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

Donald Eric Hoyt	:	CIVIL ACTION
	:	
v.	:	
	:	
Elizabeth Edge, D.O.,	:	
Mahweh Medical,	:	
Samuel Kasoff, M.D.,	:	
New York Medical College,	:	
Westchester County Medical Center,	:	
M. Valsamis, M.D.,	:	
Pathology Faculty Practice, P.C.,	:	
Paul F. Engstrom, M.D.,	:	
Foxchase Cancer Center of the American	:	
Oncologic Hospital,	:	
Arthur S. Patchefsky, M.D.,	:	
Deborah L. Benzil, M.D.,	:	
Our Lady of Mercy Medical Center,	:	
John Doe, M.D. 1-20,	:	
ABC Medical Groups 1-20,	:	
XYZ Hospitals 1-10,	:	
Henry Roe 1-20	:	
U.S Healthcare	:	No. 97-3631

MEMORANDUM AND ORDER

Shapiro, Norma L., J. June 19, 1997

Plaintiff Donald Hoyt ("Hoyt") filed this personal injury and medical malpractice action in Pennsylvania state court on April 16, 1997. One of the defendants, U.S. Healthcare, removed the action to federal court on May 23, 1997. On June 3, 1997, this court issued a Rule to Show Cause why this action should not be remanded to state court. Following hearings on June 10, 1997, and June 19, 1997, the court will remand.

I. FACTS[1]

Hoyt, a resident of New Jersey, had a brain tumor removed and biopsied; the tumor was identified as a malignant grade II/3 astrocytoma. Hoyt sought a second opinion; the physicians providing the second opinion, defendants Paul F. Engstrom, M.D. ("Engstrom"), and Arthur S. Patchafsky, M.D., failed to inform him that Engstrom had written a letter stating the tumor was a low-grade pilocystic astrocytoma, a non-malignant tumor not requiring additional treatment. The physicians receiving Engstrom's letter also failed to inform Hoyt of this opinion.

Hoyt later discovered a testicular lump that ordinarily would have been monitored and not surgically removed. However, it was removed because he had been diagnosed with a malignant brain tumor. He continued to receive medical treatment as if the brain tumor were malignant, including surgery to attach electrodes to his brain for testing and then surgery to remove them. Only when a third opinion was obtained did Hoyt learn that his brain tumor was not malignant.

Hoyt alleges: 1) the six named physicians and six named health care providers deviated from standard medical practice and committed acts of medical malpractice; 2) these defendants acted in the scope of their employment and with the permission and

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[1] In determining whether this action should be remanded, the allegations in Hoyt's complaint are accepted as true; U.S. Healthcare has denied any wrongdoing in this action.

consent of U.S. Healthcare; 3) U.S. Healthcare was negligent in failing to refer Hoyt to competent physicians for a second opinion on whether his tumor was malignant; and 4) U.S. Healthcare failed to properly supervise, manage or control Hoyt's care. Hoyt claims he has suffered brain damage, cognitive deficits, two unnecessary brain surgeries, unnecessary urological surgery, unnecessary and disturbing brain testing, medical and other costs, and severe pain and suffering.

II. DISCUSSION

U.S. Healthcare argues the district court acted prematurely in issuing a Rule to Show Cause order before thirty days had elapsed from the date of removal because when plaintiff does not object within thirty days to the procedural defects in removing to federal court, plaintiff's objections are waived and the case is not removable. Korea Exchange Bank v. Trackwise Sales Corp., 66 F.3d 46 (3d Cir. 1995). Procedural defects may be waived; lack of subject matter jurisdiction may not be waived. If a district court determines it lacks subject matter jurisdiction, it may remand the case to state court at any time before final judgment. 28 U.S.C. § 1447(c).

An irregularity in removal of a case to federal court is "jurisdictional" only if the case could not have been filed in federal court initially. Korea Exchange Bank, at 50. There is no diversity of citizenship between Hoyt and the defendants because more than one defendant is, like Hoyt, a citizen of New Jersey. Hoyt alleges only state law claims in his complaint and no

federal cause of action that would give this court original jurisdiction.

U.S. Healthcare's Notice of Removal alleges this court has original jurisdiction because Hoyt's claims "arise under the Constitution, treaties, or laws of the United States." Notice of Removal at ¶ 3; 28 U.S.C. § 1441(b); 28 U.S.C. § 1331. Under the well-pleaded complaint rule, a cause of action "arises under" federal law only if a federal question is presented on the face of the complaint. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983). As a federal defense to a state law cause of action rarely appears on the face of the complaint, "it is well-established that the defense of preemption ordinarily is insufficient justification to permit removal to federal court." Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 354 (3d Cir. 1995) cert. denied, 116 S.Ct. 564 (1995).

U.S. Healthcare argues that this case falls under the "complete preemption" exception to the well-pleaded complaint rule under which "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987).

> The complete preemption doctrine applies 'when the pre-emptive force of [the federal statutory provision] is so powerful as to displace entirely any state cause of action [addressed by the federal statute]. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of [the federal provision].'

Dukes at 354 (quoting Franchise Tax Bd., 463 U.S. at 23). A "completely preempted" claim is removable to federal court, see Dukes at 354-55, and the court, at its discretion, may exercise federal question jurisdiction over the entire action. See 28 U.S.C. § 1441(c).

The Supreme Court has applied the complete preemption doctrine to state law claims within the scope of the civil enforcement provisions of ERISA, 29 U.S.C. § 1132 ("§ 502"). Metropolitan Life, 481 U.S. at 66. A claim that does not fall within the scope of § 502 is not removable unless the well-pleaded complaint rule is satisfied. Dukes at 355. This complaint on its face does not state a federal question; U.S. Healthcare's assertion that the court has original jurisdiction is incorrect. Removal in this case is permissible only if the claims at issue fall within § 502 of ERISA.

In Dukes, the Court of Appeals held that ERISA does not preempt all state law claims, but only state law claims that an ERISA benefit plan "refused to provide the services to which membership entitled them." When plaintiffs' claims "merely attack the quality of the benefits they received" there is no ERISA preemption. Dukes, 57 F.3d at 356.

> [Nothing] in the legislative history, structure, or purpose of ERISA suggest that Congress viewed § 502(a)(1)(B) as creating a remedy for a participant injured by medical malpractice. . . . We find nothing in the legislative history suggesting that § 502 was intended as a part of a federal scheme to control the quality of the benefits received by plan participants. Quality control of

> benefits, such as the health care benefits provided here, is a field traditionally occupied by state regulation and we interpret the silence of Congress as reflecting an intent that it remain such.

Dukes, at 357 (citation omitted).

Plaintiffs in Dukes[2] alleged medical malpractice. Cecilia Dukes claimed her husband's death was the result of a hospital's refusal to perform a blood test ordered by his primary care physician. The Viscontis alleged their stillborn daughter would have lived had the obstetrician not ignored evidence of preeclampsia. The Court of Appeals reversed the lower courts' rulings that there was ERISA-based federal jurisdiction and remanded the cases to state court.

U.S. Healthcare argues that this action is not governed by Dukes, but should be decided like Lazorko v. Pennsylvania Hospital, 1997 WL 158144 (E.D. Pa. 1997), and Pell v. Shmokler, 1997 WL 83743 (E.D. Pa. 1997), in which the courts held removal was proper because ERISA preempted plaintiff's state law claims.[3] In Lazorko, the plaintiff's wife had been discharged after a two-day hospital stay following her attempted suicide. Lazorko's complaint alleged his wife sought medical treatment for three weeks following her hospital discharge but was refused. It also

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[2] Two cases were consolidated on appeal: Dukes v. U.S. Healthcare, Inc. and Visconti v. U.S. Health Care. The facts of the cases were unrelated, but the legal issue was the same.

[3] This court is bound by the Court of Appeals' ruling in Dukes. Decisions of other courts in the Eastern District of Pennsylvania are not binding.

alleged, "'[t]he minimal treatment received by Mrs. Lazorko shows either implied or express directives from U.S. Healthcare to the defendants not to give appropriate treatment.'" Lazorko at *3 (citation omitted). In deciding not to remand to state court, the court concluded, "Because plaintiff alleges that U.S. Healthcare refused to provide medical care, this court has jurisdiction under the 'complete preemption' exception to the well-pleaded complaint rule." Id. at *4. In Pell, plaintiff claimed "her condition was exacerbated when her treating physician refused timely to refer her to a pulmonologist, at least in part because of [the HMO's] practice not to refer patients to specialists or for diagnostic testing." Pell at *4. The court held that claim was preempted by ERISA. Id. at *5.[4]

Hoyt is more like Dukes than Lazorko or Pell. Like Dukes and Visconti, Hoyt claims the care he received was inadequate and negligent. Unlike Lazorko, Hoyt claims not that his health plan failed to provide services, but that the services he did receive were inadequate and negligent. If anything, he alleges he received too much health care, including three preventable, unnecessary, and harmful operations. U.S. Healthcare argues Hoyt has alleged its failure to provide him with a second opinion. On the contrary, Hoyt's complaint alleges the doctors providing the second opinion were negligent, that is, he was referred to physicians who failed to tell him his tumor

[4] Pell was remanded to state court because of a procedural defect.

was not malignant.

Other opinions in this District consistently hold that actions like Hoyt's are not preempted by ERISA. See, Kampmeier v. Sacred Heart Hospital, 1996 WL 220979 *3 (E.D. Pa. 1996) (U.S. Healthcare delayed a diagnostic ultrasound for three days; court held plaintiff's claim not preempted by ERISA because it "relates to [U.S. Healthcare's] role in 'arranging for medical treatment,' not to [U.S. Healthcare's] role in determining whether to approve or disapprove the benefit."); Muller v. Maron, 1995 WL 605483 (E.D. Pa. 1995); Howard v. Sasson, 1995 WL 581960 *3 (E.D. Pa. 1995) (plaintiffs' claims of negligence not preempted by ERISA despite U.S. Healthcare's arguments that plaintiffs were alleging denial of care; "Dukes cannot be evaded by artful pleading."); Brooker v. Becker, 1995 WL 505941 (E.D. Pa. 1995) (on reconsideration following the Court of Appeals' ruling in Dukes, U.S. Healthcare's motion to dismiss was denied and case was remanded); Whelan v. Keystone Health Plan East, 1995 WL 394153 (E.D. Pa. 1995) (plaintiffs' complaint was of the quality of medical treatment; ERISA did not preempt allegations of both direct and vicarious negligence against the health plan.).

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise..." 28 U.S.C. § 1447(d). In its reply brief, U.S. Healthcare requested this court certify for appeal any order of remand because of the conflict between Dukes and Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996) (plaintiff's

complaint preempted by ERISA where a utilization review nurse decided plaintiff should be discharged without inpatient physical therapy). It is not clear Jass conflicts with Dukes, but even if it does, Dukes is controlling on this court. U.S. Healthcare has failed to cite the overwhelming number of Eastern District of Pennsylvania cases consistently following Dukes and remanding similar actions to state court. There have been no appeals from the remands to state court in any of these cases.

Hoyt's complaint is not preempted by ERISA. This court does not have federal jurisdiction over this action and it must be remanded to state court under 28 U.S.C. § 1447(d). An appropriate order follows.

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U.S Healthcare	:	No. 97-3631

ORDER

AND NOW this 19th day of June, 1997, following a Rule to Show Cause hearing this date, it is **ORDERED** that:

1. The clerk is directed to remand this action to the Court of Common Pleas of Philadelphia County;

_____
J.