

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

BONNIE LARSON,

Plaintiff,

v.

GOLDEN RULE INSURANCE COMPANY,

Defendant.

ORDER

11-cv-138-bbc

Plaintiff Bonnie Larson has sued defendant Golden Rule Insurance Company for its refusal to pay for certain medical treatments that she received to treat metastatic melanoma. Plaintiff contends that defendant's refusal to pay for the treatments is a breach of the parties' insurance contract and a violation of defendant's duty of good faith and fair dealing. Plaintiff also asserts claims against defendant for estoppel under Wisconsin law and for interest under Wis. Stat. § 628.46(1). Jurisdiction is present under 28 U.S.C. § 1332 because the amount in controversy is more than \$75,000, dkt. #2, and there is complete diversity of citizenship between plaintiff (a citizen of Wisconsin) and defendant (an Indiana corporation with its principal place of business in Illinois).

Now before the court is defendant's motion for summary judgment, dkt. #14, in

which defendant contends that plaintiff's treatment is excluded completely from coverage because it qualifies as an "investigational treatment" under the terms of her insurance policy. Unfortunately, I cannot rule on the motion at this time because plaintiff has not had an opportunity to respond to several arguments that defendant made for the first time in its reply brief.

In its opening brief, defendant argued that plaintiff's chemotherapy treatments were not covered by the insurance policy because the treatments involved the drug Avastin. According to defendant, Avastin qualifies as an "investigational treatment" that is excluded from coverage because plaintiff was receiving the drug pursuant to phase II of a clinical trial. Also, treatment for metastatic melanoma is not as an accepted off-label use for Avastin under the terms of the insurance policy. Defendant made no other arguments in support of its motion, relying wholly on the provision in the insurance policy defining "investigational treatment." (Defendant did not even submit the full policy with its summary judgment materials. Rather, it submitted only an excerpt of the policy, including the provision defining "investigational treatment." Dkt. #16-7.)

In her opposition brief, plaintiff argued that Avastin is not an "investigational treatment" under the policy and that even if it is, her chemotherapy treatment involved several other components that were not investigational. According to plaintiff, most of the components of her treatment involved applying standard protocol for treating metastatic

melanoma that would have been covered if plaintiff had not been taking Avastin at the same time. Despite this, defendant refused to pay any of the costs of administering chemotherapy to plaintiff, including doctor visits, administrative charges and medications to control pain and infection. Plaintiff also points out that defendant failed to address the elements of her claims for estoppel, bad faith and statutory damages in its motion for summary judgment.

In its reply brief, defendant argues for the first time that all chemotherapy expenses plaintiff incurred are excluded under the “covered expenses” provision of the insurance policy. Under this provision, no benefits will be paid for any charges that are incurred “[f]or or while receiving investigational treatment . . . including expenses which might otherwise be covered if they were not incurred in conjunction with, as a result of, or while receiving investigational treatment. . . .” Dft.’s Br., dkt. #40, at 4. Defendant also argues for the first time that plaintiff cannot meet her burden of proof with respect to her estoppel, bad faith or statutory damages claims.

Plaintiff should have an opportunity to respond to the arguments defendant made for the first time in its reply brief. Therefore, plaintiff may have until March 9, 2012 to file a sur-reply brief addressing defendant’s arguments related to the “covered expenses” provision. In her sur-reply, plaintiff may also respond to defendant’s arguments relating to plaintiff’s estoppel, bad faith and statutory damages claim.

ORDER

IT IS ORDERED that plaintiff Bonnie Larson may have until March 9, 2012 to file a sur-reply addressing the arguments that defendant Golden Rule Insurance Company made in its reply brief.

Entered this 29th day of February, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge