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

DONNA HORVATH,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 00-0416
KEYSTONE HEALTH PLAN EAST, INC.,	:	
Defendant.	:	

MEMORANDUM AND ORDER

BUCKWALTER, J. February 22, 2002

Presently before the Court is Defendant's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). For the reasons stated below, Defendant's motion is granted.

I. BACKGROUND

Donna Horvath ("Ms. Horvath" or "Plaintiff") is and has been enrolled in a health plan operated by Keystone Health Plan East, Inc. ("Keystone" or "Defendant") as a benefit made available to her by her employer, Berger & Montague.[1] Ms. Horvath is the benefits administrator for the firm. In this one-count ERISA action, Ms. Horvath alleges that Keystone violated its fiduciary duty imposed by Section 404 of ERISA, 29 U.S.C.

[1] Berger & Montague is the law firm representing Ms. Horvath in the instant action.

§ 1104. Ms. Horvath claims that the failure of her Health Maintenance Organization ("HMO"), Keystone, to disclose information regarding its physician compensation scheme, including the use of physician incentives, is a breach of ERISA fiduciary duty.

Under the general scheme of managed health care, HMOs use primary-care doctors as gatekeepers who direct patients to more expensive specialists only when necessary. Managed care plans typically enter into contracts with their physicians and pay member doctors a set amount every month for each patient in the program under the doctor's care, regardless of how much care the physician provides to the patient. This fixed fee per patient is referred to as capitation. In addition, primary-care doctors often receive financial incentives or bonuses "rewarding them for decreasing utilization of health-care services, and penalizing them for what may be found to be excessive treatment." Pegram v. Herdrich, 530 U.S. 211, 219, 120 S. Ct. 2143, 2149, 147 L. Ed. 2d 164 (2000) (citations omitted). HMOs claim physician incentives are cost-controlling measures kept in check by the physicians "professional obligation to provide covered services with a reasonable degree of skill and judgment in the patient's interest." Id. Ms. Horvath claims that physician incentives set up a system whereby doctors are paid more when they provide less care and paid less when they provide more care. Consequently, she alleges, these incentives compromise the independent medical judgment of primary care physicians.

In her opposition motion for summary judgment, Ms. Horvath alleges that Keystone misrepresents the scope of insurance coverage it sells when it states to its subscribers that they are covered for medically necessary treatments, tests and hospitalizations and that physicians exercise independent medical judgment in prescribing medical treatment. According to Ms. Horvath, this information is misleading, false or incomplete because Keystone's contractual relationships with its physicians impose an array of restrictions which are intended to, and in certain instances do in fact, discourage physicians from providing optimal medical care. In other words, Keystone's contract with its doctors – making them gatekeepers for coverage while paying them more to prescribe less care – necessarily means that the scope of insurance is not based purely on medical factors; it is instead based upon a combination of medical and financial factors. Ms. Horvath argues that the fiduciary duties imposed on Keystone by ERISA prohibits such misrepresentations, and therefore Keystone is liable for failing to disclose its physician incentive program to its subscribers.

Ms. Horvath seeks to compel Keystone to disclose its physician compensation scheme and seeks restitution for losses she has suffered in the form of the alleged difference between what she actually paid for the insurance benefits she obtained from Keystone and the supposedly smaller amount she would have paid had the incentives been disclosed.

II. LEGAL STANDARD

A motion for summary judgment shall be granted if the Court determines "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources . . . must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976).

III. DISCUSSION

Ms. Horvath alleges that Keystone violated its fiduciary duties imposed by Section 404 of ERISA, 29 U.S.C. § 1104, because Keystone misrepresented the scope of insurance coverage it provides by failing to disclose its physician compensation scheme, which includes financial incentives to prescribe less care to Keystone subscribers.

A. Fiduciary Status

In every case charging breach of ERISA fiduciary duty, the threshold question is whether that person was performing a fiduciary function when taking the action subject to complaint. Fiduciary status is acquired under ERISA in one of three ways: (1) being named as the fiduciary in the instrument establishing the employee benefit plan, 29 U.S.C. §1102(a)(2); (2) being named as a fiduciary pursuant to a procedure specified in the plan instrument, e.g., being appointed an investment manager who has fiduciary duties toward the plan, 29 U.S.C. § 1102(a)(2); 29 U.S.C. § 1002(38); and (3) being a fiduciary under the provisions of 29 U.S.C. § 1002(21)(A), which provides that a person is a fiduciary

> with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A); see Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., 93 F.3d 1171, 1179 (3d Cir. 1996). Making reference to section 1002(21)(A)(iii), Ms. Horvath claims that Keystone is a fiduciary because it has discretionary authority over the extent to which physician

incentives are disclosed. In support of this contention, Ms. Horvath points to her complaint, which alleges that Keystone exercises discretion in the determination of the content of those disclosures. Plaintiff argues that the allegation in her complaint is sufficient to establish that Keystone has attained fiduciary status triggering the duty to disclose all material facts regarding its physician compensation scheme.

The nonmovant "cannot simply reassert factually unsupported allegations contained in its pleadings" in order to defeat summary judgment. Williams v. West Chester, 891 F.2d 458, 460 (3d Cir. 1989). However, Keystone does not appear to contest its fiduciary status except by way of footnote in which it cites two cases for the proposition that Keystone is not a fiduciary under ERISA. See Schulist v. Blue Cross of Iowa, 717 F.2d 1127 (7th Cir. 1983) (holding that health insurers were not fiduciaries under ERISA with respect to premiums which they charged); Marks v. Independence Blue Cross, 71 F. Supp. 2d 432 (E.D. Pa. 1999) (holding insurer did not exercise discretion and control over plan or plan's assets sufficient to be a fiduciary).

While neither Plaintiff nor Defendant has skillfully presented argument on this issue, the Supreme Court of the United States appears to give the nod to an HMO acquiring fiduciary status with respect to its duty to disclose physician incentives. See Pegram, 530 U.S. at 228 n.8, 120 S. Ct. at 2154 n.8

("Although we are not presented with the issue here, it could be argued that [an HMO] is a fiduciary insofar as it has discretionary authority to administer the plan, and so it is obligated to disclose characteristics of the plan and of those who provide services to the plan, if that information affects beneficiaries' material interests.").

Nonetheless, the Court need not determine whether and to what extent Keystone is an ERISA fiduciary because it concludes that the circumstances complained of fall outside the scope of any fiduciary relationship that may have existed between Keystone and Ms. Horvath. Thus, any fiduciary obligation that may have existed does not encompass a duty to inform Ms. Horvath of Keystone's physician compensation scheme.

B. Scope of Fiduciary Duty Under Section 404

Section 404(a) provides that an ERISA fiduciary must perform its functions solely in the interest of the beneficiaries of the plan and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). "A fiduciary's duties under ERISA are based both on ERISA, particularly the prudent person standard as set forth in ERISA § 404, 29 U.S.C. § 1104, and on the common law of trusts." Ream v. Frey, 107 F.3d 147, 153 (3d

Cir. 1997). The United States Court of Appeals for the Third Circuit ("Third Circuit") generally holds that one who may have attained a fiduciary status does not have an obligation to disclose all details of its personnel decisions that may somehow impact upon the course of dealings with a beneficiary/client. "Rather, a fiduciary has a legal duty to disclose to the beneficiary only those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." Glaziers, 93 F.3d at 1182; see also Restatement (Second) of Trusts § 173, comment d (1959). Ms. Horvath argues that Keystone's physician compensation scheme is such material information for which Keystone has an affirmative duty to fully disclose, and anything less than full disclosure is misleading to its subscribers.

The Third Circuit has not yet addressed whether ERISA imposes a fiduciary duty to disclose financial incentives in health insurance plans when silence on the matter allegedly constitutes a misrepresentation. While this case does not involve affirmative misrepresentations in the traditional sense, it is clear that "a fiduciary not only has a negative duty not to misrepresent material facts to plan beneficiaries, but also a corresponding affirmative duty to speak 'when the trustee knows that silence might be harmful.'" Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000) (citing Bixler v. Central Pa.

Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300 (3d Cir. 1993)).

We are left with the question to what extent a fiduciary's alleged misinformation or failure to provide information constitutes an actionable breach of fiduciary duty under § 404(a). While not speaking specifically to the disclosure of physician incentives, the Third Circuit has developed a body of law with respect to an ERISA fiduciary's obligation of disclosure. The three cases discussed below track the development of this law.

In one of its earlier pronouncements, the Third Circuit held that an ERISA fiduciary may be held directly liable under section 404(a) for a failure to provide complete and accurate material information to its beneficiaries "once an ERISA beneficiary has requested information from an ERISA fiduciary who is aware of the beneficiary's status and situation[.]" Bixler, 12 F.3d at 1300. "This is so even if that information comprises elements about which the beneficiary has not specifically inquired." Id.

In Bixler, a widow brought suit to recover her husband's medical expenses and death benefits after her husband's employer denied coverage and allegedly engaged in misrepresentations that prevented her from electing to continue the family's medical coverage through COBRA. Shortly after her husband’s death, the widow called her husband’s employer to inquire about a death benefit. The company’s general manager advised the widow that there were no such benefits available. Although this information was accurate as far as the benefits available through her husband’s employer, the widow was entitled to benefits through COBRA, information which the employer’s general manager failed to disclose. The Third Circuit believed summary judgment was not warranted because a material issue of fact existed with respect to whether Bixler’s employer met its fiduciary duty of informing Mrs. Bixler that she could pay for continued coverage:

> [W]e think there is evidence from which a trier of fact could infer that Welsh knew the Bixlers and their situation well enough to be aware of Mr. Bixler's hospitalization and the attendant medical expenses. If Mr. Welsh knew that Mr. Bixler's death left Mrs. Bixler with substantial unpaid medical expenses and that she could receive reimbursement for those expenses under Drivers' plan by signing and returning the COBRA notice that Welsh had sent to her husband, we believe the failure to advise her of the available benefits might be found to be a breach of fiduciary duty despite the fact that her inquiry was limited to the availability of a death benefit.

Therefore, in Bixler, it was only the beneficiary’s special circumstances, if known by the fiduciary, combined with the beneficiary’s specific inquiry that triggered the fiduciary’s duty to disclose.

The Third Circuit subsequently heightened an ERISA fiduciary’s obligations of disclosure in Glaziers, supra, doing away with any requirement that the beneficiary make a specific inquiry. In Glaziers, an employee of a brokerage firm resigned after the firm discovered suspected improprieties in his personal investments. Prior to leaving the firm’s employ, the employee acted as the firm’s representative to the plaintiff employee benefits funds. The firm did not inform the plaintiffs of the circumstances surrounding its consultant’s departure. When the departed employee established his own brokerage firm, the plaintiffs followed him and transferred their funds to the new firm, again with no advice from the brokerage firm of the negative information regarding its former employee. The consultant subsequently stole assets in excess of $500,000 and wasted additional assets in excess of $2,000,000. The Glaziers court stated that “[w]e have never held that a request is a condition precedent to such a duty [to disclose] regardless of the circumstances known to the fiduciary. To the contrary, it is clear that circumstances known to the fiduciary can give rise to this affirmative obligation even absent a request by the beneficiary.” Glaziers, 93 F.3d at 1181.

Therefore, while beneficiary inquiry is no longer required, if it ever was, under Glaziers there still must exist a set of circumstances, which puts the fiduciary on notice that the beneficiary is exposed to a potential harm for which disclosure of certain information known to the fiduciary would protect the beneficiary from making a misinformed and harmful decision with respect to the particular ERISA plan.

Jordan v. Federal Express Corp., 116 F.3d 1005 (3d Cir. 1997), further refined Third Circuit law regarding an ERISA fiduciary's legal duty to disclose by examining the concept of materiality. In Jordan, the plaintiff received a four page letter which provided information pertinent to his interest in disability retirement. The letter failed to mention that post-retirement changes to the participant's retirement plan selection were prohibited. Unaware of the revocability restriction, the plaintiff selected the 50% Joint and Survivor Annuity and designated his wife as the beneficiary, even though they had marital difficulties at the time. The plaintiff learned – only after retirement and divorce – that he could not transfer the benefits of his plan to his new wife, and that the plan was irrevocable.

The Jordan Court first reiterated the law established by Bixler and Glaziers, "a fiduciary has a legal duty to disclose to the beneficiary only those material facts known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection." Jordan, 116 F.3d at 1015. In discussing materiality, the Jordan Court held that a misrepresentation or an omission may rise to a material level if "there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision." Jordan, 116 F.3d at 1015 (quoting In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig., 57 F.3d at 1255, 1264 (3d Cir. 1995)). The Jordan court denied summary judgment on the factual issue of whether the administrator's failure to describe the irrevocability of Jordan's retirement selection constituted a material omission and thus, a breach of its duty to exercise the care, skill, prudence and diligence as required under ERISA.

Therefore, Jordan appears to have streamlined the test announced in Bixler and Glaziers, holding that a breach of fiduciary duty occurs when harm results from information not disclosed to the beneficiary that is "material," (i.e., information that would mislead a reasonable employee in making an adequately informed decision). This streamlined test is appropriate in that the Third Circuit has always held that "the duty to disclose material information is the core of a fiduciary's responsibility." Bixler, 12 F.3d at 1300.

Ms. Horvath's claim that Keystone breached its fiduciary duty under ERISA fails under any Third Circuit test obligating an ERISA fiduciary to disclose information to a beneficiary. First, under Bixler, Keystone, as the party moving for summary judgment, has demonstrated the absence of a genuine issue of material fact on an element of Plaintiff's claim. It is undisputed that Ms. Horvath did not make any type of request or inquiry that would trigger Keystone's obligation to disclose information with respect to physician incentives. This is so despite Keystone's invitation to make available, upon request, a summary of the methodologies used by Keystone to reimburse for health care services, extended to all Keystone subscribers in its Member Handbook, and to Ms. Horvath specifically as benefits administrator of the law firm for which she works, in a letter addressed to the benefits administrator.

Next, under Glaziers, Keystone again has succeeded in demonstrating the absence of a genuine issue of material fact on Plaintiff's claim in that no set of circumstances put Keystone on notice that Ms. Horvath would need protection from making a harmful decision with respect to her health insurance plan.

It appears that Ms. Horvath's theory is that she would not have paid the rate that Keystone charged for its health insurance had she known of Keystone's physician compensation scheme and her misinformed decision to do so was the result of Keystone's misrepresentations in the form of omissions regarding physician incentives. Even if this was a cognizable harm deserving of protection through disclosure under ERISA, there is no factual support for the proposition that Keystone was on notice that its physician incentive scheme exposed Ms. Horvath to making a decision to pay higher rates for health insurance coverage. In the first instance, Ms. Horvath did not pay

Keystone for health insurance. Keystone provided group insurance to Ms. Horvath’s employer, who provided health insurance to its employees at no additional cost or deduction in salary. Not only must the Court infer that Ms. Horvath’s employer could negotiate a better rate for the group insurance it purchased through Keystone, but that had Ms. Horvath’s employer done so, it would have then passed along the savings to its employees.

Additionally, Ms. Horvath has not pressed any claim that Keystone’s omissions had the potential to expose her to incompetent medical treatment that could have been prevented had she known about physician incentives. Ms. Horvath admits that she did not experience any medical injury or deficient healthcare, she has never had any type of treatment that was not covered or made any claim to Keystone that has not been paid. Furthermore, Ms. Horvath does not support her bare assertion that physician incentives cause doctors to prescribe less care than is medically necessary. There is no evidence before the Court that physicians’ financial interests eclipse their professional obligation to provide competent care or causes physicians to abandon their independent medical judgment, forego directing patients to specialists or fail to prescribe medical necessary treatments, tests or hospitalizations, for the purpose of receiving a larger bonus payment from their managed health care organization.

Finally, according to Jordan, it is not apparent why information regarding physician incentives would be considered material to Ms. Horvath. Her employer does not make available any other health plan to its staff. Ms. Horvath does not suggest that she would have chosen to forego subscribing to Keystone's health plan, or chosen to subscribe to another plan at her own expense, had she known that Keystone offered various incentives to its physicians.

Ms. Horvath further admits in her opposition brief that she in no way relied on Keystone's omissions with respect to physician incentives by arguing that reliance on such omissions is not a necessary element of her claim. However, it is implicit in the very concept of materiality that the nondisclosure relates to matter upon which a plaintiff could be expected to rely in determining whether to engage in the conduct in question.

The only influence Ms. Horvath claims that Keystone's omission had on her conduct is her claim that had she known of the existence and particulars of Keystone's physician incentive scheme, she might have questioned a physician's recommendation for a particular service or treatment. However, Ms. Horvath has repeatedly made plain that she does not complain of inferior care and disclaims any injuries arising from failure of Keystone doctors to provide a particular level of medical care. Thus, it is unclear why the knowledge of Keystone's physician compensation scheme would have caused Ms. Horvath to question the satisfactory medical care she was receiving from Keystone. Her hypothetical assertion that she may have questioned a physician's recommendation simply does not demonstrate that there was a substantial likelihood that Keystone's failure to inform her of physician incentives misled her in making adequately informed health coverage decisions.

Additional support to the Court's conclusion that ERISA does not impose a duty to disclose physician incentives can be found in a recent decision decided by a trial court in this district. In Peterson v. Connecticut Gen. Life Ins. Co., No. 00-cv-605, 2000 WL 1708787 (E.D. Pa. Nov 14, 2000), the Honorable Robert F. Kelly dismissed a plaintiff's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), finding that ERISA does not impose a broad fiduciary duty to disclose financial incentives in health insurance plans. The Peterson court reasoned that:

> those Third Circuit cases which have addressed a fiduciary duty to disclose . . . have done so only where a plan participant makes a specific inquiry or where the fiduciary knew of the plaintiff's particular circumstances requiring disclosure and the non-disclosure resulted in a particular injury. Further, while the Third Circuit is arguably willing to expand the protections afforded by ERISA's disclosure provisions, its reluctance to overly burden plan administrators with broad disclosure duties . . . recommends against the imposition of the blanket duty[.]

Peterson, 2000 WL 1708787 at *19.

Peterson further notes two cases outside of this circuit which have addressed the duty of HMOs to disclose physician financial incentives. In Shea v. Esensten, 107 F.3d 625 (8th Cir. 1997), the plaintiff, who was complaining of heart pains, asked his primary care physician whether he should see a heart specialist. His physician advised him not to, but failed to disclose that the type of referral the plaintiff sought was discouraged under the physician compensation arrangement with the plaintiff's HMO. The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") held that this failure to disclose was a breach of fiduciary duty under ERISA. Id. at 629. Specifically, the court held that "[w]hen an HMO's financial incentives discourage a treating doctor from providing essential health care referrals for conditions covered under the plan benefit structure, the incentives must be disclosed and the failure to do so is a breach of ERISA's fiduciary duties." Id. However, while the Shea court did impose the duty to disclose financial incentives, it did so under circumstances in which the nondisclosure followed a specific inquiry by a particular individual. Accord Bixler, supra.

Moreover, in Ehlmann v. Kaiser Found. Health Plan, 198 F.3d 552 (5th Cir. 2000), the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") upheld the district court's dismissal of the plaintiffs' claim that their HMO breached its fiduciary duty under ERISA to disclose its physician financial incentives, even though no request for such information had been made by any plaintiff. Ehlmann, 198 F.3d at 554. The Fifth Circuit refused to add a disclosure provision to those already enumerated in ERISA, concluding that such effective amendments to ERISA are within the sole province of Congress, and declining to "encroach on that authority by imposing a duty which Congress has not chosen to impose." Id. at 555. Moreover, the court noted that the cases in which a duty to disclose financial incentives had been imposed, including Shea, all involved a specific inquiry or other special circumstances, and therefore did not support "a broad duty to disclose to all plan members the details of its physician compensation and reimbursement schemes." Id. at 556.

Finally, the Court notes the Southern District of Florida case brought to its attention by Plaintiff. See In re: Managed Care Litigation, MDL No. 1334, Master File No. 00-1334-MD-Moreno (S.D. Fl. Feb. 20, 2002). In that case, to the extent that any breach of fiduciary duty claims survived the defendant’s motion to dismiss, the court cautioned that the plaintiffs “should be aware of the fragility of their claims[,]” due to the fact that “absent a specific inquiry by the beneficiary or some other compelling circumstance, neither the summary plan description requirements nor ERISA’s general fiduciary duty obligations require that a plan administrator disclose financial incentives paid to physicians or employees in the claims review process." Id. at 36.

IV. CONCLUSION

For the reasons stated above the Court holds that Keystone did not have an affirmative duty to disclose to Ms. Horvath its physician compensation scheme, which included the use of financial incentives for physicians to ration the health care provided to its subscribers. Thus, summary judgment is granted in favor of Defendant and Plaintiff's claim is dismissed with prejudice.

An appropriate Order follows.

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

DONNA HORVATH,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 00-0416
	:	
KEYSTONE HEALTH PLAN EAST, INC.,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 22nd day of February, 2002, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 55), Plaintiff's Brief in Opposition thereto (Docket No. 62) and Defendant's reply (Docket No. 65) it is hereby **ORDERED** that Defendant's motion is **GRANTED**.

Judgment is entered in favor of Defendant Keystone Health Plan East, Inc. and against Plaintiff Donna Horvath.

This case is marked **CLOSED.**

BY THE COURT:

RONALD L. BUCKWALTER, J.