

Before me now is Aetna's motion to dismiss. However, after considering subject matter jurisdiction,² I conclude that this case was improperly removed from the state court and therefore will remand it. See Fed. R. Civ. P. 12(h)(3); see also Wyoming v. Oklahoma, 502 U.S. 437, at 462 (1992) (Scalia, J. dissenting) (“[I]t is a court's obligation to dismiss a case whenever it becomes convinced that it has no proper jurisdiction, no matter how late that wisdom may

thus would not be within the original jurisdiction of the federal district courts. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983). Nor would the mere fact that a state law claim is preempted by ERISA convert it into one arising under federal law. Id. at 25-27. However, where a state action is not only preempted by ERISA but also comes within ERISA's civil enforcement provisions, it is " 'purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action....' " Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987)(quoting Franchise Tax Board, 463 U.S. at 23) Thus, the complaint arises under federal law. Metropolitan Life, 481 U.S. at 64- 67.

Additionally, in Metropolitan Life, the Supreme Court concluded that because an ERISA defense arising under the statute's civil enforcement provision completely preempts the original state cause of action the ERISA defense automatically confers removal jurisdiction. 481 U.S. at 66; see also Joyce v. R.J.R. Nabisco Holdings Corp., 126 F.3d 166, 171 (3d. Cir. 1997) (“If [complete preemption] applies, the district court has removal jurisdiction, even if the well-pleaded complaint rule is not satisfied.”).

As in Patient Care, however, the present case is distinguished from Metropolitan Life because the purported ERISA claim was not alleged by the plaintiff. Rather, as part of a third-party claim, the ERISA defense is ancillary to the main cause of action, plaintiff's state claim. Although Aetna may be entitled to assert the defense that federal ERISA law preempts defendant Bryant's state claims, as a third-party defendant Aetna cannot remove without meeting the “separate and independent” prong of the removal statute. See Patient Care 755 F. Supp. at 650 (recognizing that concurrent state and federal proceedings might subject defendant to inconsistent judgments). Moreover, Aetna is free to pursue its ERISA defense in state court. See 29 U.S.C. § 1132(e) (“State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under [subsection (a)(1)(B)].”).

² The present Order is a result of sua sponte review of subject matter jurisdiction. Defendant Bryant filed a motion for remand but that motion was withdrawn. The parties' submission on whether remand is proper were set forth in their briefs on the withdrawn motion, which I have considered.

arrive.”).³

After years of debate and conflicting opinions, the ability of a third-party defendant to remove a case from state to federal court remains in doubt. See Patient Care, Inc. v. Freeman, 755 F. Supp. 644, 646 (D. N.J. 1991) (“More than thirty years ago a federal judge faced with the question of whether a third-party defendant could remove an action to federal court described the case law as a ‘field luxuriat[ing] in a riotous uncertainty.’”), quoting Harper v. Sonnabend, 182 F.Supp. 594, 595 (S.D.N.Y.1960). Some courts construe the definition of “defendants” to exclude third-party defendants and have held that only the plaintiff’s “defendants” can remove a case from state to federal court under 28 U.S.C. § 1441. See, e.g., Share v. Sears, Roebuck & Co., 550 F. Supp. 1107, 1108-09 (E.D. Pa. 1982). As Judge Pollak recognized in Share, an earlier version of the removal statute specifically provided that either defendants or plaintiffs could remove to federal court, but Congress later narrowed the statute so that only defendants could remove. Id. at 1108. Judge Pollak determined that third-party defendants could not remove under the narrowed statute by analogizing to the Supreme Court’s reasoning for denying plaintiff’s the right of removal following the Congressional amendment:

[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due

³ Here, sua sponte consideration of removal jurisdiction is appropriate because the defective removal in this case is jurisdictional. See Korea Exchange Bank v. Trackwise Sales Corp., 66 F.3d 46, 50 (3d 1995) (“We conclude therefore that an irregularity in removal of a case to federal court is to be considered ‘jurisdictional’ only if the case could not initially have been filed in federal court.”) Because plaintiff and defendant Bryant are not diverse, and plaintiff’s claim against defendant Bryant contains no federal question, plaintiff could not have sued originally in federal court.

regard for the rightful independence of state governments, which should activate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'

Id. at 1109, quoting Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 109 (1946).

