

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

DORIS HUSS, Administratrix : CIVIL ACTION  
:   
v. :   
:   
GREEN SPRING HEALTH SERVICES, INC. : NO. 98-6055

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

June 30, 1999

Plaintiff Doris Huss ("Huss") originally filed this action in the Philadelphia Court of Common Pleas; her complaint alleged that her sixteen-year-old son committed suicide because defendant Green Spring Health Services, Inc. ("Green Spring") denied him emergency psychiatric services. Plaintiff's original complaint stated counts of professional malpractice, negligence, negligent misrepresentation, and negligent infliction of emotional distress.

Green Spring, after removing the action to this court, moved to dismiss based on the preemptive provisions of the Employee Retirement and Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). Huss filed a timely motion to remand. By Memorandum and Order issued April 13, 1999, this court held there was federal jurisdiction under 28 U.S.C. § 1331 because Huss' claims were completely preempted by the civil enforcement provisions of ERISA; Huss' motion to remand was denied. Because Huss' claims were preempted, Green Spring's motion to dismiss was

granted with leave to amend the complaint to assert any claim or claims Huss might have under ERISA. Huss' amended complaint seeks, under 29 U.S.C. § 1132, those benefits to which her son would have been entitled had he not committed suicide. Green Spring again moved to dismiss Huss' complaint. For the reasons that follow, Green Spring's motion will be granted.

#### **FACTS**

Jacob Stefanide, the sixteen-year-old son of plaintiff Huss, suffered from a depressive psychiatric disorder. On November 14, 1997, Jacob was enrolled in his stepfather's employee welfare benefit plan ("the plan"), with coverage beginning December 3, 1997. The plan, provided by Keystone and administered by AmeriHealth, included coverage for mental health benefits; Green Spring, under contract with Keystone, coordinated the mental health benefits. On December 16, 1997, Huss telephoned Green Spring to obtain a psychiatric referral for Jacob; two Green Spring representatives failed to verify insurance coverage and incorrectly informed Huss that no one in her family was enrolled in the plan. Calling again on December 19, 1997 for an emergency psychiatric referral, Huss was again misadvised by Green Spring that no members of her family were enrolled in the plan.

On December 23, 1997, a representative of AmeriHealth advised Huss the family would be re-enrolled as policyholders on that date. Later that day, Jacob committed suicide. A few hours

later that same afternoon, Green Spring called Huss with the name of a psychologist to call for treatment of her son's psychiatric disorder.

Huss, filing suit against Green Spring in the District of Delaware, attempted to assert diversity jurisdiction for breach of contract, breach of fiduciary duty, and medical malpractice. The District Court held that there was no diversity jurisdiction, but there was federal question jurisdiction under ERISA because all plaintiff's claims were preempted by ERISA's civil enforcement provisions. See Huss v. Green Spring Health Services, 1998 WL 554257, \*2 (D. Del. Aug. 19, 1998). Huss subsequently filed the present action asserting Pennsylvania state law claims in the Philadelphia Court of Common Pleas. Green Spring removed the action to this court and filed a motion to dismiss on grounds of preemption and res judicata; Huss sought remand. After this court denied plaintiff's motion to remand and granted defendant's motion to dismiss (because all state law claims were preempted by ERISA), Huss filed an amended complaint attempting to state an ERISA claim. Green Spring then filed the instant motion to dismiss.

## **DISCUSSION**

### **I. Standard of Review**

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true,

construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only "if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

## **II. Green Spring's Motion to Dismiss**

Huss' first amended complaint seeks to recover the benefits, improperly denied by Green Spring, to which her son was entitled. Green Spring moves to dismiss Huss' amended complaint on the ground that Huss can not recover the value of benefits that should have been afforded her son unless she suffered statutorily permitted damages caused by the improper denial.<sup>1</sup>

ERISA's civil enforcement provision states that a "civil

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<sup>1</sup>In its earlier motion to dismiss, Green Spring asserted res judicata as one ground for dismissal. Although not necessary to the decision, this court found that the Delaware District Court determined preemption of state law claims only, and that its decision would not bar federal statutory claims under ERISA. Because Huss attempted to assert a federal claim, her amended complaint is not barred by res judicata.

