

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

HOWARD MEDICAL, INC. t/a	:	CIVIL ACTION
ADVANCE AMBULANCE SERVICE,	:	
	:	NO. 00-5977
Plaintiff,	:	
	:	
v.	:	
	:	
TEMPLE UNIVERSITY HOSPITAL, t/a	:	
TEMPLE UNIVERSITY DIALYSIS, <i>et al.</i>	:	
	:	
Defendants	:	

MEMORANDUM AND ORDER

YOHN, J.

JANUARY____, 2002

On October 19, 2000, plaintiff, Howard Medical, Inc. (“Howard Medical”), a Medicare ambulance service provider, brought suit against the following Medicare approved dialysis centers: Temple University Hospital t/a Temple University Dialysis (“Temple University”), University of Pennsylvania Hospital (“University of Pennsylvania”), Belmont Court Dialysis Inc. (“Belmont Court”), Delaware County Memorial Hospital (“Delaware County”), BMA Dialysis, Inc. d/b/a/ Parkview Outpatient Dialysis (“Parkview”), Gambro Healthcare, Inc. (“Gambro”)¹, BMA Dialysis Inc. (“BMA”), BMA Dialysis Inc. d/b/a F.M.C. Abington Dialysis Center (“Abington”) and Mount Airy Kidney Center (“Mount Airy”)² (collectively, “defendants”).

¹ In the complaint, Gambro was erroneously sued as Community Dialysis Centers, Inc.

² Mount Airy has never been served by Howard Medical.

Howard Medical's complaint was initially filed in the Court of Common Pleas of Philadelphia County, alleging unjust enrichment and negligent misrepresentation. On November 22, 2000, the action was removed to the United States District Court for the Eastern District of Pennsylvania. As a basis for removal, defendants alleged that Howard Medical's state law claims were preempted by Title XVII of the Social Security Act, commonly referred to as the Medicare Act. 42 U.S.C. § 1395 *et. seq.* Defendants subsequently filed a motion to dismiss Howard Medical's complaint on the basis that the Medicare Act required Howard Medical to exhaust its administrative remedies prior to bringing suit in a judicial court, or in the alternative, that Howard Medical's state law claims were insufficient as a matter of law. On November 1, 2001, this court held that exhaustion was not required because the Medicare Act did not preempt Howard Medical's state law claims, but that the unjust enrichment claim failed as a matter of law. As a result, the only remaining claim in this action is a state law claim for negligent misrepresentation.

Presently before this court are Howard Medical's memoranda in opposition and BMA's memoranda in support of this court's continuing exercise of federal jurisdiction.³ Because the resolution of Howard Medical's negligent misrepresentation claim does not implicate a substantial disputed question of federal law, I find that this state law action does not "arise under" federal law pursuant to 28 U.S.C. § 1331.⁴ As a result, this court does not have federal jurisdiction over Howard Medical's negligent misrepresentation claim, and this action will be

³ Defendants, Temple University, Belmont Court, and Gambro have joined in BMA's memorandum in support of federal jurisdiction.

⁴ 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

remanded to the Court of Common Pleas of Philadelphia County.

STANDARD

Federal jurisdiction in this case turns on whether Howard Medical’s state law negligent misrepresentation claim arises under federal law pursuant to 28 U.S.C. § 1331⁵. The “vast majority” of cases that arise under federal law are cases in which a federal law creates the cause of action. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). However, a state law cause of action may arise under federal law “where the vindication of a right under state law necessarily turn[s] on some construction of federal law.”*Id.* The Supreme Court has cautioned that “the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.” *Id.* at 813-14. In order for a federal court to have jurisdiction of a state law action, the resolution of such action must raise a “substantial disputed question of federal law.”⁶ *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983). The existence of this federal question must be clear from the face of the plaintiff’s “well-pleaded” complaint. *Merrell Dow*, 478 U.S. at 808. “A defense that raises a federal question is

⁵ As Howard Medical is a Pennsylvania corporation and at least some of defendants are Pennsylvania corporations, the parties do not dispute that there can be no diversity jurisdiction in this action.

⁶ There is no single definition of what constitutes a federal question. The Supreme Court has provided that the existence of a federal question depends on “an evaluation of the *nature* of the federal interest at stake.” *Merrell Dow*, 478 U.S. at 814 n. 12. (emphasis in original). Beyond that, the Supreme Court has not elaborated on the inquiry that must be conducted to determine whether a federal question is substantial enough to confer federal jurisdiction. Because the Supreme Court has left the scope of federal question jurisdiction relatively undefined, commentators have found that district courts are left with great discretion in determining whether the nature of the federal interest at stake merits federal jurisdiction for the state law claim. *See e.g.*, Edwin Chemerinsky, *Federal Jurisdiction* §5.2 (3rd ed. 1999).

inadequate to confer federal jurisdiction.” *Id.*

DISCUSSION

A negligent misrepresentation claim is a garden variety state law cause of action. As such, allegations of negligent misrepresentation do not normally confer federal jurisdiction. Federal jurisdiction of a negligent misrepresentation claim only exists if the resolution of the claim raises a substantial federal issue. Defendants argue that a substantial federal question is present in this action, as the resolution of the justifiable reliance and injury components of Howard Medical’s negligent misrepresentation claim⁷ requires a consideration of duties and standards established by the Medicare Act.

I. Justifiable Reliance

Defendants contend that under the Medicare Act, Howard Medical, as an ambulance service provider, has a non-delegable duty to verify the medical necessity of transporting patients by ambulance. By relying on defendants’ representations that ambulance transportation had been certified as medically necessary, instead of assessing medical necessity on its own, defendants maintain that Howard Medical abdicated its federally imposed duty, and as a result cannot justifiably rely on defendants’ representations of medical necessity. Defendants assert that

⁷ In order to maintain an action for negligent misrepresentation, the plaintiff must prove: (1) a misrepresentation of material fact; (2) the person making the representation knew or should have known of the falsity of the representation; (3) intent of the representer to induce another to act on the misrepresentation; and (4) resulting injury on the party acting in justifiable reliance. *Gibbs v. Ernst* 647 A.2d 882, 890 (Pa. 1994). In addition, as with any action in negligence, the plaintiff must show that the resulting injury was a direct and proximate cause of the representer’s negligence. *Allegheny Gen. Hosp. v. Philip Morris Inc.*, 228 F.3d 429, 445 (3d Cir. 2000).

because the question of justifiable reliance requires a consideration of whether Howard Medical fulfilled its duties under the Medicare Act, this court should retain jurisdiction of Howard Medical's state law negligent misrepresentation claim.

Defendants' contention must be rejected. First, it is not clear from the sources cited in defendants' brief that Howard Medical has a non-delegable duty under the Medicare Act to assess medical necessity. The Pennsylvania Ambulance Billing Guide cited by defendants simply provides that ambulance companies have a responsibility "to assess the patient's medical necessity status and take the necessary and conclusive steps to substantiate their status prior to rendering services." Ambulance Billing Guide § i, Medical Necessity, Pennsylvania Medicare Fiscal Intermediary, 2001 *available at* <http://www.xact.org/professionals/bguides/pf-ambulance.shtml>. While this guideline establishes Howard Medical's responsibility to assess the medical necessity of ambulance transportation, it does not establish Howard Medical's duty to make this assessment independently, rather than by relying on the representations of the health care providers for whose patients the service is provided. The Medicare regulation cited by defendants does not prescribe the manner in which an ambulance service provider must make its assessment of medical necessity. The regulation simply deals with the responsibility of an ambulance service provider to provide documentation of medical necessity to the carrier appointed to review its claim for Medicare coverage. Medicare Program; Coverage of Ambulance Services and Staff Requirements, 64 Fed. Reg. 3637, 3639 (Jan. 25, 1999). Thus, defendants have provided evidence that Howard Medical had a responsibility to assess the medical necessity of ambulance transportation for the patients, but defendants have not clearly established that this was a non-delegable duty that barred Howard

Medical from considering defendants' representations in making this assessment.

Second, although the existence of a non-delegable duty may present defendants with a defense to its potential liability for negligent misrepresentation, the issue here is not what defenses defendants may raise to dispute its potential liability. Rather, the issue is whether this court has subject matter jurisdiction of Howard Medical's state law negligent misrepresentation claim. The existence of federal jurisdiction must be determined by reference to Howard Medical's complaint and not by reference to defenses that defendants may raise.

In its complaint, Howard Medical alleges that defendants misrepresented that a "physician had pre-determined [that] ambulance transportation was necessary" and that written documentation of medical necessity would be forthcoming. Compl. ¶ 8. Howard Medical further alleges that defendants knew or should have known of the requirements set forth by the Medicare Act and its regulations as to what constitutes a medical necessity. Compl. ¶¶ 9, 38. Howard Medical avers that it agreed to transport defendants' patients to each defendant dialysis center only after it was assured that ambulance transportation was medically necessary. Compl. ¶ 39. Finally, Howard Medical alleges that defendants, as the treating dialysis centers, were in a superior position to assess the medical necessity of transporting its patients by ambulance, and therefore Howard Medical was justified in relying on defendants' representations. Compl. ¶¶ 17, 40. Thus, to establish its justifiable reliance, Howard Medical need only prove that defendants had superior knowledge and ability to assess the medical necessity of transporting its patients by ambulance and that plaintiff relied on defendants' representations. As this proof does not require Howard Medical to demonstrate that its duties under the Medicare Act were fulfilled, the resolution of the justifiable reliance element does not raise a substantial, disputed issue of federal

law.

II. Injury Element

Defendants contend that Howard Medical can only prove that it was injured if it can show that its claim for Medicare benefits would ultimately have been denied even if Howard Medical had exhausted its administrative remedies, as provided for by the Medicare Act. Defendants also claim that to demonstrate injury Howard Medical must prove that its Medicare claims were denied solely for lack of medical necessity and that this proof requires a consideration of the medical necessity requirements as set forth in the Medicare regulations. Defendants argue that because proof of injury is “inextricably intertwined” with an application of the Medicare Act, Howard Medical’s negligent misrepresentation claim raises federal questions that allow this court to retain jurisdiction over the state law cause of action.

When the Secretary of the Health and Human Services denied Howard Medical Medicare coverage, Howard Medical could have brought an action in federal court against the Secretary for review of this determination. In order for there to be federal jurisdiction for such an action, Howard Medical must first have exhausted its administrative remedies. 42 U.S.C. §§ 405(g), 1395ff(a)-(b) (providing for judicial review of denials of Medicare benefits after exhaustion of administrative remedies). Because Howard Medical did not pursue its administrative avenues of relief before bringing the present action, this court would be without jurisdiction of this action if Howard Medical’s claim was that its Medicare coverage was wrongfully denied. However, an action against the Secretary for the wrongful denial of Medicare benefits is not Howard Medical’s exclusive remedy. Here, Howard Medical does not contest the denial of its Medicare

benefits; rather, Howard Medical brings this action against defendants to gain relief for the damages it suffered as a result of defendants' misrepresentations. Howard Medical claims that it would not have provided its services except for defendants' misrepresentations that ambulance transportation was medically necessary. Because the Medicare Act does not require exhaustion of administrative remedies for tort actions such as this one, defendants' argument that Howard Medical can only show injury if its claim for Medicare benefits would have been denied after exhaustion is without merit.⁸

Moreover, contrary to defendants' contention, proof of Howard Medical's injury does not require that a lack of medical necessity be the sole basis for the denial of Howard Medical's Medicare benefits. Proof of injury in this negligent misrepresentation claim only requires that Howard Medical show that defendants' alleged misrepresentations that medical necessity documentation had been prepared and would be forthcoming was a direct and proximate cause of its injury. *Gibbs v. Ernst* 647 A.2d 882, 890 (Pa. 1990) . Causation will be shown as long as defendants' misrepresentations of medical necessity were a substantial factor in causing Howard Medical's injury. Of course, defendants may defend against its misrepresentation liability by raising reasons other than a lack of medical necessity for the denial of Howard Medical's Medicare coverage.

Howard Medical alleges that based on defendants' representations that ambulance transportation was medically necessary and that documentation of such would be forthcoming, it

⁸ This court has already considered and rejected the argument that Howard Medical must exhaust its administrative remedies prior to bringing this action in a judicial court. In an order dated November 1, 2001, this court found that the Medicare Act did not preempt Howard Medical's state law claims and that as a result, Howard Medical was not required to exhaust its administrative remedies prior to bringing this action.

provided defendants' patients with ambulance transportation. Howard Medical claims that in the absence of such representations it would not have provided defendants' patients with its services. Howard Medical further alleges that because it did not receive such documentation from defendants as had been promised, it was unable to provide the requisite certificate of medical necessity to HighMark⁹ and its claim for Medicare coverage was denied.¹⁰ As a result, Howard Medical was never reimbursed for the expenses it incurred in rendering ambulance services to defendants' patients. Howard Medical's resulting out-of-pocket loss is clearly an injury.

