

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

ETHEL BERMAN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
ABINGTON RADIOLOGY	:	
ASSOCIATES, INC., NORMAN	:	
HANSEN, M.D., FRANK A.	:	
PIRO, M.D., and U.S.	:	
HEALTHCARE, INC.,	:	
Defendants.	:	NO. 97-3208
 Newcomer, J.		 August     , 1997

M E M O R A N D U M

Presently before the Court is Plaintiff's Motion to Remand, and defendants' response thereto. For the reasons that follow, said Motion will be granted, and the above-captioned action will be remanded to the Court of Common Pleas of Montgomery County, Pennsylvania.

**A. Background**

Plaintiff Ethel Berman is a Pennsylvania citizen and resident. (Compl. ¶ 1.) Two of the four defendants, Norman Hansen, M.D. and Frank A. Piro, M.D., are physicians who are licensed to practice medicine in the Commonwealth of Pennsylvania and who specialize in the field of radiology. (Compl. ¶¶ 2, 6.) The other two defendants, Abington Radiology Associates, Inc. ("Abington") and U.S. Healthcare, Inc. ("U.S.H.C."), are business entities. (Compl. ¶¶ 4, 5.)

On or about January 20, 1993, plaintiff presented herself to defendants Abington, Hansen and Piro to undergo a mammogram. (Compl. ¶ 9.) The physician's report regarding the mammogram,

which was signed by defendant Piro and dated January 20, 1993, noted that there was "symmetrical breast architecture similar to June 1991, with slight to moderate breast density," and that Dr. Piro "s[aw] no masses, malignant microcalcifications, or skin thickening." (Compl. ¶ 9.) The report concluded that there was "no change," "[n]o evidence of neoplasm," and "no radiographic evidence of malignancy." (Compl. ¶¶ 9, 10.)

On or about June 11, 1994, plaintiff presented herself to defendants Abington, Hansen and Piro to undergo another mammogram. (Compl. ¶ 8.) The physician's report regarding the mammogram, which was signed by defendant Piro and dated June 11, 1994, stated that the mammogram did not reveal malignant microcalcifications, masses or skin thickening. (Compl. ¶ 8.) The report concluded that there was no change, no evidence of neoplasm, and "no radiographic evidence of malignancy and/or no change from [the] previous study.(NEG)." (Compl. ¶¶ 8, 10.) Plaintiff, however, asserts that the June 11, 1994 mammography did evidence and reveal the existence of a malignancy. (Compl. ¶ 11.)

Plaintiff asserts that defendants' misdiagnosis of the mammogram on June 11, 1994, resulted in multiple injuries, which ultimately required her to undergo a bilateral segmental resection of the right breast and lymph node dissections. (Compl. ¶ 15.) Further, plaintiff has been forced to obtain follow-up medical care, including radiation therapy, and may require additional such care in the future. (Compl. ¶¶ 15-16.)

In addition to the internal physical injuries allegedly sustained by plaintiff, she asserts that she was disfigured and that she has suffered great emotional upset, pain, suffering, embarrassment, and humiliation. (Compl. ¶ 17.) Plaintiff finally contends that the full extent of her future medical problems are unknown at the present time and that her injuries may be permanent in nature. (Compl. ¶¶ 17, 18.) As a result of the foregoing, she asserts, she has been unable to attend to her usual duties and activities. (Compl. ¶ 19.)

On April 9, 1997, plaintiff commenced a lawsuit against defendants Abington, Hansen, Piro, and U.S.H.C. by filing a Praecipe for Summons in the Court of Common Pleas of Montgomery County, Pennsylvania. Thereafter, on May 5, 1997, defendant U.S.H.C. removed the action to the United States District Court for the Eastern District of Pennsylvania. Plaintiff subsequently filed a Motion to Remand the action to state court.

