

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

ROBERT NICOLAYSEN and	:	
JUDITH NICOLAYSEN, husband and wife	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	No. 01-CV-5465
v.	:	
	:	
BP AMOCO CHEMICAL COMPANY, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

May 23, 2002

In this action, Plaintiffs Robert and Judith Nicolaysen (“Plaintiffs”) seek, *inter alia*, retirement benefits allegedly owed to them pursuant to a retirement plan (“the plan”) to which Robert Nicolaysen contributed during his employment with American Oil Company, and then Standard Oil Company, from 1961 through 1971. Plaintiffs name as Defendants “BP Amoco Chemical Company, and/or BP Products North America, Inc., and/or Retirement Plan Administrator of American Oil Company, its successor Standard Oil Company, and its successor BP” (collectively, the “Defendants”). According to the amended complaint, these named Defendants include the successor to Robert Nicolaysen’s former employers, as well as the relevant plan administrator. Plaintiffs bring this action under the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 et seq. as well as Pennsylvania’s Wage Payment and Collection Law (“WPCL”), 43 P.S. § 260.1 et seq.

Presently before the Court is Defendants' Motion to Dismiss Plaintiffs' State Law Claims and Claims for Breach of Fiduciary Duty, to Strike Certain Damage Claims Seeking Extra-Contractual Relief, to Strike Plaintiffs' Jury Demand, and to Compel Separate Counts. For the reasons stated below, Defendants' motion is **GRANTED** in part and **DENIED** in part.

I. FACTS

According to the amended complaint, Robert Nicolaysen was employed by American Oil Company, and then Standard Oil Company, from 1961 through 1971. During that time he contributed to the plan. Through corporate succession, the plan is allegedly now a part of Defendants' plan, and is administered by and for some combination of the Defendants.

Upon his turning sixty-five in November 1999, Robert Nicolaysen requested his retirement benefits from Defendants. However, Plaintiffs allege, Defendants failed to calculate the proper amount of benefits due. To date, Plaintiffs have received no benefits to which they contend they are entitled. Plaintiffs filed the complaint in the instant case on October 29, 2001, and amended their complaint on February 25, 2002.

In Count I of the amended complaint, Plaintiffs allege they are due certain plan benefits pursuant to ERISA.¹ In addition, Plaintiffs allege that Defendants have failed to perform their fiduciary responsibilities under ERISA by failing to invest funds properly. Finally, Plaintiffs allege that the Defendants failed to provide them with annual statements and other

1. The amended complaint is not artfully drafted. After establishing the basis for jurisdiction, it contains an unnumbered section entitled "Facts," followed by a prayer for relief, a second unnumbered section setting forth Plaintiffs' claim under the WPCL, and a second prayer for relief. For ease of reference, the Court refers to the first section, entitled "Facts," as Count I, and construes it as containing Plaintiffs' claims under ERISA. The Court also refers to the second section as Count II.

disclosures. Plaintiffs seek the withheld pension benefits, attorney's fees, penalties and liquidated damages.

In Count II of the amended complaint, Plaintiffs contend they are also due the pension benefits in question under the WPCL. Plaintiffs again seek the withheld pension benefits, attorney's fees, and liquidated damages authorized under that statute.

On February 28, 2002, Defendants filed the instant Motion to Dismiss Plaintiffs' State Law Claims and Claims for Breach of Fiduciary Duty, to Strike Certain Damage Claims Seeking Extra-Contractual Relief, to Strike Plaintiffs' Jury Demand, and to Compel Separate Counts.

II. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), the party moving for dismissal has the burden of proving that no claim has been stated. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert.denied, 501 U.S. 1222 (1991). To prevail, the movant must show "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). In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the court must only consider those facts alleged in the complaint. See ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176,

183 (3d Cir. 1993). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. DISCUSSION

A. Count I - ERISA

1. Breach of Fiduciary Duty Claims

In the amended complaint, Plaintiffs assert, *inter alia*, a claim for benefits and a claim for breach of fiduciary duty under ERISA. Defendants seek to dismiss Plaintiffs’ claim for breach of fiduciary duty. In the alternative, they seek to compel Plaintiffs to separately enumerate their (1) claim for benefits and (2) claims for beach of fiduciary duty in such a way that permits them to adequately frame their responses.

An action for benefits is authorized under ERISA’s § 502(a)(1)(B), which permits suits by plan participants to “recover benefits due to him under the terms of his plan....” 29 U.S.C. § 1132 (a)(1)(B). Although not specifically cited in the amended complaint, any claim to recover for breach of fiduciary duty by Plaintiffs must proceed under ERISA § 502(a)(3). That section provides that an action may be brought “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain *other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.” 29 U.S.C. § 1132 (a)(3) (emphasis added).

Defendants allege that Plaintiffs' claim for breach of fiduciary duty must be dismissed under Varity Corp. v. Howe, 516 U.S. 489 (1996). In that case, the Supreme Court commented that if Congress provided plaintiffs with an adequate remedy for their injury elsewhere in ERISA, then "there will likely be no need for further equitable relief, in which such case such relief would normally would not be 'appropriate'" under § 502(a)(3). Id. at 515. Defendants allege that since Plaintiffs possess a claim for benefits under § 502(a)(1)(B), they have an adequate remedy, and a claim under § 502(a)(3) must be dismissed.

Many courts have cited this language in dismissing claims for breach of fiduciary duty upon a motion to dismiss where a plaintiff has also asserted a claim for benefits under § 502(a)(1)(B). See, e.g., Reilly v. Keystone Health Plan East, Inc., No. 98-1648, 1999 U.S. Dist. LEXIS 11200 at *10-*11 (E.D. Pa. July 22, 1999); Smith v. Thomas Jefferson Univ., 52 F. Supp. 2d 495, 498 n.4 (E.D. Pa. 1999); Feret v. CoreStates Fin. Corp., No. 97-6759, 1998 U.S. Dist. LEXIS 11512 at *33 (E.D. Pa. July 27, 1998). On the other hand, at least two courts have more recently found such a decision premature upon a motion to dismiss. See Moore v. First Union Corp., No. 00-2512, 2000 U.S. Dist. LEXIS 10730 at *2-*3 (E.D. Pa. July 24, 2000); Parente v. Bell Atl., No. 99-5478, 2000 U.S. Dist. LEXIS 4851 at *9-*16 (E.D. Pa. April 17, 2000). These decisions focus on the Supreme Court's equivocal language in Varity, which does not appear to draw a absolute bright-line rule excluding claims for relief under § 502(a)(3) if a claim is also asserted under § 502(a)(1)(B). See Parente, 2000 U.S. Dist. LEXIS 4851 at *10. These courts also cite the fundamental fairness of permitting parties to plead in the alternative. Id. at *14. The Court finds the reasoning of these latter courts to be persuasive, and therefore denies the motion

to dismiss as applied to Plaintiffs' claims for breach of fiduciary duty at this time. Defendants' argument may be reasserted at the summary judgment stage.

2. Separate Counts

As noted above, Defendants seek in the alternative to compel Plaintiffs to separately enumerate their (1) claim for benefits and (2) claims for breach of fiduciary duty under ERISA in such a way that permits Defendants to adequately frame their responses. Under Rule 10(b) of the Federal Rules of Civil Procedure, "[e]ach claim founded on a separate transaction or occurrence ... shall be stated in a separate count ... whenever a separation facilitates the clear presentation of the matters set forth." Fed. R. Civ. P. 10(b). Although Rule 10(b) does not specifically authorize motions to compel separate counts or set forth the appropriate remedy for violations of its provisions, courts entertain such motions under their broad and inherent powers to control the cases before them and their power to order compliance with the Federal Rule of Civil Procedure. See Buzzerd v. East Pikeland Township, No. 90-1675, 1990 WL 90109 at *2 n.3 (E.D. Pa. June 26, 1990); Three D Dep'ts, Inc. v. K Mart Corp., 670 F. Supp 1404, 1409 (N.D. Ill. 1987); Hare v. Family Publications Serv., Inc., 342 F. Supp. 678, 686 (D. Md. 1972). See also 5 Wright & Miller, Federal Practice and Procedure, § 1324 at 749-50 (1990).

