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

CAROL A. POST,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-3230
HARTFORD INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **FEBRUARY 23, 2005**

Presently before this Court is Defendant's, Hartford Insurance Company ("Hartford"), Motion to Dismiss the Amended Complaint, or, in the Alternative, for Summary Judgment. For the following reasons, Hartford's Motion for Summary Judgment is granted, but I will grant Plaintiff's request for leave to amend her Complaint.

I. BACKGROUND

This case involves a long-term disability insurance plan (the "Plan") and the refusal of Hartford to pay long-term disability benefits. The Plaintiff, Carol Post ("Post"), was injured in a car accident on November 27, 1993. Post filed a state law Complaint in the Court of Common Pleas for Leigh County, Pennsylvania in June of 2004. Hartford filed its notice of removal on July 8, 2004.

This marks the second time both parties are before this Court. A federal Complaint was filed on April 8, 2002. Post alleged claims against Hartford under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq and a claim for

breach of fiduciary duty. See Post v. Hartford Life & Accident Ins. Co., No. 02-1917, 2002 U.S. Dist. LEXIS 23384, at *1 (E.D. Pa. Dec. 6, 2002). Hartford moved to dismiss all but one of Post's ERISA claims and I granted that motion in December of 2002. See id. at *19. Ultimately, on January 31, 2003, a stipulation and order was entered dismissing all claims against Hartford without prejudice.

Unlike the previous case before me, the Amended Complaint currently at issue does not raise any claim under ERISA on its face.[1] Instead, the Amended Complaint contains one count for bad faith being brought pursuant to 42 PA. CONS. STAT. ANN. § 8371. Plaintiff asserts that the Plan at issue falls under ERISA's safe harbor provisions so as to prevent her state law bad faith claim from being preempted. See 29 C.F.R. § 2510.3-1(j). Hartford argues in its Motion that the Plan cannot meet all of ERISA's safe harbor provisions, thereby preempting Plaintiff's state law bad faith claim.

II. STANDARD

Before discussing the merits of the instant Motion, I must first determine whether the instant Motion should be considered a motion to dismiss under Federal Rule of Civil Procedure 12, or a motion for summary judgment under Federal Rule of Civil Procedure 56. In this case, I shall treat the instant Motion as one for summary judgment as Hartford's Motion contains matter outside of the pleadings. See Smith v. County of Bucks, No. 03-6238, 2004 WL 868278, at *6 (E.D. Pa. April 19, 2004)(citing Hilfirty v. Shipman, 91 F.3d 573, 578-79 (3d Cir. 1996)).

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary

[1] Post amended her Complaint on October 12, 2004.

judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

At the time the state law Complaint was filed, there was some disagreement

amongst my colleagues as to whether ERISA preempts 42 PA. CONS. STAT. ANN. § 8371. See Barber v. Unum Life Ins. Co. of Am., 383 F.3d 134, 137-38, n.4, n.5 (3d Cir. 2004)(listing District Court cases which found that ERISA preempted Section 8371 as well as listing District Court cases which found ERISA did not preempt Section 8371). However, in Barber, the United States Court of Appeals for the Third Circuit ("Third Circuit") held that ERISA preempts Section 8371. 383 F.3d at 140-41, 144. After the Third Circuit reached its decision in Barber, Post amended her Complaint. While her Amended Complaint still only raises one count under Section 8371, Post now alleges that "the insurance plan at issue in the case at bar was not subject to ERISA, due to the applicability of the 'safe harbor' provisions of ERISA regulations." (Am. Compl. ¶ 16). Thus, if the safe harbor provisions are met, ERISA will not apply and the state law bad faith claim will not be preempted. However, if the safe harbor provisions are not satisfied, Post's state law bad faith claim will be preempted by ERISA.

> An employee benefit plan is defined by ERISA as:
>
> > any plan, fund or program which was heretofore established or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such a plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002. The parties and I are in agreement that the Plan meets this statutory definition. While the parties do not contest the applicability of the Plan to ERISA's statutory definition, the

parties contest whether the Plan falls under ERISA's safe harbor provisions. Specifically, ERISA's safe harbor provisions state:

> the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
> (1) No contributions are made by an employer or employee organization;
> (2) Participation in the program is completely voluntary for employees or members;
> (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
> (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j). As the courts have noted, in order for the safe harbor provisions to apply, all four elements in the regulation must be satisfied. See Hevener v. Paul Revere Life Ins. Co., No. 02-415, 2002 U.S. Dist. LEXIS 11751, at *3 (E.D. Pa. March 28, 2002)(citing United States v. Blood, 806 F.2d 1218, 1220-21 (4th Cir. 1986)). Hartford argues that Post cannot meet elements (1) and/or (3).

