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

MILKIS ENTERPRISES, INC. and HOWARD L. MILKIS, Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	**NO. 04-5520**
RETIREMENT PLAN CONSULTANTS, Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **April 19, 2005**

Defendant Retirement Plan Consultants removed this negligence case from the Court of Common Pleas for Montgomery County on November 29, 2004. Defendant asserts that this Court has federal question jurisdiction under 28 U.S.C. § 1441(a) and (b) because Plaintiffs' action is completely preempted by section 502(a) of ERISA, 29 U.S.C. § 1132(a).[1] Presently pending before the Court are Plaintiffs' Motion to Remand and Defendant's Motion to Dismiss.

Plaintiff Howard L. Milkis is president of Milkis Enterprises, Inc. The Complaint alleges that Milkis Enterprises established two retirement plans, each a qualified pension plan under section 401(A) of the Internal Revenue Code (the "Plans"). Mr. Milkis is a participant in the Plans. Milkis Enterprises hired Defendant to maintain the Plans "in accordance with all Federal and state laws."

Plaintiffs assert that Defendant committed professional malpractice by failing to

[1] There is no diversity since all parties are citizens of Pennsylvania.

properly administer the Plans. Defendant allegedly did not follow the Internal Revenue Service ("IRS") regulations requiring it to: (1) timely adopt certain mandatory amendments to the Plans and (2) timely order Merrill Lynch, the third-party custodian who controlled the Plans' assets, to make required distributions to Mr. Milkis.[2] After an IRS review detected these omissions, the Plans were amended on July 28, 2004, to comply with the EGTRRA. In addition, due to distributions eventually made to Mr. Milkis, in the approximate amount of $169,000, he was subjected to greater tax liabilities than if the distributions had been properly made. The IRS then proposed to retroactively revoke the Plans' qualified status. Milkis Enterprises compromised with the IRS, agreeing to pay it $40,000, and subsequently Plaintiffs brought this action, alleging negligent administration of the Plans and claiming damages in excess of $50,000.

Defendant represents that Plaintiffs' action is removable because it is completely preempted by section 502(a) of ERISA, 29 U.S.C. § 1132(a).[3] Defendant further argues that it is not a fiduciary subject to liability under ERISA[4] because no evidence, including the Plan documents,

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[2] Plaintiffs allege that IRS Cumulative Bulletin Notice 2001-42 requires a qualified pension plan to adopt certain Economic Growth & Tax Reconciliation Act of 2001 (the "EGTRRA") plan amendments, and the IRS regulations mandate that a plan participant who is over 70.5 years old and who owns greater than five percent of the company's shares must take distributions from the plan, instead of deferring them.

[3] State causes of action within the scope of the ERISA civil enforcement provision, section 502(a), are removable to federal court as completely preempted because they "aris[e] under federal law." Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 271 (3d Cir. 2001) (holding that plan beneficiary's state law negligence and other tort claims against the plan's HMO were completely preempted by section 502(a)). Section 502(a)(1)(B) authorizes suits by "a participant or beneficiary" to recover benefits due to him, to enforce his rights, or to clarify his rights to future benefits under the terms of his plan. 29 U.S.C. § 1132(a)(1)(B). Section 502(a)(2) authorizes suits by a participant, beneficiary, or fiduciary against a plan fiduciary for breaches of fiduciary duty to the plan. 29 U.S.C. § 1132(a)(2). While section 502(a) contains other causes of action, they are not relevant here since Defendant does not argue that Plaintiffs could have brought this action under any other provision of 502(a).

[4] ERISA creates liability for "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter." 29 U.S.C. § 1109(a). ERISA defines fiduciary in functional terms of control and authority over the plan. Srein v. Frankford Trust Co., 323 F.3d 214, 220 (3d Cir. 2003) (discretionary authority, responsibility or control is a prerequisite to fiduciary status and

indicates that Defendant is a fiduciary by designation or function, and the services Defendant provides to the Plans are entirely ministerial in nature.[5] Plaintiffs do not dispute these assertions.

Plaintiffs move the Court to remand, arguing that this Court lacks jurisdiction because no federal question exists on the face of their well-pleaded Complaint.[6] Plaintiffs seek relief only for Defendant's alleged professional malpractice in administering the Plans. They argue that the mere fact that a negligence or a professional malpractice claim involves a retirement plan does not bring the claim under federal jurisdiction.[7] First, Plaintiffs do not allege that Defendant is a fiduciary, and are not claiming a breach of fiduciary duty under section 502(a)(2).[8] Second, Plaintiffs are not bringing a claim under section 502(a)(1)(B) for benefits or rights under the Plans.[9] Instead, Plaintiffs ask for reimbursement for the IRS penalties imposed on Milkis Enterprises as a result of Defendant's failure to timely amend the Plans, and for the adverse tax consequences to Mr. Milkis.

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those who perform purely ministerial tasks cannot be fiduciaries).

[5] Pursuant to the Plans, as attached to Defendant's Motion to Dismiss, Mr. Milkis is the Named Fiduciary with authority to control and manage the operation and administration of the Plans. Milkis Enterprises is both the Employer, responsible for contributing money to the Plans' trust, and the Plan Administrator responsible for making distributions to participants. Mr. Milkis and Barbara Milkis are the Trustees, charged with safeguarding and administering the trust principal. Defendant argues that the Complaint does not suggest that Defendant has more than bookkeeping responsibilities, or that any of the named fiduciaries delegated their responsibilities to Defendant.

[6] Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) ("The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

[7] Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146, 1153 (3d Cir. 1989) (stating that ERISA's broad preemption provision, 29 U.S.C. § 1144(a), does not preempt state professional malpractice claims as they relate to ERISA).

[8] Plaintiffs also point out the catch-22 aspect of Defendant's argument that Plaintiffs' claim is completely preempted by ERISA, and that Plaintiffs' fail to state a claim under ERISA because Defendant is not a fiduciary.

[9] 29 U.S.C. § 1132(a)(1)(B) ("a participant or beneficiary" may bring a civil action "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.").

Defendant responds that the relevant inquiry is whether Plaintiffs *could have* brought their action under section 502(a)(1)(B).[10] The Supreme Court recently stated that "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B)." Defendant argues that Mr. Milkis is a participant and a beneficiary of the Plans who could have sued Defendant for benefits due to him under the Plans. Defendant also states, without providing any supporting authority, that Plaintiffs could have brought their EGTRRA plan amendments claim as a claim for clarification of Plaintiffs' right to future benefits. Finally, Defendant broadly argues that no independent legal duty, apart from that established by ERISA, is implicated by its alleged failures, since the disposition of Plaintiffs' claims necessarily involves the interpretation of the Plans and of ERISA.[11]

Defendant correctly states that the Court "may look beyond the face of the complaint to determine whether a plaintiff has artfully pleaded his suit so as to couch a federal claim in terms of state law."[12] The test for complete preemption under ERISA depends not on the labels and terminology used in the Complaint but on whether Plaintiffs could have brought the suit under Section 502(a). Defedant's argument that Mr. Milkis could have brought suit under Section 502(a)(1)(B) for benefits due is misplaced because Mr. Milkis is not suing for benefits due. No one is disputing Mr. Milkis' eligibility for benefits under the Plans, his rights to any benefits under the

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[10] Aetna Health, Inc. v. Davila, 542 U.S. ----, 124 S. Ct. 2488, 2497 (2004) (citations omitted).

[11] Id., at 2497-98 (where the petitioners sought to rectify denial of benefits promised under ERISA-regulated plans, there was no state or federal duty independent from ERISA or the plan terms because the respondents' potential liability under a state statute derived entirely from the rights and obligations established by the benefit plans).

[12] Id., at 2498.

terms of the Plans, or the extent of existent coverage. There is no indication that Defendant had any discretion in administering benefits due to Mr. Milkis under the Plans. Defendant's non-fiduciary obligations arose not out of the Plans, but out of other federal and state laws. Plaintiffs allege only that Defendant failed to timely advise the third-party custodian that the IRS regulations require Mr. Milkis, due to his age, to take distributions from the Plans instead of deferring them. Defendant does not provide any authority to support its argument that a claim of damages based on tax liability incurred as a result of Defendant's conduct is actually a claim for "benefits due."[13]

Further, it is clear - and Defendant does not argue otherwise - that Milkis Enterprises is neither a participant in nor a beneficiary of the Plans. Therefore, it simply does not have standing to bring a claim under Section 502(a)(1)(B). This is exactly the type of situation that was addressed by the Third Circuit in a case on which Defendant mistakenly relies for support In Pascack Valley Hospital, Inc. v. Local 464A UFCW Welfare Reimbursement Plan, 388 F.3d 393 (3d Cir. 2004), the plaintiff hospital sued a reimbursement plan governed by ERISA in state court for breach of contract for taking an allegedly improper discount on reimbursements to the plaintiff for services it provided to the plan's participants. After the defendant plan removed the case to federal court, the district court found that remand would be improper because the plaintiff's state law claims were completely preempted under ERISA. The Third Circuit reversed, stating that standing under Section

[13] See Penny/Ohlmann/Niemann, Inc. v. Miami Valley Pension Corp., 399 F.3d 692, 702 (6th Cir. 2005). In this case the Sixth Circuit found that employer's state law actions against the plan's non-fiduciary record-keeper for damages incurred as a result of the plan's violation of the Internal Revenue Code's top-heavy limitations, which included IRS fines, were not pre-empted by ERISA. The Sixth Circuit emphasized that reference to plan benefits may be "simply a reference to specific, ascertainable damages the plaintiff claims to have suffered as a proximate result of the defendant's conduct," and a claim for such damages, proximately caused by the defendant's conduct, is "not the equivalent of an ERISA claim under § 502(a)(1)(B) to recover plan benefits." Id.

502(a)(1)(B) is limited to participants and beneficiaries, and the plaintiff hospital was neither.[14]

The party seeking removal bears the burden of proving that the plaintiff's claim is an ERISA claim and of "establishing federal subject-matter jurisdiction by a preponderance of the evidence."[15] Defendant fails to satisfy this burden because it fails to prove that Plaintiffs Milkis Enterprises and Mr. Milkis have standing to bring this action under Section 502(a)(1)(B).

Defendant's argument that it has no legal duty independent from an ERISA plan is misplaced as well. Defendant's unsupported statement that Plaintiffs' claim will require the Court to interpret ERISA provisions and the Plans at issue is incorrect because coverage and eligibility are not in dispute here. Instead, Plaintiffs' "right to recovery, if it exists, depends entirely on the operation of third-party [IRS regulations] that are independent of the [Plans themselves]."[16] Therefore, resolution of this lawsuit will involve interpretation of the IRS regulations and application of the state law of negligence.[17] The fact that Defendant provided its bookkeeping services to an ERISA plan, or that Plaintiffs' claim mentions plan benefits, does not automatically bring this action within the ambit of ERISA preemption.[18] Accordingly, for all of the reasons stated, Plaintiffs'

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[14] Pascack, 388 F.3d at 400-01. The Third Circuit also refused to find that standing was conferred on the plaintiff hospital by virtue of an assignment of a claim from a plan participant, because the record contained no evidence of an express assignment.

[15] Id.

[16] Id. at 402.

[17] See Painters, 879 F.3d at 1152 ("state law has traditionally prescribed the standards of professional liability"); see also Gerosa v. Savasta & Co., Inc., 329 F.3d 317, 323 (3d Cir. 2003) (agreeing with Painters in that "ERISA does not preempt 'run-of-the-mill' state law professional negligence claims against non-fiduciaries").

[18] Penny/Ohlmann/Niemann, 399 F.3d at 699-700 (6th Cir. 2005) ("the mere fact that an employee benefit plan is implicated in the dispute, however, is not dispositive of whether the [state law] claims are preempted" and "when an ERISA plan's relationship with another entity [such as a third-party record-keeper] is not governed by ERISA, it is subject to state law.").

Motion to Remand is granted.

Plaintiffs ask for costs and any actual expenses incurred in responding to the notice of removal and in filing their Motion to Remand, arguing that Defendant attempted to remove this case against well-established principles of law, including apposite precedent from this Circuit. Plaintiffs assert that reimbursement of costs is appropriate where removal is frivolous or insubstantial at best. Defendant, therefore, will be directed to show cause as to why the Court should not grant Plaintiffs' request for costs and actual expenses.

An appropriate Order follows.

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

MILKIS ENTERPRISES, INC. and HOWARD L. MILKIS,	:	
Plaintiffs,	:	
	:	**CIVIL ACTION**
v.	:	**NO. 04-5520**
RETIREMENT PLAN CONSULTANTS,	:	
Defendants	:	

ORDER

AND NOW, this 19th day of April, 2005, upon consideration of Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment [Doc. # 2], and Plaintiffs' Motion to Remand [Doc. # 3], it is hereby **ORDERED** that:

1. Plaintiffs' Motion to Remand is **GRANTED**.

2. Defendant's Motion to Dismiss is**DENIED AS MOOT** .

3. Defendant is **DIRECTED TO SHOW CAUSE**, within seven (7) days of the date of this Order, as to why Plaintiffs' request for attorney's fees and costs incurred in responding to Defendant's Notice of Removal and filing a Motion to Remand should not be granted.

4. Plaintiffs are **GRANTED LEAVE** to file a Reply to Defendant's Response to Show Cause, if any, within seven (7) days from the service of such Response.

It is so **ORDERED**.

BY THE COURT:

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CYNTHIA M. RUFE, J.