

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

JACQUELINE CLAY and : CIVIL ACTION  
DAVID CLAY :  
 :  
v. :  
 :  
U.S. HEALTHCARE, INC. : NO. 01-3089

**ORDER-MEMORANDUM**

Ludwig, J.

AND NOW, this 1st day of August, 2001, defendant U.S. Healthcare, Inc.'s motion to dismiss is granted without prejudice. Fed. R. Civ. P. 12(b)(6).<sup>1</sup>

This is an action against a health benefits plan, in which the complaint was originally filed in the Court of Common Pleas of Philadelphia County. On June 20, 2001, defendant removed the action on the theory of ERISA preemption. The facts alleged in the complaint are that on March 26, 1998, plaintiff Jacqueline Clay was diagnosed with rotator cuff tendinitis of the right shoulder. Cmplt. ¶ 11. As the result of a fall in August, 1998, she sustained a partial tear of the rotator cuff. Id. at ¶¶ 13-15. In October of that year, she was injured in a car accident and the rotator cuff was completely torn. Id. at ¶¶ 17-19. After a three-day hospital stay, she developed reflex sympathetic dystrophy of the right upper extremity. Id. at ¶¶ 20-25. At this point she commenced physical therapy, prescribed for

---

<sup>1</sup> Under Rule 12(b)(6), the allegations of the complaint are accepted as true, and all reasonable inferences are drawn in the light most favorable to the plaintiff; dismissal is appropriate only if it appears that plaintiff could prove no set of facts that would entitle her to relief. See Brown v. Philip Morris, Inc., 250 F.3d 789, 796 (3d Cir. 2001).

her by two physicians. Id. at ¶¶ 26, 29.

The complaint alleges that defendant U.S. Healthcare refused to allow physical therapy sessions beyond its 60-day protocol, and that the lack of continued treatment caused plaintiff pain and physical problems. Response p. 3, Cmplt. ¶32.

Plaintiffs' claims are preempted by ERISA. 29 U.S.C. 1001, et seq. This determination turns on whether a claim pertains to the quality of healthcare, or the quantity. ERISA preempts claims based on quantity of benefits provided for in a healthcare plan – but not their quality. Dukes v. U.S. Healthcare, 57 F.3d 350, 357 (3d Cir. 1995) (complete preemption doctrine did not permit removal where plaintiffs' claims attacked quality of benefits and did not assert that benefits were erroneously withheld).

Here, if the alleged malpractice concerned the quality of the care approved by the HMO, the claims would not be preempted. Dukes, 57 F.3d at 357; Kampmeier v. Sacred Heart Hosp., C. A. 95-7816, 1996 WL 220979, at \*2 (E.D. Pa. May 2, 1996) (granting plaintiff's motion to remand upon determination that dispute concerned only the quality of healthcare). But the gist of the complaint relates to the duration of physical therapy availability, not to whether the treatments were of professionally satisfactory quality. See Kampmeier, 1996 WL 220979 at \*2 (finding state law claim preempted because, “[o]n its face, a suit to recover benefits due . . . under the terms of [the] plan is concerned exclusively with whether or not the benefits due under the plan were actually provided”) (internal quotations omitted).

The complaint is dismissed without prejudice.<sup>2</sup> See Alston v. Atlantic Elec. Co., 962 F.Supp. 616, 619 (D.N.J. 1997) (dismissing claims after finding them preempted by ERISA);

---

<sup>2</sup> Plaintiffs' motion to remand is denied for the same reasons.

McCarthy v. Pelino & Lentz, P.C., Civ. A. No. 94-4861, 1995 WL 347001, at \*3 (E.D. Pa. June 6, 1995) (dismissing specific counts of claim that were preempted by ERISA).

---

Edmund V. Ludwig, J.