IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CYNTHIA LARSON, KIMBERLY DEHAAN, JEANNETTE BORDEN, REBECCA BAVNIK and AMY J. CLOUTE, on behalf of themselves and all others similarly situated,

OPINION AND ORDER

Plaintiffs,

11-cv-473-bbc

v.

UNITED HEALTHCARE INSURANCE COMPANY, WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION, HUMANA INSURANCE COMPANY, NETWORK HEALTH PLAN, BLUE CROSS BLUE SHIELD OF WISCONSIN and COMPCARE HEALTH SERVICES INSURANCE CORPORATION,

Defendants.

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Plaintiffs Cynthia Larson, Kimberly Dehaan, Jeannette Borden, Rebecca Bavnik and Amy J. Cloute filed this proposed class action, alleging that they are participants in employee welfare benefit plans sponsored by their employers and that they received health benefits as insureds under contracts of insurance issued by their employers. They contend that the insurance companies are violating Wis. Stat. § 632.87 by charging them copayments for chiropractic care. As a basis for federal jurisdiction, plaintiffs rely on two provisions of the

Employee Retirement Income Security Act, 29 U.S.C. §§ 1132(a)(1)(B) and 1104(a)(1)(B). In particular, plaintiffs argue that they were denied benefits by defendants, in violation of § 1132(a)(1)(b), and that defendants breached their fiduciary duty by failing to provide plans that complied with state law, in violation of § 1104(a)(1)(B).

Each of the six defendants has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Although most of the defendants filed their own sets of briefs, their arguments are nearly the same: (1) Wis. Stat. § 632.87 does not prohibit them from charging copayments for chiropractic care; (2) they cannot be sued under § 1132(a)(1)(B); (3) § 1132(a)(1)(B) does not provide a cause of action for reforming a plan to comply with state law; (4) defendants are not fiduciaries for the purpose of this case; (5) defendants did not breach any fiduciary duties because they acted prudently in charging copayments; (6) plaintiffs' claims are barred under the "voluntary payment" doctrine; and (7) plaintiffs failed to exhaust their administrative remedies. (Defendants Compcare and Blue Cross Blue Shield raise the additional argument in their opening brief that plaintiffs cannot prevail because they are challenging "policies" rather than "plans," dkt. #19, at 12-14, but they abandon that argument in their reply brief, so I have not considered it.)

Both sides begin their briefs with the question whether Wis. Stat. § 632.87 prohibits defendants from requiring copayments, but this is putting the cart before the horse. Before

I consider the merits of plaintiffs' claims, it is necessary to determine whether plaintiffs may sue defendants under ERISA for alleged violations of § 632.87. I conclude that they cannot. I agree with defendants that the law of this circuit prohibits plaintiffs from suing defendants under § 1132(a)(1)(B) and that plaintiffs cannot sue defendants under § 1104 because defendants were not acting as fiduciaries within the meaning of ERISA when they set the terms of the policies. Accordingly, I am granting defendants' motions to dismiss. Plaintiffs have not sought class certification, so the judgment will bind the named plaintiffs only.

Also before the court are defendants' "motion for judicial notice," dkt. #21, and plaintiffs' motion to "strike" the affidavit of Joshua Keith Meeks and portions of defendant Humana's reply brief relating to a preemption argument. Dkt. #59. Because I did not need to consider any of the materials that are the subject of these motions, I am denying these motions as moot.

OPINION

A. Claim for Benefits under § 1132(a)(1)(B)

Under 29 U.S.C. § 1132(a)(1)(B), a participant in a benefits plan may bring a civil action "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." Defendants argue that plaintiffs cannot bring claims under § 1132(a)(1)(B) for two reasons:

(1) insurers are not the proper defendants under this provision; and (2) no cause of action exists under § 1132(a)(1)(B) for reforming a plan to comply with state law. Because I agree with defendants' first argument, I need not consider the second.

In this circuit, a claim for benefits under § 1132(a)(1)(B) "generally is limited to a suit against the Plan." Blickenstaff v. R.R. Donnelley & Sons Co. Short Term Disability Plan, 378 F.3d 669, 674 (7th Cir. 2004). Plaintiffs begrudgingly acknowledge the general rule, but they focus on the exceptions. In particular, the court of appeals has allowed plaintiffs to proceed against other entities when they are "closely intertwined" with the plan or the identity of the plan is unknown. E.g., Mein v. Carus Corp., 241 F.3d 581, 585 (7th Cir. 2001); Riordan v. Commonwealth Edison Co., 128 F.3d 549 (7th Cir. 1997). Plaintiffs argue that the exceptions stand for the more general principle that an insurer may be sued if it "ultimately controlled whether the plaintiff was entitled to benefits." Plts.' Br., dkt. #50, at 39. To resolve this dispute, it is necessary to consider the purpose of the general rule and the reasons the court of appeals has departed from it under some circumstances.

Both sides point to Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996), as the origin of the general rule. In that case, the court stated that "ERISA permits suits to recover benefits only against the Plan as an entity." Id. at 1490. Plaintiffs say that it is inappropriate to rely on Jass as creating a flat rule for two reasons. First, the question in Jass was whether an employee could be sued in her individual capacity; the court

did not have occasion to consider whether other entities could be sued as well. Second, the court relied on 29 U.S.C. § 1132(d)(2), which states that "[a]ny money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter." On its face, this provision is about enforcement of a judgment; it does not limit the entities that may be sued.

Although I agree with plaintiffs that neither Jass nor § 1132(d)(2) prohibit participants from suing insurers under § 1132(a)(1)(B), plaintiffs face other obstacles. The court of appeals has acknowledged in more recent cases that § 1132(d)(2) provides little support for a rule that limits the parties that may be sued, but it has declined to alter the general rule or expand the exceptions. In Leister v. Dovetail, Inc., 546 F.3d 875, 879 (7th Cir. 2008), the court stated that § 1132(d)(2) does not "see[m] to be limiting the class of defendants who may be sued," but it concluded that "the plan is the logical and normally the only proper defendant" because "benefits are an obligation of the plan." See also Feinberg v. RM Acquisition, LLC, 629 F.3d 671, 673-74 (7th Cir. 2011) ("The proper defendant in a suit for benefits under an ERISA plan is, in any event, normally the plan itself rather than the plan administrator, because the plan is the obligor.") (citations omitted). The court restated the exception to the rule as follows: "in cases . . . in which the plan has never been unambiguously identified as a distinct entity, we have permitted the plaintiff to name as

defendant whatever entity or entities, individual or corporate, control the plan." Leister, 546 F.3d at 879. Under Leister, it is not enough to show that the insurer "control[s] the plan"; plaintiffs must show that the plan is not a "distinct entity." Under this reading, the exception exists to insure that *some* entity may be sued under § 1132(a)(1)(B). In this case, plaintiffs do not suggest that the identity of the plan is unknown or that the insurers and the plan are intertwined, so that argument is waived.

Further, the court of appeals has declined expressly to extend the exceptions. For example, in Mote v. Aetna Life Insurance Co., 502 F.3d 601, 610-11 (7th Cir. 2007), the court concluded that the insurer "was not a proper party to the action" because the exceptions identified in Riordan and Mein were not present. It did not suggest that courts should consider more generally whether the insurer exercises a certain degree of control. Accordingly, I conclude that plaintiffs' claim under § 1132(a)(1)(B) must be dismissed.

In a footnote, plaintiffs argue that it would be "illogical" to sue the plans in this case because they "hav[e] no discretion on this issue." Plts.' Br., dkt. #50, at 42 n.11. Plaintiffs do not explain this point, but to the extent they mean to argue that the plans do not have authority to change the terms of coverage in response to plaintiffs' request, this simply may be an indication that § 1132(a)(1)(B) is intended to allow participants to enforce the terms of the plan as written and not to seek amendments to the plan to comply with state law.

B. Claim for Breach of Fiduciary Duty under § 1104

Under 29 U.S.C. § 1104(a)(1)(B), a plan "fiduciary" must "discharge his duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Plaintiffs argue that defendants breached their fiduciary duty by "failing to provide coverage for chiropractic care, as required under Wisconsin law." Cpt. ¶ 138, dkt. #1. Defendants raise two arguments in response: (1) they were not acting as fiduciaries when they included copayments for chiropractor care in their policies; and (2) they did not breach any duty because they interpreted Wis. Stat. § 632.87 reasonably. Again, because I agree with the first argument, I need not consider the second.

Under ERISA, "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). The parties agree that it is not the identity of the party that is important. Rather, what matters is the *function* of the party in

the context of the particular action being challenged. Pegram v. Herdrich, 530 U.S. 211, 225-26 (2000) ("In every case charging breach of ERISA fiduciary duty, then, the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.").

In arguing that defendants are fiduciaries for the purpose of this case, plaintiffs say that defendants had "discretionary authority to change their policies as required to comply with applicable state or federal law." Plts.' Br., dkt. #50, at 46. The problem with this argument is that it ignores half of the statutory definition. The question is not simply whether defendants had "discretionary authority," but also whether they were "acting in the capacity of manager, administrator, or financial adviser to a 'plan.'" Pegram, 530 U.S. at 222. Which one of these functions covers what plaintiffs are challenging in this case? Plaintiffs are silent about that issue in their brief.

Unfortunately for plaintiffs, the Supreme Court has resolved this issue against them. "[A]n employer's decisions about the content of a plan are not themselves fiduciary acts." Id. at 226. See also Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999) ("[A]n employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."). Plaintiffs say that the holdings of Pegram and Hughes are limited to "voluntary aspects of plans" and that the cases are distinguishable

because state law prohibited defendants from charging plaintiffs copayments for chiropractic care. However, the language in Pegram and Hughes is not so limited and plaintiffs cite no authority that supports their narrow reading. In determining whether a defendant is acting as a fiduciary, courts look at the type of action involved: was the defendant managing the plan, administering it or advising it? The Supreme Court has stated that setting the terms of the plan does not fall into these categories. It is simply irrelevant for the purpose of this issue whether state law required defendants to include or exclude a particular provision. Plaintiffs are attempting to use a state law requirement to redefine the federal definition for a fiduciary, but they cite no authority for doing so and they cite no examples in which any court determined that a party was acting as a fiduciary when determining the content of a plan. Accordingly, I conclude that plaintiffs have not stated a claim upon which relief may be granted under 29 U.S.C. § 1132(a)(1)(B) or § 1104. If plaintiffs wish to enforce a state insurance law against these defendants, they will have to do so in state court.

ORDER

IT IS ORDERED that

1. The motions to dismiss filed by defendants Compcare Health Services Insurance Corporation and Blue Cross Blue Shield of Wisconsin, dkt. #18, Wisconsin Physicians Service Insurance Corporation, dkt. #22, Network Health Plan, dkt. #29, Humana

Insurance Company, dkt. #33, and UnitedHealthCare Insurance Company, dkt. #37, are GRANTED.

2. The motion to strike filed by plaintiffs Cynthia Larson, Kimberly Dehaan, Jeannette Borden, Rebecca Bavnik and Amy J. Cloute, dkt. #59, and the motion for judicial notice filed by defendants Compcare and Blue Cross Blue Shield, dkt. #21, are DENIED as moot.

3. The clerk of court is directed to enter judgment in favor of defendants and against the named plaintiffs and close this case.

Entered this 3d day of January, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge