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

DON ROSEN EMPLOYEE HEALTH PLAN	:	CIVIL ACTION
v.	:	
CARMELANN MACERA	:	
v.	:	
BENEFIT CONCEPTS, INC., et al.	:	NO. 04-183

MEMORANDUM

Dalzell, J. September 20, 2004

Stated politely, the pleadings in this case are chaotic. We cannot even begin to frame the issues before us without first summarizing the parties' relationships, but the inartful drafting in this case gives us little confidence that our description is any more than partially accurate.

"Factual" Background

In November of 1996, Dr. Alexander R. Vaccaro of the Rothman Institute diagnosed Carmelann Macera with "[l]ow back discomfort in the setting of spina bifida occulta." About six months later, on April 1, 1997, Howard E. Dade, Sr. allegedly caused an automobile accident in which Carmelann Macera's back and left shoulder were injured. Between the summers of 1998 and 1999, Macera received treatment for these injuries from Dr. John L. Eserhai, Jr. of the University of Pennsylvania's Department of Orthopaedic Surgery. Dr. Eserhai initially opined that Macera suffered from fibromyalgia, but a later MRI revealed "a peripheral annular fissure of the disc at L3-L4 and facet joint

hypertrophy at L5-S1." Dr. Eserhai's prognosis for Macera included "chronic permanent pain in her spine and left shoulder girdle."

At the time of the accident, Macera worked for Don Rosen Cadillac and received her health insurance through Don Rosen Employee Health Plan (the "Don Rosen Plan" or the "Plan"), an employee welfare benefit plan within the meaning of ERISA. See 29 U.S.C. § 1002(1)(2004). Benefit Concepts, Inc. ("Benefit Concepts") is the administrator of the Don Rosen Plan and, thus, is also a fiduciary within the meaning of ERISA. See 29 U.S.C. § 1002(16)(A), (21)(A)(2004); see also http://www.bchealthinsurance.com/. One of the Plan's key provisions, the Subrogation Clause, provides that:

> Upon the payment of benefits under this plan, the company [i.e., Don Rosen Cadillac] shall be subrogated to all of the benefits recipient's rights of recovery of those benefits against any person or organization.

When necessary, Don Rosen Cadillac hires Strategic Recovery Partnership, Inc. ("Strategic Recovery") to pursue subrogation claims on its behalf. See http://www.srpsubro.com/index.htm.

In addition to the medical coverage that she received under the Don Rosen Plan, Macera received up to $10,000.00 of personal injury benefits under her automobile insurance policy. After exhausting those benefits, however, Macera continued to incur medical bills, which she submitted to the Don Rosen Plan for payment.

On behalf of the Plan, Strategic Recovery notified Macera's attorney that it would not pay the bills until she signed a standard Subrogation Agreement. Had she executed this Agreement in its unaltered form, Macera would have agreed to abide by the Plan's Subrogation Clause "in consideration of payment of benefits for medical expenses resulting [from her] accident of 06/14/99." Rather than simply sign the form, however, Macera corrected the date to reflect that her accident actually occurred on "04/01/97" and added a hand-written limitation on Don Rosen Cadillac's subrogation rights. Specifically, she recognized its claim only "to the extent allowed by Act VI and all other laws regarding payment of reasonable expenses." After making these changes, Macera signed the altered form on July 22, 1999. The Don Rosen Plan then paid $19,028.00 to Macera's medical providers.

On April 17, 1998, Macera filed a negligence action against Dade, and, pursuant to a provision in his policy, Dade's automobile insurance company defended the suit. On December 1, 1999, just as jury selection was about to begin, Dade's insurance company settled Macera's claim for approximately $60,000.00.

Soon after Macera received her settlement, Strategic Recovery demanded that she reimburse Don Rosen Cadillac for the medical expenses that the Don Rosen Plan had paid on her behalf. Years passed without the parties reaching any agreement as to the amount that Macera would pay, and eventually the Don Rosen Plan filed a three-count complaint against her in our Court. In her

answer, Macera included several affirmative defenses and counterclaims against the Don Rosen Plan. Macera also filed a third party complaint against Benefit Concepts and Strategic Recovery, which incorporated by reference the affirmative defenses and counterclaims from her answer. Bizarrely, the Don Rosen Plan then moved to dismiss the third party complaint even though that pleading asserted no claims against it.

