

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

ARLENE GINSBERG and )  
JAMES GINSBERG ) CIVIL ACTION  
 )  
v. )  
 )  
INDEPENDENCE BLUE CROSS and ) NO. 01-66  
QCC INSURANCE COMPANY )

**MEMORANDUM**

**Padova, J.**

**March , 2001**

This matter arises on Plaintiffs Arlene and James Ginsberg’s Motion to Remand this Action to State Court. For the reasons that follow, the Court denies Plaintiffs’ Motion, and grants Plaintiff 20 days within which to file an amended complaint.

**I. Background**

Plaintiffs Arlene and James Ginsberg originally filed the instant suit in the Court of Common Pleas of Philadelphia County. Plaintiffs allege that Defendants Independence Blue Cross and QCC Insurance Company denied, unjustly and in bad faith, health insurance claims for Arlene Ginsberg’s treatment for Lyme disease. The insurance policy is a group plan for employees of Recreational Concepts, Inc. (“RCI”). James Ginsberg is a 50-percent shareholder in RCI. Arlene Ginsberg is his wife.

Defendants removed the case to federal court on the basis that it is covered by the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001, et seq., and that the claims are therefore preempted by federal law. Plaintiffs contend that ERISA does not govern,

because James Ginsberg is an employer, and not an employee under the statute's definition. Mr. Ginsberg's status, and therefore his ability to bring a suit under ERISA, is the sole question with respect to whether ERISA governs this action.<sup>1</sup>

## **II. Legal Standard**

Under the federal removal statute, a "civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States." 28 U.S.C.A. § 1441(a) (West 1994). Though ordinarily the well-pleaded complaint rule requires that a federal question be apparent on the face of a non-diversity complaint removed to federal court, there are certain areas of the law that Congress has so completely pre-empted that any civil claims raised in the area are necessarily federal in character. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67 (1987). A claim to recover benefits due under an ERISA employee benefit plan is one such claim. Id.; Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 354 (3d Cir. 1995). As the removing parties, Defendants bear the burden of establishing the propriety of removal, and thus of establishing that the insurance plan in question is an ERISA plan. See Dukes, 57 F.3d at 350.

## **III. Discussion**

### **A. Standing Under ERISA**

Under ERISA, "A civil action may be brought – (1) by a participant or beneficiary . . . 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." 29 U.S.C.A. §

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<sup>1</sup>Plaintiffs do not dispute that the plan itself is an employee welfare benefit plan under ERISA.

1132(a)(1)(B) (West 1999). A participant is “any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.” 29 U.S.C.A. § 1002(7). A “beneficiary” is “a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.” 29 U.S.C.A. § 1002(8).

Plaintiffs contends that Mr. Ginsberg is an employer rather than an employee. Under the plain language of the statute, an individual must be an employee or former employee in order to bring suit as a plan participant under ERISA. 29 U.S.C.A. § 1002(7). Thus, whether or not Mr. Ginsberg is regarded as an employee is a factor in determining whether the Plaintiffs are participants in the plan, and thus whether they have standing to file suit under ERISA.

To determine whether an individual is an employee, the Court applies common law rules of agency. Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992). The inquiry may involve consideration of such factors as the location of the work; the duration of the relationship between the parties; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; and the tax treatment of the hired party. Id. (citing Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)). The facts set forth in Plaintiff's affidavit establish that he is an employer rather than an employee. Plaintiff holds 50 percent of the shares of the company RCI, a corporation incorporated under the laws of Pennsylvania. Pl.'s Mem. Ex. B (“Ginsberg Aff.”) ¶¶ 3-5. He serves as Vice President, Secretary, and member of the Board of Directors. Id. The only other shareholder in RCI is Alan

Bruck, who holds the other 50 percent of the shares and serves as President and CEO. Id. ¶ 6. Plaintiff does not regularly work in the office, and has the power to hire and fire employees. Id. ¶¶ 8, 11-13. He receives dividend or split profits directly, and the only other compensation he receives is \$10,000 a year in payments that go directly to pay health insurance premiums. Id. ¶ 16.

