

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

DORIS HUSS, Administratrix : CIVIL ACTION
:
v. :
:
GREEN SPRING HEALTH SERVICES, INC. : NO. 98-6055

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

April 13, 1999

Plaintiff Doris Huss ("Huss"), filing this action in the Philadelphia Court of Common Pleas, alleged that the failure of defendant Green Spring Health Services, Inc. ("Green Spring") to correctly advise Huss of her family's coverage under a health benefits plan caused her sixteen-year-old son's suicide by preventing him from obtaining emergency psychiatric services. Plaintiff's complaint stated counts of professional malpractice, negligence, negligent misrepresentation, and negligent infliction of emotional distress.

Pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1446, Green Spring filed a timely notice of removal based on federal question jurisdiction, and a motion to dismiss based on the preemptive provisions of the Employee Retirement and Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). Huss filed a timely motion to remand on the ground that this court lacks jurisdiction because her state law claims are not preempted by ERISA. For the reasons set forth below, this court finds that defendant's removal is proper. This court has jurisdiction under 28 U.S.C. §

1331 because Huss' claims are preempted by the civil enforcement provisions of ERISA, and the motion to remand will be denied. The claims will be dismissed with leave to amend to assert any claim or claims that plaintiff may have under ERISA.

BACKGROUND

Jacob Stefanide, the sixteen-year-old son of plaintiff Huss, suffered from a depressive psychiatric disorder. On November 14, 1997, Jacob was enrolled in his stepfather's employee welfare benefit plan ("the plan"), with coverage beginning December 3, 1997. The plan, provided by Keystone and administered by AmeriHealth, included coverage for mental health benefits; Green Spring, under contract with Keystone, coordinated the mental health benefits. On December 16, 1997, Huss telephoned Green Spring to obtain a psychiatric referral for Jacob; she was erroneously informed by two Green Spring representatives that no one in the family was enrolled in the plan. Calling again on December 19, 1997 for an emergency psychiatric referral, Huss was again misadvised by two individual Green Spring representatives that the family was not enrolled in the plan.

On December 23, 1997, a representative of AmeriHealth advised Huss the family would be re-enrolled as of that date. Later that day, Jacob committed suicide. A few hours later that same afternoon, Green Spring called Huss with a psychiatric referral for Jacob.

Huss, filing suit against Green Spring in the District of Delaware, attempted to assert diversity jurisdiction for breach of contract, breach of fiduciary duty, and medical malpractice. The District Court held that there was no diversity jurisdiction, but there was federal question jurisdiction under ERISA because all plaintiff's claims were preempted by ERISA's civil enforcement provisions. See Huss v. Green Spring Health Services, 1998 WL 554257, *2 (D. Del. Aug. 19, 1998). Huss subsequently filed the present action asserting Pennsylvania state law claims in the Philadelphia Court of Common Pleas; Green Spring has removed the state action and filed a motion to dismiss on grounds of preemption and res judicata. Huss has filed a motion to remand.

DISCUSSION

II. Jurisdiction

Before addressing Green Spring's motion to dismiss, this court must first determine the motion to remand. Green Spring's Notice of Removal alleges this court has original jurisdiction because the claims arise under federal law. (Notice of Removal at ¶¶ 4-5); 28 U.S.C. § 1441(b); 28 U.S.C. § 1331. Under the well-pleaded complaint rule, a cause of action "arises under" federal law only if a federal question is presented on the face of the complaint, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983), not if it is a federal

defense to a state law cause of action; "it is well-established that the defense of preemption ordinarily is insufficient justification to permit removal to federal court." Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 354-55 (3d Cir.), cert. denied, 516 U.S. 1009 (1995); see Caterpillar, Inc. v. Williams, 482 U.S. 386, 398 (1987). Huss' complaint asserts state common law claims only; on its face there is no basis for this court's jurisdiction.

Defendant argues there is jurisdiction under the "complete preemption" exception to the well-pleaded complaint rule. "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). The complete preemption doctrine applies:

when the pre-emptive force of [the federal statutory provision] is so powerful as to displace entirely any state cause of action [addressed by the federal statute]. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of [the federal provision].

Franchise Tax Bd., 463 U.S. at 23. A "completely preempted" claim is removable to federal court, see Dukes, 57 F.3d at 354-55, and the court, at its discretion, may exercise federal question jurisdiction over the entire action. See 28 U.S.C. § 1441(c).

Claims under ERISA, § 502, the civil enforcement provisions, 29 U.S.C. § 1132 ("§ 502"), may completely preempt state common law claims. See Metropolitan Life, 481 U.S. at 66. If a state law claim replicates a cause of action named in § 502, that state law claim is completely preempted and there is federal removal jurisdiction under 28 U.S.C. § 1441. Section 502 provides that a "civil action may be brought . . . by a participant or beneficiary . . . 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).

Complete preemption under § 502 must be distinguished from preemption under ERISA, § 514, 29 U.S.C. § 1144 ("§ 514"). See Dukes, 57 F.3d at 355. Section 514 states that "the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA] employee benefit plan." 29 U.S.C. § 1144(a). Unless the well-pleaded complaint rule were satisfied by preemption under § 502, there would be no removal jurisdiction to consider whether claims presented were preempted under § 514.

This court must first determine if Huss' state law claims are completely preempted under § 502. "[A] claim about the quality of a benefit received is not a claim under § 502(a)(1)(B)

to 'recover benefits due . . . under the terms of [the] plan.'" Dukes, 57 F.3d at 357. In Dukes v. U.S. Healthcare, Inc., the hospital refused to perform blood tests prescribed by Darryl Dukes's ("Dukes") doctor. The next day a different doctor prescribed blood tests that were performed. Dukes died shortly thereafter with extremely high blood sugar levels. Asserting the levels would have been detected earlier had the first tests been performed, Dukes's wife filed a state court action against U.S. Healthcare for medical malpractice and negligence in selecting, retaining, and training its personnel. See Dukes, 57 F.3d at 352.

In Visconti v. U.S. Healthcare, Inc., plaintiff parents alleged their treating doctor's negligence caused their child's stillbirth. The Viscontis also filed a state court action against U.S. Healthcare for medical malpractice and negligence in selecting, employing, and overseeing its medical personnel. See Dukes, 57 F.3d at 353.

Both the Dukes and Visconti actions were removed to federal court and consolidated. The Dukes court found the complaints were not claims to "recover benefits due . . . under the terms of [their] plan[s]" as provided in § 502, but rather state law claims for medical malpractice:

Nothing in the complaints indicates that the plaintiffs are complaining about their ERISA welfare plans' failure to provide benefits under their plan. Dukes does not allege, for example, that the Germantown

Hospital refused to perform blood studies on Darryl because the ERISA plan refused to pay for those studies. Similarly, the Viscontis do not contend that Serena's death was due to their welfare plan's refusal to pay or otherwise provide for medical services. Instead of claiming that the welfare plans in any way withheld some quantum of plan benefits due, the plaintiffs in both cases complain about the low quality of the medical treatment that they actually received and argue that the U.S. Healthcare HMO should be held liable under agency and negligence principles.

Dukes, 57 F.3d at 356-57.

The inquiry is whether Huss challenges the quantity or the quality of benefits received under her ERISA plan. Green Spring argues Huss' claims are "to recover benefits due . . . under the terms of [the] plan, to enforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits under the terms of the plan" as used in § 502(a)(1)(B). Huss contends that her claims of professional malpractice, negligence, negligent misrepresentation, and negligent infliction of emotional distress attack the quality of care provided by Green Spring.¹ Huss, in pleading her present claims, tried to avoid preemption, (see Pl.'s Br. Opp'n Mot. Dismiss at 7) but "Dukes may not be evaded by artful pleading." Howard v. Sasson, 1995 WL 581960, *3 (E.D.

¹Huss also argues that preemption does not apply because Green Spring's negligence was "separate and distinct" from its administration of the ERISA plan. (Pl.'s Mem. Opp'n Mot. Dismiss at 13). In the cases cited by Huss, Kearney v. U.S. Healthcare, Inc., 854 F. Supp. 182 (E.D. Pa. 1994) and Brooker v. Becker, 1995 WL 505941 (E.D. Pa. Aug. 22, 1995), negligence claims escaped preemption because the claims involved the quality of care received. Here, Green Spring's actions go to the quantity, not quality of care received by Huss and are preempted by § 502.

Pa. Oct. 3, 1995)(Shapiro, J.). The substance, not the form, of the claims determines the claims are preempted under § 502.

In addition to Dukes, some district courts have found that negligence claims go to the quality of the care provided, and they were not among the types of claims Congress meant to preempt by enacting ERISA's civil enforcement provisions. See, e.g., Hoose v. Jefferson Home Health Care, Inc., 1998 WL 114492, *2-*3 (E.D. Pa. Feb. 6, 1998) (claims of negligence and negligent infliction of emotional distress in a medical malpractice action not completely preempted by § 502); Hoyt v. Edge, 1997 WL 356324, *3 (E.D. Pa. June 20, 1997)(Shapiro, J.)(no federal jurisdiction under § 502 over negligence claims for unnecessary surgery); Howard v. Sasson, 1997 WL 356324, *3 (E.D. Pa. Oct. 3, 1995) (Shapiro, J.) (negligence claims for inadequate medical care not completely preempted under § 502); Brooker v. Becker, 1995 WL 505941, *2 (E.D. Pa. Aug. 22, 1995)(negligence claims for doctor's refusal to refer patient to emergency room beyond purview of § 502). The substance of the underlying claims in all these actions was medical malpractice for inadequacies in the delivery of medical services, that is, claims about the "quality of a benefit received." Dukes, 57 F.3d at 357.

Here, Huss does not claim her son received inadequate psychiatric services, or that her son was refused access to a psychotherapist based on poor medical judgment, claims that would

not be completely preempted under Dukes. Huss bases all her claims, however carefully crafted, on Green Spring's denial of plan benefits; these claims are "to recover benefits due . . . under the terms of [the] plan, to enforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B)(§ 502).

Huss cites Moscovitch v. Danbury Hospital, 25 F. Supp. 2d 74 (D. Conn. 1998); the district court found claims by parents whose son committed suicide were not within the scope of § 502. See id. at 80. But the Moscovitch court determined that the gravamen of the parents' claims was

challenging the appropriateness of the medical and psychiatric decisions of [defendant] concerning the care given to the decedent. Count Five does not assert that [defendant] was making wrong decisions about whether certain care would be covered by its plan, but instead challenges the decisions made by [defendant] with respect to the quality and appropriate level of care and treatment for the decedent.

Id. at 80.

Huss also relies on the Pennsylvania Supreme Court's recent decision in Pappas v. Asbel, --A.2d--, 1998 WL 892074 (Pa. Dec. 23, 1998). The Pappas court held "negligence claims against a health maintenance organization did not 'relate to' an ERISA plan" because the HMO's administrative delay in approving a medical transfer was "intertwined with the provision of safe medical care." Id. at *5. The Pappas Court held the excessive delay in providing medical treatment was actionable under state

law because it went to the quality of care received. See id. The Court perceived a trend adverse to expansive ERISA preemption in recent decisions of the United States Supreme Court. In particular, the Pappas Court found that the Supreme Court "noticeably changed tack" in New York State Conference of Blue Cross & Blue Shield Plans v. Traveler's Ins. Co., 514 U.S. 645 (1995), by deciding preemption questions in light of the purpose of ERISA rather than by reference to ERISA's broad preemption language. Pappas, 1998 WL 892074 at *3-*4. The Pennsylvania Supreme Court was convinced that the preemption of state law negligence claims was not contemplated by ERISA. See id. at *5.

To the extent there is tension between this decision and Dukes, the Pappas holding is only persuasive; a district court is bound by the Court of Appeals' interpretation of ERISA, a federal statute, and federal removal jurisdiction.

