UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ERIC RUBIN-SCHNEIDERMAN,

Plaintiff,

00 Civ. 8101 (JSM)

-v.-

OPINION and ORDER

MERIT BEHAVIORAL CARE CORPORATION,
SATI AHLUWALIA, M.D., and
EMPIRE BLUE CROSS AND BLUE SHIELD,

Defendants.

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JOHN S. MARTIN, JR., District Judge:

This matter was previously before the Court on Plaintiff's motion to remand the case to state court. The Court denied the motion, finding that Plaintiff's state negligence claim was preempted under the Employee Retirement Income Security Act ("ERISA"). Familiarity with that opinion is assumed.

Defendants now move to dismiss the Complaint. The motion is granted.

At the heart of Plaintiff's Complaint is the claim that he was improperly denied pre-admission authorization for in-patient psychiatric treatment and that this ultimately resulted in his attempted suicide. Plaintiff's first three causes of action all involve claims of negligence or negligent hiring and supervision. In opposing the motion to dismiss, Plaintiff admits that this Court's opinion denying the motion to remand supports the

Defendants' position that these claims are preempted, but urges the Court to reconsider that ruling.[1] Plaintiff's current arguments have not dissuaded the Court from its view that

> [t]he problem with Plaintiff's argument is that both Pegram and the Third Circuit line of cases [on which Plaintiff relies] involved UR determinations by an HMO's doctors or administrators, not by independent UR agents for a more traditional fee-for-service plan.
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> * * *
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> Unlike an HMO, Empire Blue Cross never sought to undertake responsibility for Plaintiff's treatment. In providing UR services, Merit's role was confined to informing a patient before receiving treatment whether that treatment would be covered under the plan. Merit's doctors were not Plaintiff's treating physicians, nor did Merit purport to provide Plaintiff with medical services. Thus, the UR determination involved plan administration, not provision of medical services. See Dukes, 57 F.3d at 360-61.

Rubin-Schneiderman v. Merit Behavioral Care Corp., 163 F. Supp.2d 227, 231 (S.D.N.Y. 2001)

Thus, Plaintiff's first three negligence claims are preempted and must be dismissed.

Plaintiff in his fourth cause of action seeks to hold Defendant Merit Behavioral Care Corp. ("Merit") liable under ERISA § 502(c) for failing to provide him with information he requested, to wit, written clinical review criteria. That section permits the court to penalize "[a]ny administrator ... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to

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[1]The Court's opinion on the motion to remand noted that the negligence claim was preempted and that the Court had supplemental jurisdiction over Plaintiff's negligent hiring and supervision claims. Rubin-Schneiderman, 163 F. Supp. 2d at 232. Upon further review, the latter claims do not warrant any different consideration with respect to preemption.

furnish to a participant or beneficiary ...." 29 U.S.C. § 1132(c). Plaintiff argues that Merit was obligated to provide the requested information pursuant to New York State Insurance Law and ERISA §§ 104 and 402. Merit argues that it is not an "administrator" and that the information sought by Plaintiff does not fall under the subchapter's disclosure requirements.

Liability under § 502(c) is clearly limited to plan "administrators." Harless v. Research Institute of America, 1 F. Supp. 2d 235, 239 (S.D.N.Y. 1998). ERISA defines an "administrator" as "(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe." 29 U.S.C. § 1002(16)(A)(i). The only reference to an administrator in the Empire BlueChoice Preferred Provider Organization group health plan is language noting that under ERISA, "Group members have certain rights and protections and [the Group that buys the contract] may have duties as the Group Health Plan Administrator." (Schneiderman Decl. Ex. A at art. XVII(A)).[2]

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[2] An administrator may also be designated in the "summary plan description." 29 U.S.C. § 1022(a),(b). Harris v. Donnelly, 99 Civ. 12361, 2000 WL 1838308, at *5, n.14 (S.D.N.Y. Dec. 12, 2000). Neither party has provided the Court with a copy of the summary plan description.

Assuming that the quoted language is not a specific designation, the administrator is the "plan sponsor." 29 U.S.C. § 1132(c). The "plan sponsor" for single employer benefits plans is the employer. 29 U.S.C. § 1002(16)(B); U.S. v. Carson, 52 F.3d 1173, 1189 (2d Cir. 1994); Piniero v. Pension Benefit Guaranty Corp. 96 Civ. 7392, 1997 WL 739581, at *14 (S.D.N.Y Nov. 26, 1997). Merit could not be considered the plan administrator under any of the above criteria.

Plaintiff cites various sections of the plan that describe Merit's function and argues that Merit's role under the plan bestows upon Merit the position of "administrator" for mental health and behavioral care benefits. However, the Second Circuit has advised against departing from Congress's specific definition and creating *de facto* administrators. See Crocco v. Xerox Corp., 137 F.3d 105, 107 (2d Cir. 1998); Lee v. Burkhart, 991 F.2d 1004, 1010 n.5 (2d Cir. 1993); see also McKinsey v.SentryInsurance, 986 F.2d 401 (10th Cir. 1993).

Plaintiff claims that Merit's letter informing Plaintiff of Merit's role in evaluating the necessity of treatment estops Merit from saying that it is not an administrator. This argument is without merit. See Jones v. UOP, 16 F.3d 141, 144-45 (7th Cir. 1994) (rejecting a stronger estoppel argument).

Plaintiff argues that in failing to respond to Plaintiff's request for information on Merit's clinical review criteria,

Defendant Merit has breached its disclosure obligations under New York State Insurance Law and ERISA §§ 104 and 402. Even if Merit had disclosure obligations under Article 49 of the New York State Insurance Law, failure to meet these obligations does not create liability under ERISA § 502(c). That section of ERISA's civil enforcement provisions relates only to failure to "comply with a request for information which such administrator is required by *this subchapter* to furnish." 29 U.S.C. 1132(c)(1) (emphasis added). Nothing in that subchapter incorporates disclosure obligations under state law. Cf. Grove v. Modified Ret. Plan, Etc., 803 F.2d 109, 117 (3d Cir. 1986) (refusing to expand "this subchapter" to include disclosure requirements imposed by regulations promulgated pursuant to ERISA).[3]

Plaintiff quotes ERISA § 104 in identifying Merit's obligation under ERISA § 104 to "furnish a copy of the *** plan description *** or other instruments under which the plan is established." (Pl.'s Separate Mem. Opp'n Mot. Dismiss at 3). Plaintiff's quotation of ERISA § 104 conveniently omits the word "summary" before "plan description." See 29 U.S.C. § 1024(b)(4) ("... furnish a copy of the latest updated summary plan description ...."). A "summary plan description" is a specific

[3] Defendant cites ERISA § 514, 29 U.S.C. § 1144(b)(2)(A), which addresses the effect of ERISA on other laws, for the proposition that ERISA does not relieve Defendant Merit of its obligations under state insurance law. However, this "savings clause" concerns preemption and does not bring the state insurance law obligations under "this subchapter."

document with a detailed definition. See 29 U.S.C. § 1022. Plaintiff has made no claim that he requested a summary plan description from Merit.

Similarly, the requested documents do not constitute "other instruments under which the plan is established." 29 U.S.C. § 1024(b)(4). The Second Circuit has held that this clause "encompasses formal or legal documents under which a plan is set up or managed." Bd. of Trustees of the CWA/ITU Negotiated Pension v. Weinstein, 107 F.3d 139, 142 (2d Cir. 1997). It does not require disclosure of all "documents that would assist ... beneficiaries in determining their rights under a plan and in determining whether a plan is being properly administered." Id. at 145 (quoting Faircloth v. Lundy Packing Co., 91 F.3d 648, 653 (4th Cir. 1996)). Rather, it refers to formal documents which govern the plan. Id.

With respect to ERISA § 402(b)(4), this section states that "[e]very benefit plan shall ... specify the basis on which payments are made to and from the plan." 29 U.S.C. § 1102(b)(4). Plaintiff argues that this section creates a disclosure obligation for Merit. However, as discussed by the Third Circuit, the requirements of a "plan" are different from that of a "plan administrator." In Grove v. Modified Ret. Plan, Etc., 803 F.2d 109 (3rd Cir. 1986), the plaintiff sought § 502(c) penalties for a violation of § 503, which, like § 402(b)(4), requires "every benefit plan" to provide certain information.

Noting that § 502(c) specifically refers to an "administrator's" failure to supply information, and the fact that ERISA has separate definitions for "plan administrator" and "employee benefit plan," the court concluded that § 502(c) penalties were not available for violations of § 503. Id. at 116. Similarly, since § 402(b)(4) does not create an obligation for "administrators," but only refers to the "benefit plan," penalties are not available under § 502(c).

Plaintiff purports to bring his fifth cause of action "derivatively on behalf of the plan and its participants and beneficiaries pursuant to ERISA Sections 502(a)(1)(B) and 502(A)(2), against Defendants Merit and Empire Blue Cross for violation of their fiduciary duties under ERISA Section 409(a)." (Compl. at 12). Plaintiff contends that by "misus[ing] their powers and conceal[ing] from participants and beneficiaries their negligence and failure to use reasonable care in hiring, training and supervising medical personnel and other utilization review personnel," Defendants have violated their fiduciary duties to the plan. (Compl. at 12).

A fiduciary within the meaning of ERISA is someone "acting in the capacity of manager, administrator, or financial adviser to a 'plan.'" Pegram v. Herdrich, 530 U.S. 211, 222 (2000). See 29 U.S.C. § 1002(21)(A). The statutory definition has three sub-definitions, only one of which does not concern plan assets or finances. 29 U.S.C. § 1002(21)(A)(iii) (A fiduciary is someone

who "has any discretionary authority or discretionary responsibility in the administration of such plan.").

The threshold question is whether Defendants Merit and Empire Blue Cross were performing fiduciary functions when taking the actions that are the subject of the Complaint. Pegram, 530 U.S. at 226. The scope of fiduciary function under ERISA is outlined in Part 4 of the relevant subsection. See 29 U.S.C. §§ 1101-1114 ("Fiduciary Responsibility"); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 143 (1985).

The principal statutory duties outlined in the relevant subchapter "relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." Russell, 473 U.S. at 142-43. This is reflected by the fact that most cases involving breaches of fiduciary duties under ERISA involve activities such as asset management and the failure to follow specific directives in the plan documents. See, e.g., Varity Corp. v. Howe, 516 U.S. 512 (1996) (fiduciary duty to provide certain documents about the future of plan benefits that would influence beneficiaries' participation in plan). Similarly, as noted above, the statutory definition of fiduciary focuses primarily on plan assets and management.

The wrongful conduct that Plaintiff alleges does not deal with plan assets or how management decisions are made with

respect to the plan. Thus, while Defendants surely have a responsibility not to be negligent in the hiring and supervising of employees, such negligence falls outside the scope of Defendants' fiduciary duties under ERISA. See Financial Institutions Ret. Fund v. Office of Thrift Supervision, 766 F. Supp. 1302, 1309 (S.D.N.Y 1991) ("The mere fact that a decision may affect a pension plan does not make it a fiduciary decision under ERISA.").

ERISA's civil enforcement provisions give a plan beneficiary the right to bring an action to "recover benefits due to him" or to "enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Accordingly, there is no reason to believe that Congress intended to bring the process by which benefit decisions are made within the ambit of fiduciary duties, the breach of which would provide a separate remedy.

Since none of the five cause of action set forth in the Complaint state a claim upon which relief may be granted, the Complaint is dismissed.

SO ORDERED.

Dated: New York, New York

November 13, 2001

JOHN S. MARTIN, JR., U.S.D.J.

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