In contrast, the proponents of third-party removal contend that third-party defendants are more analogous to defendants than plaintiffs. See Patient Care, 755 F. Supp. at 649. As Judge Debevoise pointed out in Patient Care, “Unlike the plaintiff-counterdefendant seeking removal . . . , a third-party defendant ‘ha[s] never voluntarily submitted itself to the jurisdiction of the state court.’” Id., quoting Ford Motor Credit Co., Inc. v. Aaron-Lincoln Mercury, Inc., 563 F. Supp. 1108, 1113 (N.D. Ill. 1983). Moreover, proponents of removal correctly note that third-party defendants have a strong interest in having their federal claims heard by a federal court and that the presence of removal jurisdiction should not turn on whether a party was third-partied or was sued directly. Id.

In the present case, I need not decide whether a third-party defendant may remove under 28 U.S.C. § 1441. Assuming that third-parties can remove, I conclude that defendant’s third-party claim against Aetna is not separate and independent from the plaintiff’s claim. Most federal courts have determined that a third-party defendant cannot remove a state action to federal court based on defense of ERISA preemption where the third-party claim for indemnification is not “separate and independent” from plaintiff’s state claims. See Carroll County Gen. Hosp. v. Rosen, 174 F. Supp. 2d 384, 386 (D. Md. 2001) (concluding third-party defendant insurer could not remove suit for indemnification to federal court despite the presence of ERISA preemption defense); Galen-Med, Inc. v. Owens, 41 F. Supp. 2d 611, 615 (W.D. Va. 1999) (same); Patient Care, Inc., 755 F. Supp. at 645 (same); Sunny Acres Skilled Nursingv.

Williams, 731 F. Supp. 1323, 1327 (N.D. Ohio 1990) (same); Friends Hosp. v. Shaw, Civ. No. 87-1593, 1987 WL 12755, at *3 (E.D. Pa. June 18, 1987) (same). Under 28 U.S.C. § 1441(c),⁴ a third-party defendant may remove a state action encompassing multiple claims to federal court only when one of the claims constitutes a separate and independent claim arising under federal law. See Patient Care, 755 F. Supp. at 650 (“The reason for this is now apparent, for if the main cause of action and the third- party claim are interdependent, then remanding the former to state court will subject the defendant/third-party plaintiff to potentially inconsistent judgments in the state and federal courts.”).

Defendant Bryant’s claim, which amounts to a claim for indemnification against Aetna, is not separate and independent from plaintiff’s underlying claim for the unpaid debt. Although there is a difference of opinion among federal courts, the majority concludes that a third-party claim for indemnification is not separate and independent from the underlying dispute. See Galen-Med, 41 F. Supp. 2d at 615; Patient Care, 755 F. Supp. at 650-51 (listing cases); see also Monmouth-Ocean Collection Serv. v. Klor, 46 F. Supp. 2d 385, 393 (D. N.J. 1999) (concluding that third-party defendant can never remove to federal court and citing cases); but see Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133, 135 (concluding that issue of indemnity is sufficiently separate and independent). “In describing the ‘separate and independent’ language of § 1441(c) the Supreme Court held that ‘where there is a single wrong to plaintiff, for

⁴ 28 U.S.C. § 1441(c) provides the following:

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).” Patient Care, 755 F. Supp. at 651, quoting American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14 (1951). Similarly, federal courts have determined “Where recovery in the allegedly removable claim is dependent on the result in the non-removable claim, the claims are not ‘separate and independent’ within the meaning of § 1441(c).” Ford Motor Credit Co., 563 F. Supp. at 1111, quoted in Patient Care, 755 F. Supp. at 651.

Here, defendant Bryant’s third-party claim is dependant upon the existence of the underlying debt owed to HUP. If it should be determined that defendant is not liable to HUP, defendant’s third-party claim against Aetna becomes moot. Thus, I cannot conclude that the third-party claim for indemnification is separate and independent from plaintiff’s claim.