Defendants provide no evidence to contradict Plaintiff's claims. Rather, Defendants contend that though Plaintiff may be an employer for general purposes, he is an employee under the definition of employee in the plan itself. Def.'s Resp. Ex. A ("Personal Choice Group Contract") at 2 (defining eligible person as "an Employee; defined as: (1) any person specified by the Group as eligible to apply for coverage and who signs the Application."). Defendants' position, however, contradicts the rule in Darden, which states that common law rules govern the definition of employee for ERISA purposes. Adopting Defendants' rule, and thus using the definition of employee in the insurance contract rather than under common law rules, would in effect allow parties to contract around the Darden test for determining who is an "employee" for ERISA purposes.

However, Defendants are correct, albeit for a different reason, that Mr. Ginsberg's status as an employer under common law rules does not bar him from having standing to bring suit under ERISA. Darden was limited to the question of whether the plaintiff was disqualified as a participant by virtue of her status as an employer rather than an employee. Darden, 503 U.S. at 320. Darden did not, however, explore whether a party must be an employee in order to be a beneficiary of a plan. See Petersen v. American Life & Health Ins. Co., 48 F.3d 404, 409 (9th Cir. 1995).

Plaintiffs assert that the definitions of participant and beneficiary "make it clear that to be protected by an ERISA regulated benefit plan one must be either an employee or former employee, or a dependent of that employee or former employee." Pl.'s Mem. at 9 (emphasis omitted). With

respect to the definition of a beneficiary, however, the United States Court of Appeals for the Third Circuit has ruled to the contrary, and has held explicitly that a beneficiary can include partner-employers who are designated to receive benefits under an employee welfare benefit plan. Wolk v. UNUM Life Ins. of Am., 186 F.3d 352, 353-54 (3d Cir. 1999), cert. denied, 528 U.S. 1076 (2000). Wolk involved an attorney and former corporate tax partner who filed suit against the defendant insurance company for denying her disability benefits claim. She argued that her claims were not preempted by ERISA, because she did not have standing to pursue a claim by virtue of her status as a partner-employer. The court disagreed, and held that a partner-employer who shares coverage with employees under an employee welfare benefit plan qualifies as a beneficiary with standing to bring an ERISA suit. Id. at 355-56. The court explained that “to hold otherwise would create the anomaly of requiring some insureds to pursue benefit claims under state law while requiring others covered by the identical policy to proceed under ERISA. Such a scenario would frustrate Congress’s intent of achieving uniformity in the law governing held benefits.” Id. at 357; see also Petersen, 48 F.3d at 409 (“We conclude . . . that any person designated to receive benefits from a policy that is part of an ERISA plan may bring a civil suit to enforce ERISA.”)

Thus, in this case, Mr. Ginsberg’s status as an employer does not foreclose the possibility that he is also a beneficiary under an ERISA plan. Plaintiffs do not dispute that he and Mrs. Ginsberg are entitled to benefits under the plan; in fact, the instant suit itself is an attempt to recover benefits to which Mrs. Ginsberg claims she is entitled. The Court concludes that Plaintiffs are beneficiaries within the purview of ERISA.

#### B. Preemption

Having concluded that the Plaintiffs fall under the purview of ERISA, the remaining question

with respect to the propriety of removal is whether Plaintiffs' claims are preempted. The complete preemption doctrine applies to state law causes of action that fit within the scope of ERISA's civil enforcement provision contained in section 502. Metropolitan Life, 481 U.S. at 64-66; Dukes, 57 F.3d at 354-55. Complete preemption under ERISA section 502(a) is a jurisdictional concept. In re U.S. Healthcare, Inc., 193 F.3d 151, 160 (3d Cir. 1999). Only state law claims that are completely preempted and that fall within the scope of section 502 are removable and subject to dismissal in federal court. In re U.S. Healthcare, 193 F.3d at 160.

