

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

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|----------------------------|---|--------------|
| ABINGTON MEMORIAL HOSPITAL | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| v. | : | NO. 08-761 |
| | : | |
| DEBORAH DIVINEY, | : | |
| Defendant/ | : | |
| Third-Party Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| AETNA HEALTH PLAN, INC. | : | |
| d/b/a AETNA | : | |
| Third-Party Defendant | : | |

MEMORANDUM AND ORDER

JOYNER, J.

June 16, 2008

Plaintiff, Abington Memorial Hospital ("Abington") has filed a Motion to Remand this civil action to the Montgomery County (Pennsylvania) Court of Common Pleas for disposition. Specifically, Abington asserts that the removal to federal court by Third-Party Defendant, Aetna Health Plan, Inc. ("Aetna"), was improper because no separate and independent claim justifying removal has been raised. For the reasons which follow, Abington's Motion shall be granted.

Factual Background

On December 20, 2006, Abington filed suit against Defendant, Deborah Diviney ("Diviney"), in the Montgomery County Court of Common Pleas for alleged failure to pay medical expenses Diviney incurred during treatment provided by the hospital in December,

2005. Abington seeks to recover these expenses, totaling \$7348.50, as well as interest and costs.

On December 19, 2007, Diviney joined Aetna as Third-Party Defendant, alleging under state law that Aetna was estopped from repudiating an earlier promise to pay for Diviney's medical treatment. Thereafter, Aetna removed the action to federal court pursuant to 28 U.S.C. § 1446, asserting that Diviney's state law claim sought to recover benefits through an employee benefit plan, and thus fell within the scope of the civil enforcement provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(1)(B). The state law claim, Aetna maintained, was preempted by federal law, and the matter was therefore removable pursuant to 28 U.S.C. § 1441(b) and (c).

Now before this Court is Abington's Motion to Remand, maintaining that Aetna's removal was improper, as no separate and independent federal claim was raised in Diviney's joinder.

Rules Governing a Motion for Remand

A case removed under 28 U.S.C. § 1446 may be remanded only in accordance with 28 U.S.C § 1447(c). Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 342 (1976). 28 U.S.C. § 1447(c) allows the Court to remand if it finds a lack of subject matter jurisdiction or a defect in removal.

Discussion

We begin with the matter of subject matter jurisdiction. At no point has Aetna claimed diversity of citizenship as a basis for this Court's subject matter jurisdiction, nor could it, as all parties in this dispute either reside or do business in Pennsylvania, and the amount in controversy does not meet the minimum requirement for diversity jurisdiction. 28 U.S.C. § 1332. Diviney's state law claim to recover benefits under an employee benefit plan, however, is completely preempted by the provisions of ERISA, and therefore provides this Court with federal question jurisdiction under 28 U.S.C. § 1331. See Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66-67; Levine v. United Healthcare Corp., 402 F.3d 156, 162 (3d Cir. 2005) ("Certain federal laws . . . including ERISA, so sweepingly occupy a field of regulatory interest that any claim brought within that field, however stated in the complaint, is in essence a federal claim. In such cases, the doctrine of complete preemption provides federal jurisdiction.").

Having found jurisdiction proper, we next examine Aetna's removal for defect. 28 U.S.C. § 1441(b) and (c) specifically address removal in federal question cases. Under 1441(b), a defendant may remove any civil action brought in state court over which the federal court has federal question jurisdiction.

§1441(c) allows for an entire case to be removed “whenever a separate and independent claim or cause of action within the jurisdiction conferred by § 1331 . . . is joined with one or more otherwise non-removable claims or causes of action.”

Although “the ability of a third-party defendant to remove a case from state to federal court remains in doubt,” Hosp. of the Univ. of Pa. v. Bryant, 2002 U.S. Dist. LEXIS 2867 (E.D. Pa. Feb. 22, 2002), we need not reach that question in this matter.

Adopting the suggestion of the 3rd Circuit,¹ we read the provisions of 28 U.S.C. § 1441(c) in *pari materia* with the other subsections of §1441. In doing so, we find that, because Diviney’s joinder of Aetna to the original state law action presents no separate and independent claim, Aetna’s removal is defective.

In American Fire & Casualty Co. v. Finn, 346 U.S. 6 (1951), the Supreme Court provided a guideline for construing the separate and independent” requirement of §1441(c): “where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no

¹ See Cook v. Wikler, 320 F.3d 431, 437 n.6 (3d Cir. 2003) (“We note that if § 1441(a) is ‘read in *pari materia* with’ § 1441(c), cf. Quackenbush, 517 U.S. at 711, paragraph (a) speaks specifically of removal ‘by the defendant or defendants,’ while paragraph (c) more broadly applies ‘whenever a separate and independent claim or cause of action . . . is joined . . .’ 28 U.S.C. § 1441(a), (c).”)

separate and independent claim or cause of action." Id. at 14. The applicability of Finn to the present matter seems clear: the single wrong alleged here is the debt owed to Abington, and the dispute between Diviney and Aetna is concerned entirely with liability for that debt. That Aetna can raise an ERISA defense to liability fails to alter the equation: "[w]here 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. v. Aaron-Lincoln Mercury, Inc., 563 F.Supp. 1108, 1111 (N.D. Ill. 1983).

A majority of federal courts has concluded that a third-party claim for indemnification is not separate and independent from the underlying dispute. See, e.g., Hosp. of the Univ. of Pa. v. Bryant, 2002 U.S. Dist. LEXIS 2867 at *2; Galen-Med, Inc. v. Owens, 41 F.Supp. 2d 611, 615 (W.D. Va. 1999); Patient Care, Inc. v. Freeman, 755 F.Supp. 644, 650-51 (D. N.J. 1991).

Conversely, the Fifth Circuit has held that an indemnification claim should be considered sufficiently separate and independent if the suit could have been brought separately and would be removable on its own. Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133, 136 (5th Cir. 1980).

Such an analysis, however, seems flawed when "the right to

indemnification is wholly dependent on a judgment being awarded against the defendant." Patient Care, Inc., 755 F.Supp. at 651. Additionally, we find the reasoning of the Seventh Circuit to be persuasive:

[C]onsiderations of federalism[] militate against removal. To allow removal of an entire suit on the basis of a third-party claim is to bring into the federal court an action the main part of which is not within that court's original jurisdiction, and is thus to enlarge federal at the expense of state jurisdiction in rather a dramatic way.

Thomas v. Shelton, 740 F.2d 478, 486 (7th Cir. 1984). For these reasons, we decline to follow the Fifth Circuit's approach.

Where the third-party indemnification claim is not separate and independent from the plaintiff's state claim, federal courts have determined that a defense of ERISA preemption does not justify removal. See Hosp. of the Univ. of Pa. v. Bryant, 2002 U.S. Dist. LEXIS 2867 at *2; 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., 41 F.Supp.2d at 615 (same); Patient Care, Inc., 755 F.Supp. at 645 (same); Sunny Acres Skilled Nursing v. Williams, 731 F.Supp. 1323, 1327 (N.D. Ohio 1990) (same); Baldwin County Eastern Shore Hospital Bd., Inc. v. Windham, 706 F. Supp. 38, 39 (S.D. Ala. 1989) (same). It must also be noted that

third-party defendants situated such as Aetna in this case are free to pursue their 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)].")

The Eastern District of Pennsylvania has likewise weighed in on this very issue before. In Hosp. of the Univ. of Pa. v. Bryant, the Hospital of the University of Pennsylvania ("HUP") sued Bryant for alleged failure to pay medical expenses which Bryant had incurred during treatment for an injury. Bryant joined Aetna U.S. Healthcare as a third-party defendant, alleging under state law that Aetna had breached its duty to pay Bryant's medical bills. Aetna then removed to federal court, asserting that Bryant's claims were preempted by ERISA. In deciding to remand the case, Judge O'Neill found that:

[D]efendant Bryant's third-party claim is dependent 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.

Hosp. of the Univ. of Pa. v. Bryant, 2002 U.S. Dist. LEXIS 2867 at *2. We find Judge O'Neill's reasoning to be well-reasoned. In light of this, and for the reasons stated above, Plaintiff's Motion to Remand shall be granted. Accordingly, we decline to

address Aetna's Motion to Dismiss, leaving the disposition of that motion to the state court.

An order follows.

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| d/b/a AETNA | : | |
| Third-Party Defendant | : | |

ORDER

AND NOW, this 16TH day of June, 2008, upon consideration of Plaintiff's Motion to Remand (Doc. No. 4), and Third-Party Defendant's Response thereto (Doc. No. 5), it is hereby ORDERED that Plaintiff's Motion is GRANTED, and this action is REMANDED to the Montgomery County Court of Common Pleas.

BY THE COURT:

S/J. CURTIS JOYNER
J. CURTIS JOYNER, J.