Plaintiff's complaint, filed in the Court of Common Pleas of Montgomery County on April 9, 1997, asserts two causes of action. Count One, grounded in negligence, alleges essentially that defendants Abington, Piro, and Hansen failed to exercise reasonable care in performing the proper diagnostic tests on plaintiff, accurately and completely reading plaintiff's mammography studies, properly diagnosing plaintiff, and timely initiating plaintiff's proper treatment. In sum, plaintiff contends that defendants failed to diagnose the existence of a malignancy which appeared in her initial mammography. Count Two,

also grounded in negligence, maintains that defendant U.S.H.C. failed to exercise reasonable care in hiring medical personnel, monitoring the standards and capabilities of defendants Abington, Piro, and Hansen, and allowing said defendants to continue rendering care to plaintiff.

Defendants removed this action to this court on May 5, 1997, on the ground that this Court has exclusive jurisdiction over it under the provisions of Title XVII of the Social Security Act, 79 Stat. 291, as amended, 42 U.S.C. ¶ 1395 et. seq., commonly known as the Medicare Act (the "Act"). Plaintiff moves to remand this action to the Court of Common Pleas of Montgomery County, Pennsylvania, on the ground that removal was improper.

**B. Motion for Remand Standard**

The removal statute, 28 U.S.C. ¶ 1441 (a), authorizes removal of state court actions over "which the district courts of the United States have original jurisdiction." District courts have original jurisdiction over claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The "well-pleaded complaint" rule provides that a cause of action "arises under" federal law only when it is presented on the face of the plaintiff's properly pleaded complaint.

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983). Because preemption is an affirmative defense, the well-pleaded complaint rule generally precludes a defendant from relying on ordinary preemption as a basis for removal jurisdiction. See, Caterpillar, Inc. v. Williams, 482 U.S. 386,

392-93 (1987). Accordingly, the fact that a defendant ultimately might prove that a plaintiff's claims are preempted does not establish that they are removable to federal court. Dukes v. U.S. Healthcare, Inc., 57 F.3d 350, 355 (3d Cir.), cert. denied, 514 U.S. 1063 (1995).

The United States Supreme Court, however, recognizes an exception to the well-pleaded complaint rule known as the "complete preemption" doctrine. This doctrine holds that the preemptive force of a statute can be so extraordinary that it converts an ordinary state common law complaint into one stating a federal cause of action. Id. at 393. If a claim is completely preempted by federal law, it may be removed to federal court because it necessarily "arises under" federal law. Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 311 (3d Cir. 1994), cert. denied, 115 S. Ct. 1691 (1995) (quoting Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R. Co., 858 F.2d 936, 939 (3d Cir. 1988) (citations omitted)).

The doctrine of "complete preemption" applies only when the following two conditions are present: (1) "the enforcement provisions of a federal statute create a federal cause of action vindicating the same interest that the plaintiff's cause of action seeks to vindicate;" and (2) "there is affirmative evidence of a congressional intent to permit removal despite the plaintiff's exclusive reliance on state law." Allstate Ins. Co. v. The 65 Security Plan, 879 F.2d 90, 92 (3d Cir. 1989).

**C. Discussion**

In the instant action, this Court determines that the complete preemption doctrine does not apply because the first condition is not met.<sup>1</sup> That is to say, the enforcement provision of the Medicare Act that is at issue, namely, 42 U.S.C. §§ 405(h)-(g), does not "create a federal cause of action vindicating the same interest that the plaintiff's cause of action seeks to vindicate." Id.

Section 405(h), made applicable to the Medicare Act by 43 U.S.C. § 1395ii, provides that any claim "arising under" the Medicare Act must be brought exclusively under 42 U.S.C. § 405(g). See 42 U.S.C. § 405(h); Heckler v. Ringer, 466 U.S. 602, 614-15 (1984) (stating that section 405(h) provides that section 405(g) is the sole avenue for judicial review for all "claim[s] arising under" the Medicare Act); Ardary v. Aetna Health Plans of California, 98 F.3d 496, 499 n.7 (9th Cir. 1996), cert. denied, 117 S.Ct. 2408 (1997) (stating that section 405(h) makes section 405(g) the sole avenue for judicial review of all "claim[s] arising under" the Medicare Act); Bodimetric Health Servs., Inc. v. Aetna Life & Casualty, 903 F.2d 480, 483 (7th Cir.), cert. denied, 498 U.S. 1012 (1990) (stating that section 405(h) provides that any "claim arising under" the Medicare program must be brought exclusively under section 405(g)). Section 405(g), in relevant part, provides that "[a]ny

