IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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CORPORATE BENEFIT SERVICES
OF AMERICA, INC. and ST. CROIX
TRIBAL COUNCIL,

OPINION AND ORDER

Plaintiffs,

03-C-0048-C

v.

ANDREW SEMPF, LARRY SEMPF,
KATHY SEMPF and NOVITZKE,
GUST & SEMPF, Attorneys at Law,

Defendants.

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This is a civil suit brought under the Employment Retirement Income Security Act, 29 U.S.C. §§ 1101-1461 (ERISA), in which plaintiffs Corporate Benefit Services of America, Inc. and St. Croix Tribal Council are suing defendants Andrew Sempf, Larry Sempf, Kathy Sempf and Novitzke, Gust & Sempf, Attorneys at Law, for reimbursement in the amount of $180,095.01 for claims paid on behalf of defendant Andrew Sempf, who was injured in an automobile accident. Plaintiffs contend that under the terms of the benefit plan in which defendant Kathy Sempf was a participant, the payments they made on Andrew's behalf are a first priority claim against any recovery from a responsible party. They allege that without

notice to plaintiffs and without joining them as indispensable parties, defendants entered into a settlement agreement with the tortfeasor in the amount of $255,000; the Circuit Court for Polk County, Wisconsin, approved the settlement and the disbursement to defendants of money for attorney fees, reimbursement of miscellaneous expenses and for deposit into a money market account, pending a decision on medical reimbursement; and sometime later, the court approved withdrawal of the funds in the money market account in small amounts directly to Andrew Sempf and in the amount of $142,078, to the Revocable Living Trust of Andrew Sempf, Ron Jungman, Trustee.

The case is before the court on defendants' motion to dismiss the complaint for failure to state a claim and on plaintiffs' motion to amend the complaint to add Ron Jungman, Trustee of the Revocable Living Trust of Andrew Sempf, and the Revocable Living Trust of Andrew Sempf as defendants and the St. Croix Tribal Council Benefit Plan as a plaintiff and to add certain claims. (In their motion to amend, plaintiffs say they wish to add "additional federal common law claims of unjust enrichment, and state law claims of tortious interference with contract against the Defendants," Plts.' Mot. to Amend, dkt. #7, at 2, but they do not articulate such state law claims in their proposed amended complaint or cite either federal common law or supplemental jurisdiction as a basis for jurisdiction.) I conclude that the motion to amend should be granted as to plaintiffs' ERISA claim and that plaintiffs should have an opportunity to identify with specificity their state law claims.

The granting of the motion to amend moots defendants' motion to dismiss the original complaint.

Two threshold motions must be addressed. First, plaintiffs moved for an enlargement of time in which to file their brief in opposition to defendants' motion to dismiss, asserting that they had placed the brief in the mail three days before it was due but that it had failed to arrive on the due date. Defendants opposed the motion, arguing that plaintiffs had not shown excusable neglect for missing the due date and asserting that relying on the United States Postal Service can never be a justifiable reason for missing a deadline. I will grant defendants the proposition that mail service is not as reliable as it may have been in the past, but I disagree with their assertion that allowing three days for a letter to move the eighty-five miles from Milwaukee to Madison is negligence per se. Moreover, there is no merit to defendants' argument that because the brief is signed as of April 1, 2003, plaintiffs are lying about the date on which they put the brief in the mail. Plaintiffs have explained that counsel signed another copy of the brief on April 1, 2003, after learning that the first one had not arrived at the court. This is a reasonable explanation.

Defendants' fight over a one-day delay in these circumstances is a misuse of their energies and billing time. Plaintiffs' motion for an enlargement of time in which to file their opposition brief will be granted.

Also, defendants have moved to strike or disallow plaintiffs' amended complaint and

to strike plaintiffs' response brief. (The motion to strike the response brief is directed at the same brief I have just discussed. It will be denied.) Defendants argue that the proposed amended complaint is not signed and should be stricken on this ground. Their motion fails because the copy filed with the court *is* signed. Even if it were not, it is accompanied by an affidavit in which the affiant swears that the amended complaint attached is a true and correct copy of the original. Having sworn to an affidavit and signed the copy of the complaint filed with the court, plaintiffs have complied with Fed. R. Civ. P. 11 for all practical purposes. They are liable for anything said in the complaint.

Defendants referred to Rule 11 in their motion to strike. I am not disposed to strike either the amended complaint or the brief in response but if I were, I would require defendants to file any motion for sanctions in a separate document.

Defendants maintain that the amended complaint should be disallowed because it is frivolous, it would not have been filed had defendants not filed their motion to dismiss and it is an attempt to circumvent the jurisdictional requirements of this court. For reasons that I will discuss in the Opinion section, I conclude that the amended complaint is not frivolous, that it is irrelevant whether plaintiffs would have filed it had defendants not filed their motion to dismiss and that it is not an attempt to circumvent the requirements of federal jurisdiction.