action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Although not explicitly stated in this provision, it is a sine qua non of any statutory claim that the party seeking relief has incurred damages for which the statute grants compensation. It is no different for a claim under ERISA. See Garner v. Capital Blue Cross, 859 F. Supp. 145, 150 (M.D. Pa. 1994) ("Because Plaintiff did not actually incur medical expenses, restitution would be inappropriate and, because [the beneficiary] did not survive, any request for an injunction would be moot."), aff'd, 52 F.3d 314 (3d Cir.), cert. denied, 516 U.S. 870 (1995); see also Kemmerer v. ICI Americas, Inc., 70 F.3d 281, 290-91 (3d Cir. 1995)(participants were not entitled to any relief because they failed to prove they had been damaged), cert. denied, 517 U.S. 1209 (1996). If Huss had obtained other psychiatric services for her son because of Green Spring's improper denial of benefits, she would be entitled to seek compensation for the cost of those services. But Huss has not alleged any actual expenses, so she can not seek the value of benefits to which her son was clearly entitled had he not committed suicide.

Huss has not alleged any medical expenses resulting from

Green Spring's negligence, but there may have been other damages, both monetary (funeral expenses), and non-monetary (emotional distress). But ERISA's civil enforcement provision, § 502(a)(1)(B), limits claims to those for benefits and rights due under the plan; it does not authorize claims for extracontractual compensatory damages. See Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). Huss did not sustain damages compensable under ERISA, and the damages she no doubt sustained are not recoverable under that statute.

ERISA's civil enforcement provisions limit the actions that a beneficiary may bring against her plan; it does not ensure that every beneficiary will have a cause of action to bring. See Cannon v. Group Health Serv. of Oklahoma, Inc., 77 F.3d 1270, 1274 (10th Cir.)("[T]he unavailability of a remedy under ERISA is not germane to preemption analysis."), cert. denied, 519 U.S. 816 (1996); Tolton v. American Biodyne, Inc., 48 F.3d 937, 943 (6th Cir. 1995)("That ERISA does not provide the full range of remedies available under state law in no way undermines ERISA preemption.").

Huss relies on this court's previous decision that her claims were covered by ERISA. But in holding Huss' state law claims were preempted by ERISA, the court did not decide that plaintiff had a viable claim under ERISA; she was given leave to assert any viable claim she might have had. Huss argues:

[i]f this court did not believe that this precise [ERISA] claim had validity, it would not have issued its very explicit invitation to Plaintiff to amend the complaint. The facts of this case have not changed, and this Court knew those facts when it elicited the recently filed first amendment. If the Defendant's view were correct, that action in those circumstances would have been a deliberate exercise in futility designed only to provoke needless effort and expense by the Plaintiff, the Defendant and this Court itself. This cannot be, and this Court must now reaffirm the basic premise of its order allowing this amendment.

(Pl.'s Mem. Opp'n Def.'s Mot. Dismiss at 5-6).

A denial of a motion to dismiss with leave to amend is not an expression of the court's opinion on the merits of any subsequent amended complaint. It is correct that a court may deny leave to amend to state a new cause of action if the new cause of action would be clearly subject to dismissal. But all the facts were not necessarily alleged in Huss' original complaint; a prior determination that Huss had no cause of action under ERISA would have been premature. It is neither possible nor appropriate for courts to analyze the viability of all potential claims. Huss, having been now afforded an opportunity to bring a claim under ERISA, has failed to state a claim for which relief can be granted. Accordingly, Green Spring's motion to dismiss will be granted.

Huss also seeks an award of attorney's fees under 29 U.S.C. § 1132(g)(1): "In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of the

action to either party." Ordinarily only a prevailing party is entitled to attorney's fees, but the language of § 502(g)(1) does not contain such a requirement. See, e.g., Sharron v. Amalgamated Ins. Agency Servs., Inc., 704 F.2d 562, 569 (11th Cir. 1983)(under ERISA "the losing party may under certain circumstances be entitled to attorney's fees"); Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan, 698 F.2d 593, 602 (2d Cir.)(“Although success on the merits is not, in theory, indispensable to an award of attorney's fees under [ERISA], rarely will a losing party in an action such as this be entitled to fees.”)(footnote omitted), cert. denied, 464 U.S. 829 (1983); Keffer v. Cigna Corp., 1990 WL 97759, \*4 (E.D. Pa. July 9, 1990) (“[prevailing party] status is not required for recovery of attorney's fees under § 1132(g)(1)"); Walling v. Brady, 1997 WL 678173, \*1-\*2 (D. Del. Oct. 23, 1997)(in the absence of binding precedent to the contrary, the court assumed without deciding that a losing party may recover attorney's fees under ERISA). The observations of these courts are all dicta, however, because in all of the cases the court denied attorney's fees to the non-prevailing party.

The Court of Appeals for the Third Circuit has not yet considered whether § 502(g)(1) applies to a non-prevailing party, but has articulated the following factors that a court must consider in deciding any award of attorney's fees:

- (1) the offending parties' relative culpability or bad faith;
- (2) the relative ability of the offending parties to

- satisfy an award of attorneys' fees;
- (3) the deterrent effect of an award of attorneys' fees against the offending parties;
- (4) the benefit conferred on members of the pension plan as a whole; and
- (5) the relative merits of the parties' position.

McPherson v. Employees' Pension Plan, 33 F.3d 253, 254 (3d Cir. 1994)(citation omitted); see Ellison v. Shenango Inc. Pension Bd., 956 F.2d 1268, 1274 (3d Cir. 1992)(applying factors to awards of attorney's fees under ERISA).

An analysis of these factors convinces the court that an award of attorney's fees is not appropriate. Green Spring is the more culpable party; it is not clear from the pleadings whether Green Spring acted in bad faith, but it was clearly culpable to deny benefits erroneously to a distraught mother seeking an emergency psychiatric referral for her son. Green Spring is also better able to bear the cost of this litigation. It is possible, though speculative, that an award of attorney's fees would deter Green Spring from similar negligence in the future; any resulting deterrence would certainly confer a benefit to other plan members. However, the final factor, the relative merit of the parties' positions, weighs heavily in favor of Green Spring. Huss' ERISA claim, once articulated, was clearly foreclosed by the Supreme's Court decision in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985). Green Spring has now successfully moved for dismissal against Huss on three separate occasions; an award of attorney's fees to Huss is not

appropriate.<sup>2</sup>

### CONCLUSION

Huss' newly amended complaint purports to state a claim under ERISA for the value of benefits to which her deceased son would have been entitled had he survived. Section 502 of ERISA provides a cause of action for benefits improperly denied, but only damages incurred may be awarded; Huss has not demonstrated that she has incurred any medical expenses or other monetary damages on her son's behalf. Huss has certainly suffered a tremendous loss in the untimely death of her son, but that is a type of loss to which the enforcement provisions of ERISA are simply not directed. Huss has failed to state a claim under 29 U.S.C. § 1132 for which relief can be granted; her complaint will be dismissed. Huss' request for an award of attorney's fees will be denied.

An appropriate order follows.

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<sup>2</sup>Without seeking leave of court, Green Spring filed a reply brief in support of its motion to dismiss in which it suggested for the first time that the court grant attorney's fees to Green Spring. Green Spring is the prevailing party, but the factors governing ERISA attorney's fees awards do not justify any award of fees to Green Spring: Green Spring acted culpably and other potential ERISA claimants should not be deterred from seeking redress by the award of attorney's fees to defendant.

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ORDER

AND NOW this 30th day of June, 1999, upon consideration of Defendant's Motion to Dismiss, Plaintiff's Response in Opposition, Defendant's Reply, and in accordance with the attached Memorandum, it is **ORDERED** that:

1. Defendant's Motion to dismiss is **GRANTED**. Plaintiff's complaint is **DISMISSED**.
2. Plaintiff's request for attorney's fees is **DENIED**.
3. Defendant's request for attorney's fees is **DENIED**.

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Norma L. Shapiro, S.J.