Defendants could also have raised this issue through a Motion for More Definite Statement under Rule 12(e). See Anderson v. District Bd. of Trustees, 77 F.3d 364, 366 (11th Cir. 1996). Rule 12(e) implicitly authorizes courts to order plaintiffs to amend their complaints. See Fed. R. Civ. P. 12(e).

As described in note 1 supra, "Count I" of the amended complaint, which the Court has construed as Plaintiffs' ERISA count, is simply an unnumbered section entitled

“Facts.” This section contains factual allegations making out an ERISA claim for benefits, a claim for breach of fiduciary duty for failure to invest funds properly, as well as other possible ERISA claims relating to the disclosure of certain information. These are each separate claims, involving different sets of operative facts, legal theories, and requirements of proof. They are founded on “separate transaction[s] or occurrence[s]” for the purposes of Rule 10(b).

Furthermore, the Court finds that under the circumstances, requiring these claims to be pled in separate counts would “facilitate the clear presentation of the matters set forth” such that it would significantly aid Defendants in framing their responses, for a number of reasons. First, as just noted supra, the facts as pled are unclear as to whether Plaintiffs’ intended claims under ERISA include more than just a claim for benefits and a single claim for breach of fiduciary duty.

Second, this section of the amended complaint does not mention or cite ERISA at all. Therefore, it is difficult to discern, with regard to each separate claim, the specific ERISA provision Plaintiffs contend Defendants violated. This is particularly significant in the context of a complex and detailed statute such as ERISA. Third, due to the inartful nature of the pleading, it is also not clear whether these separate claims are asserted on behalf of one or both the Plaintiffs, and whether each is asserted against one or more of the Defendants.

Therefore, the Court will order Plaintiffs to file a second amended complaint. Plaintiffs shall set forth their claim for benefits, claims for breaches of fiduciary duty, and any other claims under ERISA as separate counts. Plaintiffs shall also indicate in each count the ERISA provision that was allegedly violated, the parties on behalf of whom and against whom the claim is brought, and the relief sought.

B. Count II - WPCL

Defendants also seek to dismiss Plaintiffs' claims under the WPCL because, Defendants allege, they are preempted under ERISA. Plaintiffs assert their desire to plead a claim under the WPCL in the alternative to their ERISA claims, in the event that ERISA does not apply to this action. They state that they have been told in the past by Defendants that the plan is not an ERISA plan and that their claim is not an ERISA claim. For their part, Defendants point to the allegations in Count I of Plaintiffs' amended complaint, which implicitly allege that the plan is an ERISA plan, but do not themselves explicitly agree that the plan is subject to ERISA.

The ERISA preemption provision states that the statute broadly "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title." 29 U.S.C. § 1144(a). In general, a plan established or maintained by an employer that provides retirement income to employees is governed by ERISA. See 29 U.S.C. § 1002(2) & 29 U.S.C. § 1003(a). However, there are exceptions to this general rule. See 29 U.S.C. § 1003(b).

There is no question that a claim under the WPCL for benefits due pursuant to an ERISA plan is preempted by ERISA. See McMahon v. McDowell, 794 F.2d 100, 106 (3d Cir. 1986). If the plan at issue in the case at bar is an ERISA plan, this is precisely the type of claim asserted by Plaintiffs, and it is preempted. Nevertheless, Plaintiffs appear to have a good faith concern about the applicability of ERISA to the plan at issue, even if they have not specified a valid reason why the plan might not be an ERISA plan. Furthermore, Defendants' have not themselves explicitly conceded or sought to independently demonstrate that the plan is subject to ERISA, except through reference to Plaintiffs' allegations in Count I of the amended complaint.