For the purpose of deciding these motions, I find that plaintiffs fairly pleaded the

following facts in their original and amended complaint.

PLAINTIFFS' ALLEGATIONS

Plaintiff Corporate Benefits Services of America, Inc. is the contract administrator for the St. Croix Tribal Council Employee Benefits Plan, with the responsibility for processing claims filed under the plan. Plaintiff St. Croix Tribal Council is the plan administrator of the St. Croix Tribal Council Employee Benefits Plan. At all relevant times, the Plan was a self-funded, non-insured ERISA employee welfare benefit plan that provided medical coverage for employees and their covered dependents, except to the extent that it had a stop loss insurance agreement with Massachusetts General Liability Insurance Company.

Defendant Andrew Sempf was born on February 27, 1982. Defendants Kathy Sempf and Larry Sempf are the parents of Andrew Sempf. At all relevant times, defendant Kathy Sempf was an employee of St. Croix Tribal Council and a participating "covered person" under the benefits plan, as was her son Andrew. Defendant Novitzke, Gust & Sempf is a law firm that represented the Sempfs in a law suit arising out of injuries Andrew Sempf incurred in an automobile accident on July 6, 1998. The law firm received $85,000 in a court-approved settlement of the Sempfs' claim.

The Plan paid a total of $180,095.01 on plaintiff Andrew Sempf's behalf for the treatment of his injuries. Its stop loss insurer, Massachusetts General Liability Insurance

Company, paid plaintiff Tribal Council $30,362.77 for a portion of Andrew's claim.

Plaintiff Corporate Benefit retained Subrogation Advantage to pursue a subrogation recovery for the money disbursed by the Plan and by Massachusetts General under the specific subrogation provisions of the Plan. These provisions required covered persons to include the Plan's subrogation claim in any action against a third party and, in the event of recovery, to hold the funds received in trust for the benefit of the Plan. The Plan provided that its subrogation rights were to be considered a first priority claim to be paid before any other claims for the covered person as a result of injury and it prohibited payment of any fees or costs associated with the pursuit of a claim without the prior consent of plaintiff Corporate Benefit. Defendant Kathy Sempf signed a document on February 15, 1999, acknowledging the Plan's right of subrogation and the first right of reimbursement as a condition precedent to the receipt of benefit payments.

On November 2, 1998, Timothy Sempf filed a Petition for Appointment of Guardian ad Litem and Petition for Minor Settlement on behalf of his clients, defendants Andrew, Larry and Kathy Sempf, in the Circuit Court for Polk County. On November 12, 1998, he wrote to the presiding judge, enclosing a copy of a letter from Subrogation Advantage he had received, setting forth the amount the Plan had paid in benefits as of that time and the reimbursement the Plan had received from its stop loss insurer. Although defendants were aware of plaintiffs' subrogation claim, they never added plaintiff Tribal Council as a

necessary and indispensable party in the settlement of defendant Sempfs' claims.

On November 24, 1998, the court signed an order, approving a total settlement in the amount of $255,000, to be disbursed in the following manner: $85,000.00 in attorney fees to Novitzke, Gust & Sempf, with 25% to be paid then and the rest retained in trust until full resolution of the case; $10,000 to Kathy Sempf and Larry Sempf for reimbursement for lost time from work and mileage to doctors' appointments and miscellaneous expenses they had incurred; and $160,000 to be retained in a money market account until a decision on medical reimbursement could be made. Later, Timothy Sempf petitioned for withdrawal of certain amounts from the money market account, including $142,078.57 to be paid into a revocable trust for defendant Andrew Sempf's benefit. Ron Jungman was the named trustee.

On July 5, 2001, defendants Andrew Sempf, Kathy Sempf and Larry Sempf filed a suit against Dunn County, Wisconsin, and Wisconsin County Mutual Insurance Company, alleging negligence by the county contributing to the accident in which Andrew was injured. Plaintiff Corporate Benefit intervened in the action, alleging its first right of reimbursement. It prevailed in the action and was awarded the full amount of its subrogation lien, $180,095.01. Defendants have appealed the judgment; the appeal is pending.

OPINION

In moving to dismiss, defendants rely on the opinion in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002), in which the Supreme Court held that a plan fiduciary cannot sue beneficiaries for the recovery of money paid to the beneficiaries that allegedly belongs to the plan. In Great-West, Mrs. Knudson was injured in an automobile accident. Great-West paid over $400,000 on her behalf for medical expenses. She and her husband filed a suit in state court against the manufacturer of the car she was driving and other tortfeasors and reached a $650,000 settlement of the case, which the parties to the settlement agreed would be disbursed roughly as follows: $256,745 to a trust for Mrs. Knudson's special needs; $373,426 for attorney fees and costs; $5,000 to reimburse California Medicaid; and $13,829 to Great-West to satisfy its claim under the reimbursement provisions of the plan. Great-West tried to remove the state court case to federal court; its effort was rebuffed. It sought next to obtain a temporary restraining order in federal court against approval of the settlement in state court. This, too, was unsuccessful. The federal court entered summary judgment in favor of the Knudsons on the ground that the plan language limited the plan's right of reimbursement to the amount beneficiaries received from third parties for past medical treatment. Because the state court had identified the allocation to Great-West as representing the full amount of the Knudsons' recovery for past medical treatment, the federal court found no reason to require the Knudsons to pay