The Dukes court also differentiated between the HMO's roles in "utilization review" or "pre-certification review" and "arranging for medical treatment." At the utilization review stage, the HMO or its agent makes decisions about whether to fund medical treatment in advance. An HMO's economic or policy decisions at the "utilization review stage" were protected by § 502 from state tort liability. But the HMO's role in "arranging for treatment" relates to the quality, not quantity, of medical care; Congress did not intend to preempt malpractice claims

arising from these decisions. See Dukes, 57 F.3d at 360-61.

Green Spring denied Huss' claim for benefits because of an administrative error, not for economic or policy reasons, but Huss still seeks redress for denial of benefits, caused by inadequate administration of an ERISA covered plan, not inadequate services. Huss' claims go to the quantity, not quality, of benefits received and fall within the scope of § 502. See St. Mary Med. Ctr. v. Cristiano, 724 F. Supp. 732, 739-40 (S.D. Cal. 1989)(claims by plan beneficiary against plan for misadvising her on the proper procedure by which to enroll her new child preempted). Cf. Dukes, 57 F.3d at 361 ("[T]he plaintiffs' claims in these cases do not concern a denial of benefits due or a denial of some other plan-created right. . .[and] bear no significant resemblance to the claims described in § 502(a)(1)(B)."); Huss' claims fall within § 502 of ERISA and are completely preempted.

This court has original jurisdiction under 28 U.S.C. § 1331 because a federal question is presented even though not stated on the face of the complaint. Green Spring's removal to this court was proper and Huss' motion for remand will be denied. See Metropolitan Life Ins. Co., 481 U.S. 58, 67 (1987).

II. Motion to Dismiss

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true,

construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only "if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

This court has jurisdiction to consider Green Spring's motion to dismiss Huss' claims as preempted under ERISA or, in the alternative, as barred by res judicata. See Dukes, 57 F.3d at 355. Because all Huss' claims are preempted under § 502 they are also preempted under § 514 and will be dismissed. See Rice v. Panchal, 65 F.3d 637, 646 n.10 (7th Cir. 1995); Bauman v. U.S. Healthcare, Inc., 1 F. Supp. 2d 420, 425 (D.N.J. 1998); Lancaster v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc., 958 F. Supp. 1137, 1142 (E.D. Va. 1997).

The court is dismissing all of Huss' claims on preemption grounds, so it need not reach Green Spring's res judicata argument. Dismissal of Huss' claims is without prejudice to

amending the complaint to assert an ERISA claim or claims. The Delaware District Court determined preemption of state law claims only, and its decision would not bar federal statutory claims under ERISA.

CONCLUSION

Huss' state law claims challenge the denial of benefits by Green Spring. These claims are to recover benefits due or to enforce rights under an ERISA plan, for which Congress intended exclusive federal jurisdiction under ERISA's civil enforcement provisions. See 29 U.S.C. § 1132. Huss' claims having been completely preempted, Green Spring properly removed the action and Huss' motion to remand will be denied. This court will dismiss all state law claims as preempted by ERISA with leave to amend to assert any available and appropriate claim under the federal ERISA statute.

An appropriate order follows.

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

DORIS HUSS, Administratrix : CIVIL ACTION
:
v. :
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GREEN SPRING HEALTH SERVICES, INC. : NO. 98-6055

ORDER

AND NOW this 13th day of April, 1999, upon consideration of Defendant's Notice of Removal, Defendant's Motion to Dismiss, Plaintiff's Response thereto, Plaintiff's Motion to Remand, and in accordance with the attached Memorandum, it is **ORDERED** that:

1. Plaintiff's Motion to remand is **DENIED**.
2. Defendant's Motion to dismiss is **GRANTED**. Plaintiff's claims are **DISMISSED** with leave to amend the complaint to state any available claim for relief under ERISA, 29 U.S.C. § 1001, et seq., within twenty (20) days of entry of this order.

Norma L. Shapiro, S.J.