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<sup>1</sup> As such, this Court need not address whether the second condition is met.

individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action [in the district court of the United States for the judicial district in which the plaintiff resides] commenced within sixty days after the mailing to him of notice of such decision . . . " 42 U.S.C. § 405(g). Applying the foregoing rules to the instant case, this Court concludes that, if plaintiff's claim against U.S.H.C. "arises under" the Medicare Act, removal of this case to the federal court was proper, but, if plaintiff's claim against U.S.H.C. does not "arise under" the Medicare Act, removal of the case to federal court was improper, and, thus, the case should be remanded. See, Ardary, 98 F.3d at 502 (noting that "[b]ecause we hold that the Ardarys' state law claims do not 'arise under' the Medicare Act, we must conclude that the action was improperly removed to federal court").

This Court determines that plaintiff's state law claim against U.S.H.C. does not "arise under" the Medicare Act and, therefore, that this case should be remanded to state court. The United States Supreme Court seems to have adopted two alternative tests for determining whether a claim "arises under" the Medicare Act. First, a claim "arises under" the Medicare Act if "both the standing and the substantive basis for the presentation" of the claim is the Act. Ringer, 466 U.S. at 615 (quoting Weinberger v. Salfi, 422 U.S. 749, 760-61 (1975)); see also Ardary, 98 F.3d at 499 (applying the foregoing test to determine whether plaintiffs'

complaint "arose under" the Medicare Act). Second, a claim "arises under" the Medicare Act if it is "inextricably intertwined" with a claim for Medicare benefits. Ringer, 422 U.S. at 614; see also Ardary, 98 F.3d at 500 (applying the foregoing test to determine whether plaintiffs' complaint "arose under" the Medicare Act).

In the instant case, plaintiff's claim against U.S.H.C. does not "arise under" the Act under either of the two aforementioned tests. First, the "standing and the substantive basis for the presentation" of plaintiff's claim is not the Act. See, Ringer, 422 U.S. at 615. Plaintiff seeks damages from U.S.H.C. on a theory of negligence. State common law, not the Medicare Act, provides the standing and substantive basis for the presentation of this claim. See, Ardary, 98 F.3d at 499 (holding that state common law, not the Act, provided standing for plaintiff's claims of negligence, intentional and/or negligent infliction of emotional distress, intentional and/or negligent misrepresentation, and professional negligence). Second, plaintiff's claim is not "inextricably intertwined" with a claim for Medicare benefits. See, Ringer, 422 U.S. at 614. Plaintiff's claim, for damages resulting from U.S.H.C.'s alleged negligence, is not "inextricably intertwined" because plaintiff, at bottom, is not seeking to recover benefits. See, Ardary, 98 F.3d at 500 (finding that plaintiffs' claims for general and punitive damages resulting from negligence, intentional and/or negligent infliction of emotional distress, intentional and/or

negligent misrepresentation, and professional negligence were not "inextricably intertwined" with claims for benefits because plaintiffs "at bottom [were] not seeking to recover benefits"); compare, Ringer, 466 U.S. at 614 (finding that claims were "inextricably intertwined" with claims for benefits because "it makes no sense to construe the claims ... as anything more than, at bottom, a claim that they should be paid for their [ ] surgery").

As plaintiff's cause of action against U.S.H.C. does not "arise under" the Medicare Act, and as no other basis for federal subject matter jurisdiction exists, removal of this action to federal court was improper, and, thus, this Court will remand it to the Court of Common Pleas of Montgomery County, Pennsylvania.

**D. Conclusion**

In conclusion, this Court will grant Plaintiff's Motion to Remand and remand this action to the Court of Common Pleas of Montgomery County, Pennsylvania.

An appropriate Order follows.

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Clarence C. Newcomer, J.



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HANSEN, M.D., FRANK A.	:	
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Defendants.	:	NO. 97-3208

O R D E R

AND NOW, this day of August, 1997, upon consideration of Plaintiff's Motion to Remand, and defendants' response thereto, and consistent with the foregoing Memorandum, it is hereby ORDERED that the above-captioned action is REMANDED to the Court of Common Pleas of Montgomery County, Pennsylvania.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.