ERISA also provides for a second type of preemption, under section 514(a).<sup>2</sup> Dukes, 57 F.3d at 355. Section 514(a) preemption, or express preemption, is a substantive concept that governs the applicable law, which does not by itself create removal jurisdiction. Id. It is important to distinguish between complete preemption, which governs the jurisdictional inquiry, and express preemption, which is a substantive concept. In re U.S. Healthcare, 193 F.3d at 160. With respect to state law claims that fall outside the scope of section 502, the district court lacks removal jurisdiction over such claims, even if they are preempted by section 514(a). Id. In such a case, the district court only has power to remand such claims to the state court. Id.

To consider whether the claims stated are completely preempted, the Court considers whether they "fall within the scope of" ERISA's civil-enforcement provisions. Dukes, 57 F.3d at 355. The Third Circuit distinguishes between claims regarding the quantity and the quality of the benefits due

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<sup>2</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).

under a plan. In re U.S. Healthcare, 193 F.3d at 161-63. Quantity of care claims are those that involve 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. Id. at 162. Quality of care claims are those that seek to hold a defendant liable for its role as the arranger of medical treatment whether in terms of its decisions about the treatment of individual plaintiffs or adoption of certain treatment policies. In re U.S. Healthcare at 162-63. Only the former, quantity claims, are completely preempted under ERISA section 502(a). Id. at 162. Claims about the quality of provided service are not completely pre-empted.; the district court lacks removal jurisdiction over such claims. Id. at 162-63.

Plaintiffs bring claims for bad faith, breach of fiduciary duty, and breach of contract. The breach of contract and breach of fiduciary duty claims are completely preempted. See 29 U.S.C. §1132(a)(1)(B); see Kolb v. Livengrin Foundation, Inc., Civil Action No. 92-1703, 1992 U.S. Dist. LEXIS 17172, at \*12 (E.D. Pa. Nov. 9, 1992). The declaratory relief claim is also completely preempted. See Norris v. Continental Casualty Co., CIVIL ACTION No. 00-1723, 2000 U.S. Dist. LEXIS 9163, at \*4 (E.D. Pa. June 29, 2000). Thus, removal is proper, and the Court has jurisdiction over the claims.<sup>3</sup> All four counts are subject to dismissal on a motion to dismiss, as they are either completely or expressly preempted. See Norris, 2000 U.S. Dist. LEXIS 9163, at \*3 (dismissing claims subject to complete preemption); Asprino v. Blue Cross & Blue Shield Ass'n, Civil Action 96-7788, 1997 U.S. Dist. LEXIS 6708, at \*4 (E.D. Pa. May 7, 1997) (dismissing bad faith claim as expressly pre-empted under §514(a)).

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<sup>3</sup>The Court has supplemental jurisdiction over the third claim of bad faith. See Cecchanecchio v. Continental Casualty Co., No.CIV.A.00-4925, 2001 WL 43783, at \*4 n.5 (E.D. Pa. Jan. 19, 2001) (citing Davis v. SmithKline Beecham Clinical Labs., Inc., 993 F. Supp. 897, 899 (E.D. Pa. 1998)).

For all the above reasons, Plaintiffs' Motion to Remand is denied. Plaintiffs are further granted 20 days from the date of this Memorandum and Order within which to file an Amended Complaint. An appropriate Order follows.

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INDEPENDENCE BLUE CROSS and ) NO. 01-66  
QCC INSURANCE COMPANY )

**ORDER**

**AND NOW**, this            day of March, 2001, upon consideration of Plaintiff's Motion to Remand to the Court of Common Pleas of Philadelphia County (Doc. No. 2), all supporting submissions, and any responses thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**. It is further **ORDERED** that Plaintiff may file an amended complaint under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. on or before April 5, 2001.

BY THE COURT:

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John R. Padova, J.