, rather than the soundness of medical decisions made during the course of treatment, there is no complete preemption in this case. Accordingly, the Court does not have jurisdiction over this action pursuant to 28 U.S.C. § 1331, and section 502(a) of ERISA, 29 U.S.C. § 1132(a). The Court, therefore, grants Plaintiff's Motion and remands this action to the Court of Common Pleas of Berks County.

An appropriate Order follows.

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O R D E R

**AND NOW**, this day of March, 2000, upon consideration of Plaintiff's Motion to Remand (Doc. No. 5), and Defendant's Response thereto (Doc. No. 6); and Defendant's Motion to Dismiss Counts II, V, VIII, IX, XIII (Doc. No. 2), and Plaintiff's Response thereto (Doc. No. 4), **IT IS HEREBY ORDERED** that Plaintiff's Motion is **GRANTED** and the above-captioned case is **REMANDED** to the Court of Common Pleas of Berks County. Defendant's Motion is **DENIED** as moot.

BY THE COURT:

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John R. Padova, J.