I will consider whether the Plan satisfies the third criterion. Under this element:

> [a]n employer will be said to have endorsed a program . . . if in the light of all the surrounding facts and circumstances, an objectively reasonable employee would conclude on the basis of the employer's actions that the employer had not merely facilitated the program's availability but had exercised control over it or made it appear to be part and parcel of the company's own benefit package.

Hevener, 2002 U.S. Dist. LEXIS 11751, at *4 (citing Johnson v. Watts Regulator Co., 63 F.3d

1129, 1136 (1st Cir. 1995)). Here, the Plan was created by contract between Post's employer, Overlook Hospital, and Hartford. (See Def.'s Mot. Dismiss Am. Compl. or Alternative for Summ. J. Ex A, at 3). Indeed, Overlook Hospital is listed as the "Policyholder" under the insurance policy. (Id.). Here, the employer designated the types of employees who could be covered under the Plan by allowing only full-time exempt employees to participate. (Id.). As some courts have noted, "[a]n employer who creates by contract with an insurance company a group insurance plan and designates which employees are eligible to enroll in it is outside the safe harbor.'" Hevener, 2002 U.S. Dist. LEXIS 11751, at *5 (quoting Brundage-Peterson v. Compcare Health Svcs. Ins. Corp., 877 F.2d 509, 511 (7th Cir. 1989)). Additionally, the employer acted as the liaison between the insurance carrier and the employee.[2] Also, the

[2] At her deposition, Mary Sleece, the human resource information system manager at Overlook Hospital, stated:

> Q: What if someone needed help completing a form?
> A: They would talk to somebody in HR and not that – we would kind of just tell them – help them fill out the form itself, and I can't remember exactly, but I would think that we probably told them what their contributions were.
> Q: Okay. Regarding long-term disability or any of the other benefits offered at Overlook if an employee at Overlook had a question about a particular benefit, who would they go to?
> A: Human resources.
> Q: Okay. And is that true whether it was long-term disability or medical or dental?
> A: Yes. They would come to HR to ask the question that they had, and if they had questions that HR couldn't handle, we would then be the liaison between the carrier and the employee, unless it was something that the employee then needed to call about.

(Def.'s Mot. Dismiss Am. Compl. or Alternative Summ. J. Ex. D, at 22-23).

employer characterized the Plan as an ERISA plan by annually filing Form 5500. See Stern v. IBM, 326 F.3d 1367, 1373-74 (11th Cir. 2003)(stating the way an employer characterizes a plan is one factor in determining ERISA coverage but merely labeling a plan as an ERISA plan is not determinative); see also, Cronin v. Zurich Am. Ins. Co., 189 F. Supp. 2d 29, 36 (S.D.N.Y. 2002)(considering, in part, the fact that an employer filed Form 5500 with the IRS as evidence of failing to satisfy subsection (3) of ERISA's safe harbor provisions). Finally, the cover page of the Summary Plan Description itself featured the employer's name, Overlook Hospital. (Def.'s Mem. Law Supp. Mot. Leave File Rep. Br. at Ex. A). These factors show a level of involvement by the employer above the limits of the third provision of ERISA's safe harbor. See Hevener, 2002 U.S. Dist. LEXIS 11751, at *5-6 (citing Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1214 (11th Cir. 1999)). As the plan does not satisfy the third criterion under ERISA's safe harbor provisions, it is unnecessary for me to consider whether the Plan satisfies the first criterion or Hartford's other arguments.

IV. CONCLUSION

The Third Circuit has stated that ERISA acts to preempt Pennsylvania's bad faith statute, Section 8371. Here, the parties have contested whether the Plan satisfies ERISA's safe harbor provisions so as to not preempt the sole claim of the Amended Complaint. I have found that the Plan cannot satisfy the third criterion of the safe harbor provisions, thereby preempting the Amended Complaint. However, I will grant Plaintiff's request for leave to file an Amended Complaint under ERISA.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROL A. POST,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	No. 04-3230
HARTFORD INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this 23rd day of February, 2005, upon consideration of Defendant's Motion to Dismiss the Amended Complaint or, in the Alternative, for Summary Judgment (Doc. No. 21), the Response and Exhibits attached thereto, it is hereby **ORDERED** that:

1. Defendant's Motion for Summary Judgment is **GRANTED**; and

2. Plaintiff shall have fifteen (15) days from the date of this Order for which to file an Amended Complaint under ERISA.

BY THE COURT:

/s/ Robert F. Kelly
Robert F. Kelly Sr. J.