Therefore, at this time, the Court cannot absolutely conclude that there is “no set of facts” upon which Plaintiffs might be entitled to relief pursuant to the WPCL, and the Court will permit the WPCL claim to survive this motion to dismiss.

Permitting Plaintiffs to plead a WPCL claim in the alternative allows them to maintain a cause of action if – for whatever unlikely reason – the facts bear out that the plan is not subject to ERISA. However, the Court cautions that the import of McMahon is clear: if the plan at issue is an ERISA plan, Plaintiffs’ claim under the WPCL is a claim for benefits under ERISA, and their WPCL claim is preempted. Therefore, Plaintiffs will not be able to make out a prima facie case for relief under both the WPCL and ERISA; both counts cannot survive the summary judgment stage.²

C. Extra-Contractual Remedies & Jury Demand

Defendants seek to strike the extra-contractual remedies and jury trial demand made by Plaintiffs in connection with their WPCL claim because, they contend, such are not permitted pursuant to the ERISA claims asserted. However, as explained supra, the Court will permit the WPCL claims to survive this motion to dismiss. Since extra-contractual remedies are provided for under the WPCL,³ and no authority has been brought to the Court’s attention which

2. For this reason, Plaintiffs would do well to ensure that their second amended complaint properly asserts diversity jurisdiction under 28 U.S.C. § 1332(a)(1), as well as federal question jurisdiction. Because Defendants’ motion does not seek to dismiss the WPCL claim on this basis and because the Court is ordering Plaintiffs to file a second amended complaint, the Court need not reach the issue of whether the amended complaint successfully asserts diversity jurisdiction. Clearly, it purports to do so. However, the Court notes, for example, that it does not appear that the amended complaint sets forth sufficient facts from which the Court could conclude that there is diversity of citizenship between Plaintiffs and *all* the named Defendants so as to satisfy the complete diversity rule. In order “[t]o satisfy the jurisdictional requirements of 28 U.S.C. § 1332(a)(1), the federal diversity statute, diversity must be complete; that is, no plaintiff can be a citizen of the same state as any of the defendants.” Midlantic Nat. Bank v. Hansen, 48 F.3d 693, 696 (3d Cir. 1995).

3. See 43 P.S. § 260.9a & 43 P.S. § 260.10.

bars a jury trial under the WPCL, the Court declines to strike these portions of the amended complaint at this time. Again, Defendants may renew this argument at the summary judgment stage.

IV. CONCLUSION

For the reasons stated above, the Court declines to dismiss Plaintiffs' claims for breach of fiduciary duty under ERISA and claims under the WPCL, and declines to strike Plaintiffs' request for extra-contractual relief and their demand for a jury trial. However, the Court grants Defendants' request to compel separate counts. Plaintiffs will be ordered to amend the amended complaint in the manner described supra.

An appropriate order follows.

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

ROBERT NICOLAYSEN and	:	
JUDITH NICOLAYSEN, husband and wife	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	No. 01-CV-5465
v.	:	
	:	
BP AMOCO CHEMICAL COMPANY, et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 23rd day of May 2002, upon consideration of Defendants' Motion to Dismiss Plaintiffs' State Law Claims and Claims for Breach of Fiduciary Duty, to Strike Certain Damage Claims Seeking Extra-Contractual Relief, to Strike Plaintiffs' Jury Demand, and to Compel Separate Counts (Docket No. 7), Plaintiffs' response thereto (Docket No. 8), Defendants' Reply (Docket No. 11), it is hereby **ORDERED** that Defendants' motion is **GRANTED** in part and **DENIED** in part.

Defendants' Motion to Compel Separate Counts is **GRANTED**. Plaintiffs shall file a second amended complaint within twenty (20) days of this Order in which they set forth their claims for benefits, claims for breaches of fiduciary duty, and any other claims under ERISA as separate counts. Plaintiffs shall indicate in each count the ERISA provision that was allegedly violated, the parties on behalf of whom and against whom the claim is brought, and the relief requested.

In all other respects, Defendants' motion is **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.