

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

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FRANCISCAN SKEMP HEALTHCARE, INC.,

Plaintiff,

v.

CENTRAL STATES JOINT BOARD HEALTH  
& WELFARE TRUST FUND,

Defendant.

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MEMORANDUM AND ORDER  
07-C-387-S

Plaintiff Franciscan Skemp Healthcare, Inc. ("Franciscan") commenced this estoppel and negligent misrepresentation action against defendant Central States Joint Board Health & Welfare Trust Fund ("Central States") in the Circuit Court for La Crosse County, Wisconsin. Defendant removed this action pursuant to 28 U.S.C. § 1441 alleging that the Court has original jurisdiction because plaintiff's claims arise under or are governed by the Employee Retirement Income Security Act ("ERISA"), specifically 29 U.S.C. § 1132. The matter is presently before the Court on plaintiff's motion to remand pursuant to 28 U.S.C. § 1447(c) and defendant's motion to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The following facts are undisputed for the purpose of deciding the present motions.

## BACKGROUND

Plaintiff Franciscan is a health care provider and defendant Central States is a multi-employer employee benefit plan as defined under 29 U.S.C. §§ 1002(2), (3) and (37). In October 2003 plaintiff provided services to Sherry Romine ("Romine"). Romine was an employee of Northern Engraving, and as part of her employment she received health benefits through defendant as provided in the Central States Joint Board Health & Welfare Plan (the "Plan"). Prior to providing services plaintiff contacted defendant to verify that its prospective services for Romine would be covered by the Plan. Defendant's confirmed coverage.

However, after providing services to Romine plaintiff's claim for payment for those services was ultimately denied by defendant. On February 4, 2004 plaintiff was informed that Romine's failure to pay necessary premiums had led to termination of her COBRA coverage effective retroactively beginning September 30, 2003. Accordingly, Romine's retroactive loss of coverage required denial of plaintiff's claim for payment.

On May 18, 2007 plaintiff filed its suit against defendant in the Circuit Court for La Crosse County, Wisconsin based on state law theories of estoppel and negligent misrepresentation. On July 9, 2007 defendant received the state summons and complaint and on July 18, 2007 filed for removal to this Court. On July 28, 2007 defendant filed its motion to dismiss the complaint. On August 6, 2007 plaintiff filed its motion to remand.

## MEMORANDUM

Plaintiff argues that this case should be remanded because ERISA does not govern its claims for the Court's lack of original jurisdiction. Plaintiff further argues that should the Court have original jurisdiction its claims should not be dismissed because they are not preempted by ERISA. Conversely, defendant argues that this case was correctly removed to federal court because plaintiff's state claims are artfully pleaded as ERISA claims and ERISA's complete preemption gives the Court original jurisdiction over the claims. Defendant further argues that once plaintiff's claims are correctly recharacterized as arising under ERISA the complaint must be dismissed for failing to state a claim upon which relief can be granted.

### **A. Plaintiff's motion to remand**

Generally, removal is appropriate only if a federal district court has original jurisdiction over the action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993) (citing 28 U.S.C. § 1441). This includes "'federal question' jurisdiction over cases 'arising under the Constitution, laws, or treaties of the United States.'" Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 966 (7th Cir. 2000), aff'd, 536 U.S. 355 (2002) (quoting 28 U.S.C. § 1331). The party choosing federal court, in this case defendant, bears the burden to establish federal jurisdiction. Allied-Signal,

Inc., 985 F.2d at 911. Accordingly, the Court must address whether it has "federal question" jurisdiction over this action.

The Seventh Circuit has explained that "[t]he determination of jurisdiction on removal involving an ERISA issue is based upon the well-pleaded complaint rule, the ERISA 'complete preemption' exception to that rule and the defense of 'conflict preemption' under ERISA.'" Moran, 230 F.3d at 966 (quoting Speciale v. Seybold, 147 F.3d 612, 614 (7th Cir. 1998)). Under the well-pleaded complaint rule a court is to look only to the state court complaint in determining whether or not the complaint on its face triggers federal question jurisdiction. See id. at 966. However, "complete preemption"<sup>1</sup> is an exception to the well-pleaded complaint rule. Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996).

The complete preemption doctrine "provides that 'to the extent that Congress has displaced a plaintiff's state law claim, that intent informs the well-pleaded complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law.'" Jass, 88 F.3d at 1487 (quoting Rice v. Panchal, 65 F.3d 637, 640 n.2, (7th Cir. 1995)). The Supreme Court has determined that ERISA's civil enforcement provision, § 502(a) (i.e., 29 U.S.C. § 1132(a))

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<sup>1</sup>Although one might assume the "complete preemption doctrine" was a preemption doctrine, it is not; in reality the doctrine is a federal jurisdiction doctrine. Jass, 88 F.3d at 1487.

"completely preempts state law causes of action that fall within the scope of that provision." Moran, 230 F.3d at 967 (citing Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 67, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)). Accordingly, a claim that arises under ERISA's civil enforcement provision provides the basis for complete preemption.

However, when the defendant raises "conflict preemption" under ERISA, § 514(a) (i.e., 29 U.S.C. § 1144(a)) this is merely a defense that cannot provide a basis for federal question jurisdiction. Jass, 88 F.3d at 1487-88. The Seventh Circuit succinctly explained the difference between the two doctrines in Speciale v. Seybold, stating "'[c]omplete preemption' under § 502(a) encompasses all claims by a participant beneficiary to enforce his rights under an ERISA plan whereas 'conflict preemption' under § 514(a) preempts any state law that may 'relate to' an ERISA plan, but is not a basis for federal jurisdiction. 147 F.3d 612, 615 (7th Cir. 1998) (citation omitted).

In this case, defendant argues that the Court has federal question jurisdiction over plaintiff's claims based on the jurisdictional doctrine of complete preemption. There are three relevant factors to address in determining whether a state law claim should be recharacterized to arise under the scope of ERISA's civil enforcement provision and thus create complete preemption: "(1) 'whether the plaintiff is eligible to bring a claim under that

section'; (2) 'whether the plaintiff's cause of action falls within the scope of an ERISA provision that the plaintiff can enforce via § 502(a)'; and (3) 'whether the plaintiff's state law claim cannot be resolved without an interpretation of the contract governed by federal law.'" Moran, 230 F.3d at 967 (quoting Jass, 88 F.3d at 1487 (internal quotation marks and citations omitted)). Accordingly, if all three factors are present plaintiff's claims will be recharacterized as arising under ERISA which requires complete preemption and creates a basis for federal question jurisdiction.

Plaintiff argues that it is not eligible to bring a claim under § 502(a) because it is not a participant or beneficiary. Defendant rebuts this argument by reasoning that Romine's assignment of benefits to plaintiff has placed plaintiff in Romine's shoes, i.e., Romine was a beneficiary and her assignment of benefits to plaintiff makes it a beneficiary. Although plaintiff has omitted in its complaint whether there was an assignment of benefits, the Court is not limited by the complaint "but may look beyond it to assure [itself] 'that the plaintiff has not by 'artful pleading' sought to defeat defendant's right to a federal forum.'" Jass, 88 F.3d at 1489 (quoting Oglesby v. RCA Corp., 752 F.2d 272, 277-78 (7th Cir. 1985) (citation omitted); see also Burda v. M. Ecker Co., 954 F.2d 434, 438 (7th Cir. 1992)).

Accompanying defendant's notice of removal was the claim form that plaintiff had submitted in an effort to collect for services provided to Romine and the claim form provides evidence of an assignment of benefits. Furthermore, plaintiff refers to the claim form several times in its complaint. (Compl. ¶¶ 8-12.) Accordingly, despite plaintiff's artful omission, defendant has proved for jurisdictional purposes that Romine assigned her benefits to plaintiff. See Kennedy v. Conn. Gen. Life Ins. Co., 924 F.2d 698,700 (7th Cir. 1991).

As an assignee of benefits, plaintiff stepped into Romine's shoes and became a beneficiary under ERISA. Decatur Mem'l Hosp. v. Conn. Gen. Life Ins. Co., 990 F.2d 925, 927 (7th Cir. 1993). This entitles plaintiff to bring a claim under § 502(a) and satisfies the first recharacterization factor. See id. (citing Kennedy, 924 F.2d 698).

In addressing the second factor, the Court must ask whether plaintiff's cause of action falls under an ERISA provision enforceable under § 502(a). In the complaint, plaintiff requests that defendant "be estopped from denying coverage benefits for the Romine medical services . . . ." (Compl. ¶ 17.) Plaintiff further requests that it be granted a "judgment against defendant for the services provided by [plaintiff] as would otherwise be covered by defendant's plan." (Compl. at 5, sub(A).) These requests establish that the gravamen of plaintiff's cause of action is a

desire to recover benefits it believes are due to it under the terms of the Plan. Under § 502(a)(1)(B) a participant or beneficiary can bring a civil action to "recover benefits due to him under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Accordingly, under § 502(a)(1)(B) plaintiff could bring its cause of action to try to recover benefits due to it under the terms of the Plan which satisfies the second factor.

Finally, plaintiff's state law claims cannot be resolved without an interpretation of defendant's ERISA Plan which is governed by federal law. Defendant cannot be estopped from denying coverage benefits unless the Plan is interpreted to decide what the covered benefits were. Also, there can be no judgment against defendant for services provided to Romine that were covered by the Plan without interpreting the Plan to decide what services were covered. Accordingly, interpretation of the Plan is central to addressing plaintiff's cause of action which satisfies the third factor.

The satisfaction of all three factors triggers complete preemption and requires the Court to recharacterize plaintiff's state law claims as seeking to obtain Plan benefits under ERISA because "the preemptive force of ERISA is so powerful that it converts 'a state law claim into an action arising under federal law,' even if the plaintiff does not want relief under ERISA." Jass, 88 F.3d at 1490 (quoting Taylor, 481 U.S. at 64).

Furthermore, the recharacterization of plaintiff's state law claims as arising under ERISA gives the Court federal question jurisdiction over the case. Accordingly, defendant has proven that removal was proper and the plaintiff's motion for remand is denied.

#### **B. Defendant's motion to dismiss**

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the complaint for failure to state a claim upon which relief can be granted. Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997) (citing Fed. R. Civ. P. 12(b)(6)). Dismissal is appropriate when plaintiff's complaint fails to provide sufficient factual allegations to "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, --- U.S. ----, ----, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007); see also E.E.O.C. v. Concentra Health Serv., Inc., No. 06-3436, 2007 WL 2215764, at \*2-3 (7th Cir. Aug. 3, 2007).

When deciding a motion to dismiss for failure to state a claim courts are generally restricted to an analysis of the complaint. See Hill v. Trustess of Ind. Univ., 537 F.2d 248, 251 (7th Cir. 1976) (citation omitted). However, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [its] claim." Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993) (citations omitted).

In this case, the recharacterization of plaintiff's claims as arising under ERISA necessarily limits the manner in which plaintiff can pursue relief to those provided under ERISA. See Jass 88 F.3d 1491-93. Furthermore, "§ 502(a) displaces state claims that it does not necessarily replace with federal claims." Rice v. Panchal, 65 F.3d 637, 641 (7th Cir. 1995) (citation omitted). Additionally, when a plaintiff artfully pleads an ERISA case to avoid federal jurisdiction a court is permitted to dismiss the case without granting an opportunity to amend. See Jass, 88 F.3d 1491. Accordingly, the Court must determine whether ERISA provides relief under common law estoppel and negligent misrepresentation claims and if so whether plaintiff has stated sufficient factual allegations to raise its right to relief above the speculative level concerning those claims.

Under conflict preemption "ERISA 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.'" Pohl v. Nat'l Benefits Consultants, Inc., 956 F.2d 126, 127 (7th Cir. 1992) (quoting 29 U.S.C. § 1144(a)). On its face the statute appears to exclude relief for any claims not explicitly provided for in the statute. However, the Seventh Circuit has recognized that "[i]n passing ERISA, Congress expected that 'a federal common law of rights and obligations under ERISA-regulated plans would develop.'" Trustmark Life Ins. Co. v. Univ. of Chi. Hosp., 207 F.3d 876, 881 (7th Cir. 2000) (quoting Pilot

Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987)). Also, courts are permitted to use state common law as a foundation for building federal common law in areas that ERISA does not expressly address. Id. (citations omitted).

The Seventh Circuit has not recognized a claim for negligent misrepresentation under ERISA and attempts to bring such a claim under ERISA have been unsuccessful. See Decatur Mem'l Hosp., 990 F.2d at 926-27 (citations omitted); see also Pohl, 956 F.2d 126. Plaintiff cannot obtain relief for an unrecognized claim which makes its right to relief under negligent misrepresentation speculative at most. Accordingly, the nonexistence of negligent misrepresentation as a claim under ERISA requires dismissal of plaintiff's claim based on that theory.

Conversely, this circuit has recognized estoppel as a common law claim under ERISA. Coker v. Trans World Airlines, Inc., 165 F.3d 579 (7th Cir. 1999). There are four elements necessary to support a claim for estoppel under ERISA: "(1) a knowing misrepresentation; (2) made in writing; (3) with reasonable reliance on that misrepresentation by the plaintiff; (4) to [its] detriment." Id. at 585. Furthermore, this standard is stricter than a normal common law estoppel claim because under ERISA "[a] claim will not lie for every false statement reasonably and detrimentally relied upon by an unwitting plaintiff." Id. at 585-86 (emphasis in original).

Although the boundaries of estoppel under ERISA have not been definitively set, application of estoppel under ERISA has been limited to “claims for benefits under unfunded single-employer welfare benefit plans.” Id. at 585 (quoting Black v. TIC Inv. Corp., 900 F.2d 112, 115 (7th Cir. 1990)). Estoppel has not been applied to multi-employer plans because of the danger of damaging the actuarial soundness of such plans. See Thomason v. Aetna Life Ins. Co., 9 F.3d 645, 649-50 (citing Black, 900 F.2d at 115). In this case, defendant is a multi-employer plan which places it outside the cases that have allowed estoppel claims under ERISA.

However, even if the elements of estoppel under ERISA are applied to this case plaintiff has not raised its right to relief above the speculative level. First, plaintiff has not alleged or argued that defendant made a knowing misrepresentation but instead alleged negligent misrepresentation. (See Compl.) Without a knowing misrepresentation there can be no estoppel. Second, plaintiff has not alleged in its complaint that the misrepresentation was in writing and has later stated that defendant’s misrepresentation was over the phone (i.e., oral). (Pl.’s Remand Reply Br. 4.) Without a written misrepresentation there can be no estoppel. Failure to allege facts in satisfaction of the first two ERISA estoppel elements ends the inquiry because “[a] claim will *not* lie for every false statement reasonably and detrimentally relied upon by an unwitting plaintiff.” Coker, 165

F.3d at 585-86 (emphasis in original). Accordingly, plaintiff has not raised its right to relief under its claim for estoppel above the speculative level and dismissal of the claim is proper.

**C. Conclusion**

Despite plaintiff's artful pleading, the complete preemption doctrine requires that its state common law claims for estoppel and negligent misrepresentation be recharacterized as arising under ERISA which provides the Court with original jurisdiction over the case. Once the claims are recharacterized as arising under ERISA, the Court finds that plaintiff has failed to state claims upon which relief can be granted and the complaint is dismissed.

ORDER

IT IS ORDERED that plaintiff's motion to remand is DENIED.

IT IS FURTHER ORDERED that defendant's motion to dismiss plaintiff's complaint is GRANTED without prejudice.

Entered this 10th day of September, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge