IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALLAN DE JESUS, AMANDA DE JESUS LAURITZEN
and A.D., a minor,

OPINION and ORDER

Plaintiffs,

11-cv-579-bbc

v.

MICHAEL DE JESUS, MELISSA DE JESUS
and DEBORAH LAVENDUSKEY,

Defendants.

- -

This case involves a dispute over the proceeds to a life insurance policy purchased by veteran Michael A. De Jesus and issued under the Servicemembers' Group Life Insurance Act. 38 U.S.C. § 1965. Defendants Michael De Jesus and Melissa De Jesus (De Jesus's children from his first marriage) are the named beneficiaries but plaintiffs Allan De Jesus, Amanda De Jesus Lauritzen and A.D. (the children of De Jesus's second wife) contend that they are entitled to the money under state law because of a provision in the judgment entered in connection with Michael A. DeJesus's divorce from his second wife that required De Jesus to name her children as the beneficiaries of his insurance policy until the youngest child became an adult. Both sides have filed motions for summary judgment, which are

ready for review.

Plaintiffs' claim is foreclosed by Ridgway v. Ridgway, 454 U.S. 46, 59 (1981), which involved indistinguishable facts. In that case, the Supreme Court held that § 1965 gives "the service member an absolute right to designate the policy beneficiary" and that it preempts conflicting state law, including orders in divorce judgments requiring the veteran to name a different beneficiary. Id. at 59. Although the Court "recognize[d] that [the facts of] this unpalatable case suggest[] certain 'equities' in favor of" the children named in the divorce judgment, it concluded that it was up to Congress to limit the reach of federal law if it wished to preserve the children's rights under state law. Id. at 62.

Plaintiffs raise an alternative argument in their reply brief that defendants used undue influence on De Jesus, but that argument fails for lack of evidence. Accordingly, I am denying plaintiffs' motion for summary judgment and granting defendants' motion.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiffs Allan De Jesus, Amanda De Jesus Lauritzen and A.D. are the children of De Jesus's second wife and were adopted by De Jesus during the marriage. Defendants Michael De Jesus and Melissa De Jesus are the children of Michael A. De Jesus from his first

marriage. Defendant Deborah Lavenduskey is De Jesus's sister. (Defendant Lavenduskey is not a named beneficiary and she does not claim that she is entitled to the proceeds. Plaintiffs have not explained why they included her in this lawsuit.)

Michael A. De Jesus was a veteran of the United States Army. When he retired from military service in the year 2000, he purchased a Veterans Group Life Insurance policy offered through the Department of Veterans Affairs and issued by Prudential Insurance Company of America. De Jesus designated defendants Michael De Jesus and Melissa De Jesus as equal beneficiaries to the policy's $100,000 death benefit.

On February 12, 2008, the Circuit Court for Monroe County, Wisconsin entered a judgment of divorce in a proceeding involving De Jesus and his second wife, Theresa De Jesus. Article V of the Marital Settlement Agreement, incorporated in the divorce judgment, addressed the issue of life insurance. The judgment required both parties to maintain any life insurance policy existing at the time and to name plaintiffs as sole and irrevocable primary beneficiaries until "the youngest minor child reaches the age of majority." If either party failed to do this, the remedy was a "valid and provable lien against their estate" in favor of the beneficiary specified by the court "to the extent of the difference between the insurance required and the actual death benefits received." De Jesus made no changes to the beneficiary designation or to the amount of benefit under the policy after the divorce judgment.

On July 3, 2011, Michael A. De Jesus died. At the time, plaintiffs Allan De Jesus and Amanda De Jesus Lauritzen were adults, but A.D. was still a minor.

Plaintiffs filed a lawsuit in the Circuit Court for La Crosse County, naming Michael De Jesus, Melissa De Jesus, Deborah Lavenduskey and The Prudential Life Insurance Company of America as defendants. Prudential removed the case to federal court and deposited the proceeds with the court, after which it was dismissed from the case.

OPINION

A. Subject Matter Jurisdiction

"The first question in every case is whether the court has jurisdiction." Avila v. Pappas, 591 F.3d 552, 553 (7th Cir. 2010). Even when the parties do not raise the issue, the court has an independent obligation to confirm that jurisdiction is present. DeBartolo v. Healthsouth Corp., 569 F.3d 736, 740 (7th Cir. 2009) ("The parties may be content to assume that the district court had jurisdiction to resolve this dispute, but we are not. Subject-matter jurisdiction is not an issue that can be brushed aside or satisfied by agreement between the litigants."). In fact, the court of appeals has repeatedly admonished lawyers and district courts for failing to confirm jurisdiction before proceeding to the merits. Smoot v. Mazda Motors of America Inc., 469 F.3d 475 (7th Cir. 2006) (directing parties to show cause why they should not be sanctioned for failing to submit proper jurisdictional

statement); BondPro Corp. v. Siemens Power Generation Corp., 466 F.3d 562 (7th Cir. 2006) (sanctioning lawyers $1000 for inadequate jurisdictional statement); Belleville Catering Co. v. Champaign Market Place, L.L.C., 350 F.3d 691, 692-93 (7th Cir. 2003) (vacating jury verdict after determining that jurisdiction was not present: "The complaint should not have been filed in federal court . . ., the answer should have pointed out a problem . . . and the magistrate judge should have checked all of this independently."); May Dept. Stores Co. v. Federal Insurance Co., 305 F.3d 597, 598 (7th Cir. 2002) ("[T]he district judge and the lawyers for the parties must do careful legal research to determine the citizenship of the party rather than content themselves with making a wild stab in the dark.").

In an order dated March 22, 2012, dkt. #34, I noted that neither side had addressed the issue of jurisdiction in their summary judgment materials. Because it is defendants who removed the case and have the burden to show that jurisdiction is present, I directed them to submit supplemental materials to the court. Smart v. Local 702 International Brotherhood of Electrical Workers, 562 F.3d 798, 802-03 (7th Cir. 2009) ("[T]he party seeking to invoke federal jurisdiction bears the burden of demonstrating that the requirements for diversity are met."). In their response, defendants rely on both 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332 (diversity) as a basis for jurisdiction.

1. Diversity jurisdiction

Under § 1332, there must be complete diversity of citizenship between plaintiffs and defendants and the amount in controversy must be more than $75,000. A person is a citizen of the state where she is domiciled, which is where she intends to live for the foreseeable future. Dakuras v. Edwards, 312 F.3d 256, 258 (7th Cir. 2002).

With respect to the amount in controversy, defendants rely on the life insurance proceeds. These are worth approximately $100,000, but there are three plaintiffs seeking their own share of that policy, which means that no one plaintiff would be entitled to recover more than $75,000. Although the general rule is that plaintiffs cannot aggregate their claims in order to reach the jurisdictional minimum, McMillian v. Sheraton Chicago Hotel & Towers, 567 F.3d 839, 844 (7th Cir. 2009), an exception exists when the plaintiffs "unite to enforce a single title or right in which they have a common and undivided interest." Snyder v. Harris, 394 U.S. 332, 335 (1969). Such an interest exists in the situation in which, "if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased." Id.

That exception seems to apply in this case because plaintiffs are claiming a joint entitlement to the same pot of money. Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1424 (2d Cir. 1997) ("Plaintiffs in paradigm 'common fund' cases assert claims to a piece of land, a trust fund, an estate, an insurance policy, a lien, or an item of collateral, which they claim

as common owners or in which they share a common interest arising under a single title or right.").

With respect to diversity of citizenship, defendants submitted affidavits showing that, at the time of removal, they were citizens of Colorado, Florida and Texas. Dkt. ##37-39. Defendant Lavenduskey moved to Wisconsin in February 2012, but "[t]he well-established general rule is that jurisdiction is determined at the time of removal, and nothing filed after removal affects jurisdiction." In re Burlington Northern Santa Fe Railway Co., 606 F.3d 379, 380-81 (7th Cir. 2010). Because Lavenduskey says that she did not have plans to move at the time the case was removed, dkt. #39, ¶ 2, her current residence in Wisconsin does not affect her citizenship for the purpose of this case. (Defendants did not submit any evidence regarding former defendant Prudential's citizenship, but it is undisputed that Prudential is a citizen of New Jersey, where is it is incorporated and has its principal place of business. Dkt. #3, at 5, ¶ 1; Dkt. #7, at 1, ¶ 2.)

The problem is with plaintiffs' citizenship. Although I anticipated that defendants would reach a stipulation with plaintiffs regarding their domicile and submit it to the court, they did not submit *any* evidence of plaintiffs' citizenship. Instead, they cite plaintiffs' complaint, in which plaintiffs allege that they are "residents" of Wisconsin, along with plaintiffs' answer to former defendant Prudential's counterclaim in which they set out the same allegation. Dkt. #3, at 5, ¶¶ 1-3; dkt. #7, at 1, ¶ 2. In addition, defendants cite a

previously filed copy of A.D's driver's license, which lists a Wisconsin address as his residence. Dkt. #19. Although defendants acknowledge that domicile rather than residence is what matters for determining citizenship, they cite District of Columbia v. Murphy, 314 U.S. 441, 455 (1941), for the proposition that "[t]he place where a man lives is properly taken to be his domicile until facts adduced establish the contrary." Defendants ask the court to infer that plaintiffs' residence is the same as their domicile in the absence of any evidence to the contrary.

Although defendants' view makes sense, it is questionable under circuit precedent. Defendants cite Craig v. Ontario Corp., 543 F.3d 872, 876 (7th Cir. 2008), as supporting their view, but this citation is disingenuous. Although the defendants in that case objected to jurisdiction, the court did not address the question whether evidence of residency is sufficient to prove citizenship in the absence of a dispute. Defendants simply ignore the other cases this court cited in the March 22 order in which the court of appeals stated that evidence of residency is *not* sufficient to show citizenship, even when none of the parties were objecting to jurisdiction. Meyerson v. Harrah's East Chicago Casino, 299 F.3d 616, 617 (7th Cir. 2002); McMahon v. Bunn-O-Matic Corp., 150 F.3d 651, 653 (7th Cir. 1998). See also Camico Mutual Insurance Co. v. Citizens Bank, 474 F.3d 989, 992 (7th Cir. 2007); Macken ex rel. Macken v. Jensen, 333 F.3d 797, 799 (7th Cir. 2003).

Defendants may mean to imply that the court should disregard any contrary opinions

from the court of appeals in favor of the Supreme Court decision. (The court of appeals has not cited Murphy for any purpose since 1948, Central States Co-ops. v. Watson Brothers Transportation Co., 165 F.2d 392, 396 (7th Cir. 1948), and has never discussed the statement on which defendants rely.) However, there is no direct conflict between the court of appeals and the Supreme Court because Murphy was about the interpretation of a tax statute of the District of Columbia. It had nothing to do with jurisdiction under § 1332, a fact that defendants fail to mention. Defendants cite a district court decision in which the court applied Murphy to § 1332, Kitson v. Bank of Edwardsville, CIV 06-528-GPM, 2006 WL 3392752 (S.D. Ill. Nov. 22, 2006), but they do not acknowledge that the court of appeals later disagreed with that decision. After noting the view in Kitson that a court is "'entitled to assume' that class members were Illinois citizens on the basis of Illinois mailing addresses because, in its view, mailing addresses are evidence of residence, which is evidence of domicile," the court of appeals rejected that view: "we agree with the majority of district courts that a court may not draw conclusions about the citizenship of class members based on things like their phone numbers and mailing addresses." In re Sprint Nextel Corp., 593 F.3d 669, 674 (7th Cir. 2010).

The bottom line is that defendants have not adduced sufficient evidence of plaintiffs' citizenship under circuit precedent, so I cannot exercise jurisdiction over this case on the basis of § 1332.

2. Federal question jurisdiction

Defendants' alternative argument is that jurisdiction is present under § 1331, which applies whenever the plaintiff's claim "arises under" federal law. In particular, defendants argue that plaintiffs' claim arises under the Servicemembers' Group Life Insurance Act, 38 U.S.C. § 1965, because the life insurance policy at issue was obtained through the Department of Veterans Affairs and § 1965 governs the distribution of proceeds from a veteran's policy.

Neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has addressed this precise question, but both courts have decided cases under § 1965. Ridgway v. Ridgway, 454 U.S. 46 (1981), involved facts similar to this case in which the named beneficiary on the policy was the veteran's second wife, but the owner of the policy was subject to a state court order requiring him to name the children from his first marriage as beneficiaries. The decedent's first wife argued on behalf of her children that state law required the creation of a constructive trust for her children, using the proceeds from the policy.

The Supreme Court rejected the first wife's claim, concluding that it was preempted by federal law. In particular, the Court stated that the state law conflicted with the servicemember's right "to designate the beneficiary and to alter that choice at any time by

communicating the decision in writing to the proper office." Ridgway, 454 U.S. at 55-56. The Court did not need to determine whether the claim arose under federal law because the Court was reviewing a decision of the Maine Supreme Court.

Prudential Insurance Co. of America v. Athmer, 178 F.3d 473, 475 (7th Cir. 1999), also involved a dispute over a policy governed by § 1965, but the facts were a bit more complicated. Relevant to this case, the veteran had named his second wife as the beneficiary and her son as the contingent beneficiary. Later, the second wife murdered the veteran. The issue before the court was whether the son was disqualified from collecting the proceeds. (The parties agreed that the second wife was not entitled to them.)

The court did not discuss the issue of jurisdiction, presumably because jurisdiction was present under the interpleader statute. 28 U.S.C. § 1335. (That statute applies only when the insurance company *files* the lawsuit after it is presented with two or more conflicting claims. Because the insurance company was sued as a defendant in this case, I cannot rely on § 1335 as a jurisdictional hook.) The threshold question for the court was whether state or federal law should apply, but it framed the issue as one of choice of law rather than preemption. The court stated: "As we have both a government contract and a federal statute . . . , the case for using federal law to answer the question of who is to receive the proceeds of the insurance policy is compelling." Athmer, 178 F.3d at 475. Although the statute itself did not supply an answer, the court declined to use state law to fill in the gap:

> It would be arbitrary to subject issues arising under the policy to the law of a particular state. Better that these policies should be governed by a uniform set of rules untethered to any particular jurisdiction. Congress's desire for uniformity is reflected in the statute's detailed provision mentioned earlier regarding who shall receive the proceeds if a beneficiary is not named.

Id.

Although the courts in Ridgway and Athmer did not decide whether a claim such as plaintiffs' arises under federal law, both support a view that it does, particularly Athmer. The ultimate conclusion in Athmer was that federal law "answer[s] the question of who is to receive the proceeds of the insurance policy." This seems to imply that federal law completely displaces state law in cases involving a dispute over an insurance policy issued under § 1965. Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.").

At least one other court has relied on Athmer for the proposition that "when a complaint seeks to recover benefits pursuant to a SGLI policy, the claim arises under federal law." Cotton v. Prudential Insurance Co. of America, 391 F. Supp. 2d 1137, 1140 (N.D. Fla. 2005). Further, most of the courts that have addressed the jurisdictional issue in similar cases have concluded that § 1331 supplies a basis for jurisdiction, although they have been reluctant to rely on a theory of complete preemption. Rather, they seem to invoke the more

nebulous doctrine that a case arises under federal law when it "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 314 (2005). E.g., Rice v. Office of Servicemembers' Group Life Insurance, 260 F.3d 1240, 1245-46 (10th Cir. 2001) ("[W]e need not determine whether Plaintiff has asserted a cause of action under state or federal law. It is sufficient for us to find that (1) the issues of mental capacity and undue influence are governed by federal law; (2) these issues raise substantial questions of federal law that must be resolved; and (3) the federal SGLI statute gives rise to an implied private cause of action."); Cotton, 391 F. Supp. 2d at 1140 ("[T]he plaintiff seeks to recover benefits under a policy authorized, maintained, and issued pursuant to a federal program. Therefore, removal is proper because federal question jurisdiction appears on the face of the complaint, and complete preemption is inapplicable to the court's determination."); Prudential Insurance Co. of America v. Tomaszek, 1992 WL 26734, *1 (N.D. Ill. 1992) ("[S]ubject matter jurisdiction exists here . . . because this action unquestionably implicates federal statutory law and regulations issued under the authority of those statutes."). There is one district court decision that points the other way, Smith v. Arkansas Federal Credit Union, 2011 WL 2039548, *1-2 (E.D. Ark. 2011), but it does not take into consideration all of the other cases undermining its conclusion, including

Ridgway and Athmer, so it is not persuasive.

I conclude that jurisdiction is present under § 1331. Athmer seems to support a finding of complete preemption, but even if that is incorrect, I agree with those courts concluding that a dispute over the proceeds to an insurance policy issued under § 1965 arises under federal law because it requires the resolution of a substantial federal question.

B. Merits

The parties' arguments on the merits are closely related to the jurisdictional issues discussed above. In their opening brief, plaintiffs relied exclusively on an argument that the divorce judgment requires the court to create a constructive trust and distribute the proceeds of the life insurance policy to them. However, after defendants raised Ridgway in their response brief, plaintiffs abandoned that claim in their reply brief. Instead, they argue that federal law does not preempt their claim of undue influence. In particular, they say that "[a]ll dicta in Ridgway points to there being exceptions to the federal preemption that is set forth in 38 U.S.C. § 1965." Plts.' Br., dkt. #33, at 1. In addition, they cite Cotton, 391 F. Supp. 2d at 1141, for the proposition that "the federal preemption standard is not absolute" and they cite Lyle v. Bentley, 406 F.2d 325 (5th Cir. 1969), as an example of a case in which the court applied state law to determine whether the named beneficiary of a veteran's life insurance policy should be denied benefits as a result of undue influence.

This argument cannot carry the day for plaintiffs. The passage they cite from Ridgway to support their argument is not "dicta," it is from the *dissenting* opinion. Ridgway, 454 U.S. at 64 ("The Court also finds, as it must in light of previous decisions, that the pre-emptive power of this Act does not extend to cases of fraud or breach of trust.") (Powell, J., dissenting). Further, the dissent's characterization of the majority opinion is not accurate. It is true that the Court distinguished cases in which federal law did not preempt state laws regarding fraud and breach of trust when determining who was entitled to the proceeds of United States bonds. Ridgway, 454 U.S. at 58-59 ("A careful reading of the complaint and the amended complaint, App. 11 and 24, in this case reveals no allegation of fraud or breach of trust.") (citing Yiatchos v. Yiatchos, 376 U.S. 306 (1964)). However, the Court also distinguished Yiachtos on the ground that the decedent had purchased the bonds with community property:

> Federal law and federal regulations bestow upon the service member an absolute right to designate the policy beneficiary. That right is personal to the member alone. It is not a shared asset subject to the interests of another, as is community property. Yiatchos had imposed his will upon property in which his wife had a distinct vested community interest. In contrast, only Sergeant Ridgway had the power to create and change a beneficiary interest in his SGLIA insurance.

Ridgway, 454 U.S. at 59-60. The Court did not have any reason to consider whether any issue of fraud or breach of trust in a case involving a veteran's policy should be resolved under state law. Rather, this passage suggests that the Court viewed policies obtained under

§ 1965 as unique and controlled by federal law entirely.

The two other cases plaintiffs cite do support the view that federal courts may apply state law to some issues in cases involving veterans' life insurance policies. The problem is that the court of appeals in this circuit has flatly rejected the argument, stating broadly that "borrowing state law would be a mistake in the case of soldiers' life insurance policies." Athmer, 178 F.3d at 475. I am bound to follow Athmer rather than Cotton or Lyle.

Defendants seem to assume that, if federal law is controlling, this means necessarily that the proceeds must go to the named beneficiary. That is incorrect. In Athmer, the court of appeals recognized that there are exceptions to the rule under federal common law. For example, the court stated that "[i]t is undoubtedly an implicit provision of the Servicemen's Group Life Insurance Act of 1965" that beneficiaries who murder their spouses cannot recover their benefits. Id. at 475-76. Defendants identify no reason why federal common law would not recognize an exception for undue influence as well. In fact, in Rice, 260 F.3d at 1247-48, a case on which defendants rely, the court assumed that an undue influence exception existed.

However, even if I assume that a beneficiary may be disqualified for using undue influence, plaintiffs cannot prevail. Although plaintiffs alleged in their complaint that defendants used undue influence to become the named beneficiaries on De Jesus's life insurance policy, plaintiffs have adduced no evidence in support of that view. Instead, they

argue that defendants' evidence is unconvincing and they ask for an opportunity to seek discovery.

These arguments fail. It does not matter whether defendants' affidavits are self serving because it is not their burden to prove that they did not use undue influence; it is plaintiffs' burden to prove that they did. Shields v. Dart, 664 F.3d 178, 182 (7th Cir. 2011). Plaintiffs' request for discovery makes no sense. It was *plaintiffs* who were the first to file a motion for summary judgment. If they believed they still needed discovery to prevail on their claim, they should not have filed their motion three months before the deadline. As the court of appeals has stated many times, summary judgment is the "put up or shut up" moment in litigation when the parties are required to show that they have sufficient evidence to allow a reasonable to jury to find in their favor. Goodman v. National Security Agency, Inc., 621 F.3d 651, 654 (7th Cir. 2010). At the least, plaintiffs should have filed a motion under Fed. R. Civ. P. 56(d) as soon as defendants filed their own summary judgment motion, instead of burying a request for discovery in a reply brief. James Cape & Sons Co. v. PCC Construction Co., 453 F.3d 396, 400 (7th Cir. 2006).

Even if I construed plaintiffs' reply brief as a Rule 56(d) motion, I could not grant them any relief. When a party asks for a stay on a summary judgment decision so that it may conduct discovery, that party must identify the "specific evidence" it seeks that will support its claim. American Needle Inc. v. National Football League, 538 F.3d 736, 740-41

(7th Cir. 2008); Davis v. G.N. Mortgage Corp., 396 F.3d 869, 885 (7th Cir. 2005); United States v. All Assets & Equipment of West Side Building Corp., 58 F.3d 1181, 1190-91 (7th Cir. 1995). Plaintiffs have not pointed to any specific evidence they wish to uncover or even identified a reason they believe that defendants used undue evidence. Accordingly, they are not entitled to additional discovery.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by plaintiffs Allan De Jesus, Amanda De Jesus Lauritzen and A.D., dkt. #14, is DENIED, and the motion for summary judgment filed by defendants Melissa De Jesus, Michael De Jesus and Deborah Lavenduskey, dkt. #25, is GRANTED.

2. The clerk of court is direct to enter judgment in favor of defendants, distribute to defendants Michael De Jesus and Melissa De Jesus equal shares of the money placed in escrow by former defendant Prudential Insurance Company of America and close this case.

Entered this 2d day of April, 2012.

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