Legal Analysis

Far from attempting to be comprehensive or definitive, our summary of the "facts" of this case was meant only to provide a backdrop for our discussion of the pleadings. It would have been impossible to explain how far afield the attorneys in this case have wandered without concisely stating our understanding of the factual predicates on which their legal arguments are based. With that background in mind, we turn now to the pleadings themselves.

A. The Complaint

When we first read the complaint, soon after it was filed, it appeared to lay out the bases for the Don Rosen Plan's claims rather well. Of course, it did include only a cursory and selective discussion of the "facts" that we summarized above, but we could expect little more from a complaint filed under the federal "notice pleading" regime. As we considered plaintiff's motion to dismiss the third party complaint, however, serious flaws in each of the complaint's three counts became apparent.

Count I is predicated on a breach of a contract into which "Plaintiff" -- that is, the Don Rosen Plan -- allegedly entered with Macera. For reasons that will become clear when we discuss Count II, we presume that the "contract" to which Count I refers is the Subrogation Agreement that Macera signed on July 22, 1999. Although it is clear that Macera signed this contract, it is less clear with whom she entered the agreement. The document was drafted on Benefit Concepts letterhead, but Strategic Recovery sent it to Macera. Further complicating matters, Don Rosen Cadillac was a third-party beneficiary of the contract. Indeed, it appears that any of these entities might have sued Macera for her alleged breach of the subrogation agreement. None of them did. Instead, the Don Rosen Plan asserted the breach of contract claim even though it was neither a party to, nor a beneficiary of, the contract.

Count II attempts to recover "medical benefits paid out by Plaintiff to Defendant's providers, upon the promise by Defendant to reimburse said amounts as set forth in Plaintiff's Health Plan." Because it is untitled, we cannot be sure what legal theory the Don Rosen Plan attempts to advance in this count, but there appear to be two possibilities. First, we could focus on the reference to Macera's alleged "promise" and construe this claim as duplicative of Count I's breach of contract claim. Alternatively, we could concentrate on Count II's reference to the "Plan" and infer that plaintiff intended to make a claim under ERISA for enforcement of the Plan's Subrogation Clause.

Because the former approach suggests that plaintiff inexplicably chose to include two separate counts for the same theory, we subscribe to the latter interpretation. Still, we would have been more certain of that choice had plaintiff titled his claim "ERISA" or cited that statute (or some other) in any part of Count II.

Although the Don Rosen Plan may sue to enforce the subrogation clause, see 29 U.S.C. § 1132(d), the administrator of the Plan, Benefit Concepts, might also have brought this claim, see 29 U.S.C. § 1132(a)(3). If Benefit Concepts had brought the ERISA claim on the Plan's behalf, then Macera probably would not have had to file a third party complaint. A counterclaim would have sufficed.

Finally, Count III -- which, like Count II, is also untitled -- requests the "reasonable value of services rendered by Plaintiff to Defendant." The complaint fails to suggest, however, what "services" the Don Rosen Plan provided to Macera. Even if we assumed that the complaint meant to refer to payment of Macera's medical bills, then this count would still fail to identify the legal theory under which the Plan would be entitled to recover the reasonable value of that service. In short, Count III states no claim upon which relief could be granted.

B. The Answer and the Third Party Complaint

Rather than raise the defects that we have just identified in a motion to dismiss, Macera chose to answer the

complaint. Her answer further complicated this action by including more than twenty paragraphs of disorganized legal theories that were sloppily amalgamated under the all-encompassing title, "Affirmative Defense and Counterclaims." Worse still, she filed a third party complaint against the parties that should have sued her, and the third party complaint simply incorporated by reference the affirmative defenses and counterclaims en masse.

Such pleading practices make it impossible to identify with any confidence what claims Macera asserts against plaintiff Don Rosen Plan and what claims she asserts against third party defendants Benefit Concepts and Strategic Recovery. Without such identification, we cannot consider intelligently the motion to dismiss the third party complaint that is now before us. Thus, in lieu of evaluating the motion on the merits, we shall discuss briefly the arguments that Macera appears to advance in her pleadings.

First, she seems to suggest that some of her medical bills were not related to the April 1, 1997 automobile accident. The Subrogation Clause in the Plan and the Subrogation Agreement that Macera signed on July 22, 1999 allow Don Rosen Cadillac to recover only payments related to the accident, and Macera implies that some of the $19,028.00 that the Don Rosen Plan now seeks was paid for unrelated medical services. Far from asserting any independent ground for recovery, this argument is a partial affirmative defense.

Macera also claims that, even if all of the medical bills were related to her accident, she still should not have to pay the full $19,028.00 because the Plan administrator overpaid her medical providers. The providers may have submitted bills for $19,028.00, but, according to Macera, Pennsylvania's Motor Vehicle Financial Responsibility Law required the administrator not to pay the full amounts if they exceeded statutorily provided levels. See 75 Pa. Cons. Stat. Ann. § 1797(a) (2004). Though plaintiff suggests that this argument is frivolous, we note, without holding, that the Pennsylvania Superior Court appears to have adopted it. See Pittsburgh Neurosurgery Assoc. v. Danner, 733 A.2d 1279 (Pa. Super. Ct. 1999). Regardless of the argument's merit, however, it seeks to reduce the damages that plaintiff may recover, not to assert an independent claim. Thus, Macera should have pled it as a partial affirmative defense and not as a counterclaim.

Similarly, Macera appears to assert defenses of estoppel, waiver, laches, and duress. Putting aside their applicability to this case, they simply should not be pled as counterclaims. Moreover, her allegations of fraud and breach of fiduciary duty, though potentially cognizable as counterclaims, appear here to be alternative statements of the legal theories that we have already explained should be pled as affirmative defenses.

As we read the answer and third party complaint, therefore, Macera does not actually assert any independent

claims. The matters lumped together as "Affirmative Defense and Counterclaims" in the answer are actually all affirmative defenses.

Conclusion

All that we have written is based on our reading of a collection of poorly drafted pleadings. It is possible that their inelegance gave us the wrong impression about the facts of this case and/or the parties' legal theories, and, to the extent that is so, we shall allow them adequate opportunity to explain their positions more fully and, above all, clearly.

On the other hand, if we have accurately captured the essence of this case, Benefit Concepts, in its capacity of Plan administrator (or the actual Plan administrator), should have filed a two-count complaint against Macera. The first count should have alleged that her failure to reimburse Don Rosen Cadillac was a breach of the Subrogation Contract. In the second count, Benefit Concepts should have alleged that she failed to comply with the Subrogation Clause when she refused to reimburse Don Rosen Cadillac. Had there been such a complaint, Macera should have listed each of her affirmative defenses separately in a way that gave clear notice to plaintiff and the Court (e.g., titling them "First Affirmative Defense," "Second Affirmative Defense," etc.). She also should have included a detailed explanation of the bases for her counterclaims, if any would have been necessary. In the highly unlikely event that Macera had an

independent, but related, claim against some entity other than the Plan administrator, she might have filed a third party complaint against that entity.

Had the case proceeded in this way, the parties would have constructed a solid foundation for the remainder of this litigation. As the pleading now stands, however, the foundation is cracked to the core. To allow the parties to build again from a freshly cleared site, we shall dismiss the complaint and the third party complaint without prejudice and require new pleadings.

An Order to this effect follows.

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ORDER

AND NOW, this 20th day of September, 2004, upon consideration of Don Rosen Employee Health Plan's motion to dismiss the third party complaint (docket entry # 11) and Carmelann Macera's response thereto, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. The claims against Carmelann Macera are DISMISSED WITHOUT PREJUDICE;

2. The claims against Don Rosen Employee Health Plan, Benefit Concepts, Inc., and Strategic Recovery Partnership, Inc. are DISMISSED WITHOUT PREJUDICE;

3. Don Rosen Employee Health Plan's motion to dismiss the third party complaint is DENIED AS MOOT;

4. By September 27, 2004, Benefit Concepts, Inc., in its capacity as administrator of the Don Rosen Employee Health Plan, (and/or any other entity that counsel deems appropriate) may FILE a complaint against Carmelann Macera;

5. By October 4, 2004, Macera shall RESPOND to the complaint; and

6. If Macera moves to dismiss the complaint, plaintiff shall FILE its response to the motion to dismiss by October 12, 2004.

BY THE COURT:

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Stewart Dalzell, J.