

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

DONNA CAMPBELL, Administratrix of the : CIVIL ACTION
Estate of William M. Campbell, III and :
DONNA CAMPBELL, Individually :
 :
 :
v. :
 :
 :
PRUDENTIAL INSURANCE COMPANY :
OF AMERICA, *et al.* : No. 01-5229

MEMORANDUM

Ludwig, J.

May 17, 2002

This is an action under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., for benefits alleged to be due under two life insurance plans, together with supplemental state law claims. A memorandum and order were entered on March 25, 2002 granting in part and denying in part defendants' motions to dismiss the amended complaint.¹ On April 8, 2002, plaintiff filed a second amended complaint,² which defendant Prudential Insurance Company of America (Prudential) now moves to dismiss under Fed. R. Civ. P. 12(b)(6).³

¹ "Plaintiff will be permitted to amend Counts II and III to set forth specific claims under ERISA and to plead or otherwise deal with the issue of exhaustion. If plaintiff has not yet exhausted remedies, as alleged by Prudential, this action will be placed in suspense pending completion of the administrative procedures, assuming plaintiff is required to do so under the Prudential and UNUM plans." Memorandum of March 25, 2002.

² The second amended complaint is identical to the first, except that it alleges: "it is futile for plaintiff to be forced to undergo the appellate procedures outlined in the plan since defendants, Prudential and UNUM, both indicate the plan has no applicability to the plaintiff.

Requiring plaintiff to exhaust her administrative remedies will further exacerbate their[sic] irreparable harm already caused to her by the denial of those benefits." Secd. Amd. Cmplt. ¶12.

³ Under Fed. R. Civ. P. 12(b)(6), the complaint's allegations are accepted as true, all reasonable inferences are drawn in the light most favorable to plaintiff, and dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would justify relief. Bown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001). Since the dismissal motion challenges subject matter jurisdiction, it is appropriately considered under Rule 12 (b)(1). "The burden of proof on a Rule 12

(continued...)

The following will be ordered:

Counts IV, V, VI, VII, VIII and IX - dismissed consistent with the order and memorandum of March 25, 2002 and without objection by plaintiff. See plaintiff's response to Prudential's 12(b)(6) motion, at 1.

Count II - dismissed without prejudice, with leave granted to plaintiff until June 3, 2002 within which to amend the complaint or to initiate administrative proceedings. In general, exhaustion is a jurisdictional prerequisite of an ERISA claim. Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3d Cir. 1990) citing Wolf v. National Shopmen Pension Fund, 728 F.2d 182, 185 (3d Cir. 1984). Exhaustion may be excused "if the claimant is threatened with irreparable harm, if resort to administrative remedies would be futile, or if the claimant has been denied meaningful access to the plan's administrative procedures." Grumbine v. Teamsters Pension Trust Fund of Philadelphia & Vicinity, 638 F. Supp. 1284, 1286 (E.D.Pa. 1986)(citation omitted). In addition, it is not required where the claim is for a violation of statutory right under ERISA, rather than a simple denial of a benefit under the plan. Tinley v. Gannett, 2000 WL 1728259, at *5 (D.Del) citing Zipf v. American Telegraph and Telephone Co., 799 F.2d 889, 892 (3d Cir. 1986) ("When a plan participant claims that he or she has been unjustly denied benefits, it is appropriate to require participants to first address their complaints to the fiduciaries to whom Congress, in Section 503, assigned the primary responsibility for evaluating claims for benefits To the extent that plaintiffs are alleging that an employer violates a substantive right guaranteed by ERISA . . . it would seem that such a statutory claim should not be subject

³(...continued)

(b)(1) motion is on the party asserting jurisdiction." 5A Wright & Miller § 1350 at 226 (1990).

to the exhaustion requirement.").⁴ Plaintiff's response to the previous motion to dismiss suggested an intent to allege a violation of a fiduciary duty under ERISA.⁵ However this theory of liability is not explicitly stated in the second amended complaint. Instead, it is alleged that exhaustion is not required because it would be futile and would lead to irreparable harm.⁶ This pleading states legal conclusions and does not support a finding of futility or irreparable harm. See 5A Wright and Miller § 1357 at 315 (1990). If plaintiff does not proceed in accordance with this memorandum by June 3, 2002, the action against Prudential will be dismissed.

Edmund V. Ludwig, J.

⁴ The Second Amended Complaint does not set forth facts underlying the ERISA claim sufficient to excuse exhaustion. As noted in the Memorandum of March 25, 2002, Count II is not labeled an ERISA claim; however, the statute is invoked as a basis for federal jurisdiction, and all other claims set forth state law causes of action. Defendant UNUM's motion to dismiss will be marked "moot" since it has settled with plaintiff.

⁵ The response asserted that defendant Prudential did not notify plaintiff's decedent's about his conversion rights under the plan. Pl. Reply at 2. In some circumstances, this may constitute a breach of a fiduciary duty. See Plumb v. Fluid Pump Service, Inc., 124 F. 3d 849, 854 (7th Cir. 1997); Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 752 (D.C. Cir. 1990).

⁶ To succeed under the futility exception, a plaintiff must demonstrate that continued denial of the claim is a foregone conclusion. Wogman v. Teamsters Health, Welfare Fund of Philadelphia, 1998 WL 461841, at *2 (E.D.Pa.) citing Kimble v. International Bhd. of Teamsters, 826 F.Supp. 945, 947 (E.D.Pa. 1993)(futility exception triggered when plaintiffs "show that it is certain that their claim will be denied on appeal, not merely that they doubt an appeal will change the decision.").

