

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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SHARON MONDRY,

Plaintiff,

MEMORANDUM AND ORDER

v.

06-C-320-S

AMERICAN FAMILY MUTUAL INSURANCE COMPANY  
and AMERIPREFERRED PPO PLAN,

Defendants.

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On June 14, 2006 plaintiff Sharon Mondry commenced this civil action against defendants American Family Mutual Insurance Company and AmeriPreferred PPO Plan alleging violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, and seeking civil forfeitures and reimbursement of benefits allegedly due under an employee benefit plan governed by ERISA.<sup>1</sup> On October 2, 2006 defendants filed a motion for summary judgment arguing in relevant part that both CIGNA's Clinical Resource Tool and its BIRT document were not statutorily defined Plan documents which defendant American Family was obligated to disclose under 29 U.S.C. § 1024(b)(4).<sup>2</sup>

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<sup>1</sup>Plaintiff likewise commenced this action against Connecticut General Life Insurance Company. However, on September 26, 2006 the Court entered an order granting Connecticut General's motion to dismiss. Accordingly, the Court dismissed said party from the action.

<sup>2</sup>Defendants also argued that the 1996 Claims Administration Agreement by and between defendant American Family and CIGNA was

On October 23, 2006 plaintiff filed a brief in opposition to defendants' motion for summary judgment arguing in relevant part that defendant American Family had an obligation to disclose both CIGNA's Clinical Resource Tool and its BIRT document because such documents were "similar in nature" to those specifically enumerated in 29 U.S.C. § 1024 as they assist Plan participants in understanding their rights.

On November 22, 2006 the Court denied defendants' motion for summary judgment as it concerned count one of plaintiff's complaint. The Court determined that both CIGNA's Clinical Resource Tool and its BIRT document were Plan Documents which defendant American Family had an obligation to disclose under 29 U.S.C. § 1024(b)(4).<sup>3</sup>

#### MEMORANDUM

Defendants assert the Court's November 22, 2006 Memorandum and Order conflicts with Seventh Circuit precedent. Additionally, defendants assert both CIGNA's Clinical Resource Tool and its BIRT

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not a statutorily defined Plan document. The Court agreed with defendants and found that the 1996 agreement did not fall within the Seventh Circuit's narrow reading of 29 U.S.C. § 1024(b)(4)'s "other instruments" language. Accordingly, the Court determined that defendant American Family had no statutory obligation to disclose said agreement. Neither party disputes this determination.

<sup>3</sup>In its November 22, 2006 Memorandum and Order the Court granted defendants' motion for summary judgment as it concerned count two of plaintiff's complaint finding that defendant American Family did not breach its fiduciary duty. Again, neither party disputes this aspect of the Court's Order.

document are not legally binding. Rather, defendants assert they simply serve as attempts to reasonably construe the formal Plan language of defendant American Family's Summary Plan Description. Accordingly, defendants request that the Court: (1) reconsider its decision denying summary judgment as to count one; and (2) grant summary judgment in their favor dismissing count one of plaintiff's complaint.

Plaintiff asserts the Court correctly determined that even under the Seventh Circuit's narrow interpretation of the "other instruments" language of 29 U.S.C. § 1024(b)(4) both CIGNA's Clinical Resource Tool and its BIRT document are formal documents under which defendant AmeriPreferred PPO Plan is operated. Accordingly, plaintiff argues defendants' motion for reconsideration should be denied.

#### **A. Standard of Review**

As a preliminary matter, plaintiff argues defendants' motion should be reviewed under the standard articulated by the Seventh Circuit in Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185 (7<sup>th</sup> Cir. 1990). In Bank of Waunakee, the Seventh Circuit determined that a motion for reconsideration performs a valuable function where: (1) a court has patently misunderstood a party, (2) a court has made a decision outside the adversarial issues presented, (3) a court has made an error not of reasoning but of apprehension; or (4) there has been a significant change in the law

or facts since submission of the issue to the Court. Id. at 1191. Additionally, the Seventh Circuit has determined that a motion to alter or amend a judgment must “clearly establish either a manifest error of law or fact or must present newly discovered evidence.” FDIC v. Meyer, 781 F.2d 1260, 1268 (7<sup>th</sup> Cir. 1986) (citation omitted). However, the standard articulated by the Seventh Circuit in FDIC concerning motions to alter or amend the judgment is not applicable to defendants’ motion because no judgment has been entered in this action.

Rather, defendants’ motion is reviewed under the standard articulated by the Seventh Circuit in Cameo Convalescent Ctr., Inc. v. Percy, 800 F.2d 108 (7<sup>th</sup> Cir. 1986). In Cameo Convalescent Ctr., Inc., the Seventh Circuit determined that a district court “has the discretion to make a different determination of any matters that have not been taken to judgment or determined on appeal.” Id. at 110. Additionally, the Seventh Circuit determined that “[p]re-judgment orders...are interlocutory and may be reconsidered at any time.” Id. The distinction between the two standards of review makes sense considering the interest courts have in the finality of judgments. However, as previously stated, no final judgment has been entered in this action. Accordingly, the Court maintains discretion to make a different determination on defendants’ motion for summary judgment because its November 22, 2006 Memorandum and Order is interlocutory and may be reconsidered at any time before judgment is entered. Id.

**B. Disclosure of CIGNA's Clinical Resource Tool and its BIRT document under 29 U.S.C. § 1024(b) (4) .**

Defendants argue CIGNA's internal claims handling guidelines are not contractually binding and as such they are not formal legal instruments under which participant rights are established. Accordingly, defendants argue neither CIGNA's Clinical Resource Tool nor its BIRT document are Plan documents which defendant American Family had an obligation to disclose under Section 1024(b) (4). Plaintiff argues the substance of the requested documents is considered in determining disclosure obligations and as such both CIGNA's Clinical Resource Tool and its BIRT document are Plan documents because they are the types of documents subsumed under the language of Section 1024(b) (4). As the Court stated in its November 22, 2006 Memorandum and order this is a close question. However, after careful consideration, the Court finds that neither CIGNA's Clinical Resource Tool nor its BIRT document are formal documents that establish or govern a plan. Accordingly, defendants' motion for reconsideration is granted.

Defendants principally rely on the Seventh Circuit's decision in Egert v. Conn. Gen. Life Ins. Co., 900 F.2d 1032 (7<sup>th</sup> Cir. 1990) to support their argument that CIGNA's internal guidelines are not Plan documents. While the Seventh Circuit's holding in Egert is not dispositive because it addressed whether a decision to deny a claim for benefits was arbitrary and capricious rather than whether defendant's internal guidelines were subject to disclosure under

Section 1024(b)(4), the Seventh Circuit's discussion of such internal guidelines is helpful to the Court's analysis.

In Egert, the Seventh Circuit provided as follows:

Nonetheless, the treatment of IVF claims by the CCP - a compilation of secret, internal guidelines not disclosed to Canteen or to participants or beneficiaries of the Plan - is not dispositive here. The CCP is not the Plan: it is simply a set of memoranda designed to provide guidance to those interpreting the Plan.

Id. at 1036. In this action, both CIGNA's Clinical Resource Tool and its BIRT document were compilations of private, internal guidelines not disclosed to either defendant American Family or plaintiff. However, it does not necessarily follow that said internal guidelines constitute Plan documents.

Rather, the Court finds that just as the CCP in Egert was a set of memoranda designed to provide guidance for plan interpretation, CIGNA's Clinical Resource Tool and its BIRT document were designed to construe the formal Plan language of defendant American Family's Summary Plan Description which is the binding Plan document. Dispositive of the Court's finding is plaintiff's counsel's recognition in his December 21, 2004 letter to CIGNA that the BIRT is not contractually binding. It is difficult to imagine how documents which CIGNA was not contractually obligated to either consult or use when evaluating benefit claims under the Plan could be construed as formal documents that establish or govern the Plan.

Plaintiff is correct in her assertion that CIGNA used its Clinical Resource Tool and its BIRT document to deny her claim for benefits not only initially but also at the appellate level. Additionally, the Court acknowledges that this factor played an important role in its analysis of defendants' motion for summary judgment. However, the Court was not aware of the information contained in plaintiff's counsel's December 21, 2004 letter when it decided defendants' motion for summary judgment because neither party referenced it in their proposed findings of fact or submitted it as evidence during the summary judgment process (although it apparently was attached as an exhibit to plaintiff's complaint.) This evidence alters how the Court views defendant American Family's disclosure obligations. Accordingly, it is now clear that while plaintiff was entitled to these internal guidelines to ensure a full and fair review of her claim under 29 U.S.C. § 1133(2) she was not entitled to them under 29 U.S.C. § 1024(b)(4).

The Seventh Circuit has determined that the "catch-all" part of 29 U.S.C. § 1024(b)(4) which requires disclosure of "other instruments under which the plan is established or operated" is to be narrowly construed. Ames v. Am. Nat'l Can Co., 170 F.3d 751, 758-759 (7<sup>th</sup> Cir. 1999). Accordingly, a plan administrator is not required to produce all documents relevant to a plan. Id. Rather, a plan administrator has an obligation to disclose only those formal documents that establish or govern a plan. Id. at 758. In

light of both the Seventh Circuit's narrow construction of 29 U.S.C. § 1024(b)(4) and plaintiff's concession that CIGNA's internal guidelines were not contractually binding the Court finds that defendant American Family did not have a statutory obligation to disclose either CIGNA's Clinical Resource Tool or its BIRT document under 29 U.S.C. § 1024(b)(4) because neither document establishes or governs the Plan. Accordingly, defendants' motion for reconsideration is granted.

ORDER

IT IS ORDERED that defendants' motion for reconsideration is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED as it concerns count one of plaintiff's complaint.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants against plaintiff Sharon Mondry dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 12<sup>th</sup> day of December, 2006.

BY THE COURT:

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JOHN C. SHABAZ  
District Judge