any more money to Great-West. The Court of Appeals for the Ninth Circuit affirmed the district court on different grounds, holding that ERISA limited the Plan to equitable relief and that "equitable relief" does not include judicially decreed reimbursement for payments made by a third party to a beneficiary of an insurance plan. Id. at 209. The Supreme Court agreed with the court of appeals, holding that Great-West was seeking legal relief rather than equitable and that § 502(a)(3) did not authorize such relief.

It is important to note that the Supreme Court did not rule out an ERISA action to recover wrongfully disbursed funds if the insurer brought the action against a trustee holding identifiable funds belonging to the insurer. Great-West, 534 U.S. at 220 ("Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust . . .") Such an action would be one for restitution in equity, as opposed to legal restitution. No doubt it is in recognition of the force of the holding in Great-West that plaintiffs have moved to amend their complaint to add the Trustee of the Revocable Living Trust of Andrew Sempf as a defendant and have not attempted to argue that their original complaint stated a viable ERISA claim against defendants Andrew, Larry or Kathy Sempf or the law firm of Novitzke, Gust & Sempf. Despite the obstacles to recovering money from the individual defendants or the law firm under ERISA, it does not appear that any similar obstacles bar plaintiffs from obtaining equitable restitution from the trustee or trust, assuming, of course, that they are able to

prove their claim.

Despite defendants' characterization of the proposed change as frivolous, I am persuaded that it is viable. Whether plaintiffs can prove the facts that would support recovery from the trustee or trust is a question for the factfinder to decide at a later stage of the proceedings. At this stage, I am deciding only that the provisions of ERISA would not prevent plaintiffs from recovering from the trustee or trust. (I am assuming from plaintiffs' lack of argument on the subject that they agree with defendants that no ERISA claim lies against any of the defendant Sempfs or the law firm for recovery of any funds that cannot be traced directly to the state court verdict in the Sempfs' favor or for the firm's failure to release subrogated funds to plaintiffs.)

As to plaintiffs' state law claims, defendants argue primarily that these are claims that should be heard in state court and that plaintiffs' ERISA claim is nothing but a Trojan horse providing a phony framework for jurisdiction. Their argument succeeds only if they can show that the federal claim has no independent validity or that the claims against the other defendants do not arise out of the same nucleus of facts as those giving rise to the ERISA claim. I conclude that the federal claim and the state law claims arise out of the same set of facts. They all center on the legitimacy of plaintiffs' claim of entitlement to the money it has paid on behalf of defendant Andrew Sempf. I conclude that this court's supplemental jurisdiction extends to plaintiffs' state law claims.

I have some question whether this suit is necessary, given plaintiffs' apparent victory in the Circuit Court for Dunn County. Plaintiffs seem to think that their victory will not hold up on appeal. In the meantime, however, they should not consider this case a mere place holder. They will be expected to litigate it vigorously and to be prepared to go to trial as scheduled, whatever the status of their state court appeal. Defendants have not raised any defenses of res judicata or claim preclusion. I have no way of knowing from the present record whether any such defenses would have any validity.

One last comment. The court will do everything possible to move this case expeditiously and to resolve the parties' dispute. Counsel can be of immeasurable help in that effort if they refrain from making large mountains out of very small molehills and display moderation in their characterization of the motives of their opponents. On the other hand, if they persist in submitting eight-page briefs in opposition to motions for one-day extensions of time and submerging the court in lengthy and mostly irrelevant affidavits, they will only make it harder for the court to respond promptly to their motions.

ORDER

IT IS ORDERED that the motion of plaintiffs Corporate Benefit Services of America, Inc. and St. Croix Tribal Council for an extension of time in which to file their response brief is GRANTED; the motion of defendants Andrew Sempf, Larry Sempf, Kathy Sempf and

Novitzke, Gust & Sempf to strike plaintiffs' motion to amend their complaint and to strike plaintiffs' response brief is DENIED and plaintiffs' motion to amend their complaint is GRANTED. Plaintiffs may have until May 19, 2003, in which to file and serve an amended complaint that (1) adds St. Croix Council Employee Benefit Plan as a plaintiff; (2) adds Ronald Jungman, Trustee of the Revocable Living Trust of Andrew Sempf and the Revocable Living Trust of Andrew Sempf as defendants; and (3) identifies the basis for jurisdiction of their common law claims.

Entered this 9th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge