

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

ELIZABETH and JOHN KAPKA  
: CIVIL ACTION  
:  
v. :  
:  
LUCY E. HORNSTEIN, M.D., :  
:  
MICHAEL GREENBERG, D.D.S., :  
UNITED STATES HEALTH CARE SYSTEMS :  
:  
of PENNSYLVANIA, INC., t/b/d/a :  
U.S. HEALTHCARE, and :  
U.S. HEALTHCARE, INC. : No. 97-1261

**O R D E R - M E M O R A N D U M**

AND NOW, this 25th day of June, 1997, upon conference, the motion of plaintiffs Elizabeth and John Kapka to remand this action to the Court of Common Pleas of Philadelphia is granted.

This is a medical and dental malpractice action for injuries alleged to have been sustained by plaintiff Elizabeth Kapka as a result of negligent care administered by defendants. The complaint, originally filed in the Court of Common Pleas of Philadelphia, sets forth claims against Drs. Hornstein and Greenberg and U.S. Healthcare, Inc. Defendant U.S. Healthcare removed the action, asserting federal question jurisdiction premised on complete preemption of state law claims by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001. Plaintiffs moved to remand for lack of proper joinder and lack of removal jurisdiction.<sup>1</sup>

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1. Inasmuch as the preemption issue appears to be dispositive,  
(continued...)

According to defendant U.S. Healthcare, complete preemption exists under ERISA because plaintiff wife is attempting to obtain benefits alleged to be due under her employer's health plan.<sup>2</sup> Our Court of Appeals has interpreted the civil enforcement section of ERISA<sup>3</sup> to preempt state law where the issue concerns the "quantity" of plan benefits due - but not the "quality" of services rendered. Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 357-58 (3d Cir. 1995); Pell v. Shmokler, 1997 WL 83743, at \*3-4 (E.D. Pa. Feb. 20). In examining the plain language of that section, Dukes found ERISA was intended to deal "exclusively with whether . . . the benefits due under the plan were actually provided" - and is simply

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(...continued)

plaintiffs' assertions of lack of proper joinder by all defendants, 28 U.S.C. § 1441(a), (b), and defendant U.S. Healthcare Inc.'s "separate and independent claim" argument, 28 U.S.C. § 1441(c), will not be considered.

2. An action may be removed only if the federal court would have had original jurisdiction. Caterpillar Inc. v. Williams, 482 U.S. 386, 391, 107 S. Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). Ordinarily, if removal is predicated on federal question jurisdiction, the "federal question must be presented on the face of the plaintiff's properly pleaded complaint." Id.; Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 353 (3d Cir. 1995). An exception to the well-pleaded complaint rule permits the exercise of removal jurisdiction if the state law claims are completely preempted by federal law. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 1546, 95 L.Ed.2d 55 (1987).

3. ERISA's civil enforcement section:

A civil action may be brought by a participant . . . 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. § 1132(a)(1)(B).

silent "about the quality of benefits received." Dukes, 57 F.3d at 357.<sup>4</sup>

Here, inasmuch as quality of care is at issue, the claim against U.S. Healthcare does not appear to be completely preempted by the civil enforcement section of ERISA. Compl. ¶¶ 36, 40. U.S. Healthcare, for instance, is alleged to have improperly supervised and managed the treatment of plaintiff. Id. ¶ 36(a)-(c); see Dukes, 57 F.3d at 352-53 (allegations of malpractice of agents and negligent selection and oversight of physicians not completely preempted). Plaintiffs, at the Rule 16 conference, disclaimed that the amount of benefits is in question. See id. at 356, 358 (assertions of existing rights under generally applicable state tort and agency law not preempted by ERISA).

Accordingly, given that this appears to be a qualitative malpractice claim, this action will be remanded.<sup>5</sup>

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Edmund V. Ludwig, S.J.

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4. Upon review of the statute's legislative history, Dukes concluded that Congress did not intend to regulate the quality of benefits received and that this area remains a field traditionally occupied by state regulation. Dukes, 57 F.3d at 357.

5. Because removal jurisdiction is lacking, defendant U.S. Healthcare's motion to dismiss, Fed. R. Civ. P. 12(b)(6), is denied as moot. In addition, plaintiffs' request for reasonable costs and attorney's fees on account of its motion to remand is denied. The removal argument was not frivolous.