Defendants may raise as a defense that it was medically necessary to transport its patients by ambulance, and that as a result, it did not misrepresent the existence of medical necessity. However, as stated above, federal jurisdiction cannot be based solely on the presence of a federal issue raised in a defense. Because Howard Medical can prove its injury without raising a substantial issue of federal law, a resolution of the injury element of Howard Medical's negligent misrepresentation claim does not confer federal jurisdiction of Howard Medical's state law cause of action.¹¹

⁹ HighMark was the carrier appointed to review Howard Medical's claim for Medicare benefits.

¹⁰ Under the Medicare Act, a physician's certification that the ambulance services provided are medically necessary is required before Medicare reimbursement is available. 42 U.S.C. § 1395n(a)(2).

¹¹ The Supreme Court's holding in *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804 (1986) further supports this court's finding that there is no basis for federal jurisdiction in the present action. In *Merrell Dow*, plaintiffs filed an action in state court, alleging that their children were born with deformities as a result of their mothers' ingestion of the drug Benedectin during pregnancy. 478 U.S. at 805. One of the state law counts asserted that Benedectin was misbranded in violation of the Federal Food, Drug and Cosmetic Act ("FDCA") and that this violation constituted a rebuttable presumption of negligence. *Id.* at 805-6. Defendant asserted federal question jurisdiction and removed the claim to federal court. *Id.* at 806. The Supreme Court held

CONCLUSION

Proof of the justifiable reliance and injury elements of Howard Medical's negligent misrepresentation claim does not raise any substantial, disputed questions of federal law that provide a basis for federal jurisdiction of this state law action. That defendants may defend against its potential negligent misrepresentation liability by raising Medicare governed standards or a Medicare imposed duty is not sufficient to confer federal jurisdiction of Howard Medical's state law negligent misrepresentation claim. Accordingly, I find that this court lacks subject matter jurisdiction and I will remand this action to the Court of Common Pleas of Philadelphia County.

An appropriate order follows.

that plaintiff's state law claim of negligence that was based a violation of the FDCA, did not arise under federal law because the FDCA did not provide for a private, federal cause of action. *Id.* at 817.

In *Merrell Dow*, the court found that when Congress has precluded private federal remedies, the "presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer jurisdiction." *Id.* at 814. Here, there is even less of a substantial federal issue raised by Howard Medical's negligent misrepresentation claim. Like the FDCA, the Medicare Act does not provide for a private right of action. However, unlike the state cause of action considered by the Supreme Court in *Merrell Dow*, which alleged a violation of the FDCA, Howard Medical's negligent misrepresentation claim is not based on an alleged violation of the Medicare Act. Instead, standards and duties imposed by the Medicare Act are raised by defendants as possible defenses to its negligent misrepresentation liability. Considering that when the federal statute does not provide for a private right of action, the Supreme Court found allegations of negligence due to violation of a federal statute to be insufficient to confer federal jurisdiction, it follows that when a federal statute is not raised in plaintiff's complaint, but only by defendants as part of a defense strategy, the federal issue raised by the state law claim is not substantial enough to confer federal jurisdiction. As such, the Supreme Court's decision in *Merrell Dow* instructs this court to find an absence of federal jurisdiction in the present action.

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v.	:	
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TEMPLE UNIVERSITY DIALYSIS, <i>et al.</i>	:	
	:	
Defendants	:	

ORDER

And now this day of January, 2002, upon consideration of plaintiff's memoranda in opposition to federal jurisdiction (Doc. Nos. 43, 56); BMA's memoranda in support of federal jurisdiction (Doc. Nos. 54, 63); Temple Medical's joinder in BMA's memoranda (Doc. No. 51); Belmont Court's joinder in BMA's memoranda (Doc. No. 58); and Gambro's joinder in BMA's memoranda (Doc. No. 59); this court concludes that it does not have subject matter jurisdiction of this action, and it is therefore ORDERED that this action is remanded to the Court of Common Pleas of Philadelphia County.

William H. Yohn, Jr., Judge