

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BARBARA JOHNSON,)	
)	
Plaintiff)	
)	
v.)	Civil No. 03-68-P-S
)	
UNUMPROVIDENT)	
CORPORATION,)	
)	
and)	
)	
UNUM LIFE INSURANCE)	
COMPANY OF AMERICA,)	
)	
Defendants)	

**RECOMMENDED DECISION ON DEFENDANT
UNUMPROVIDENT CORPORATION’S MOTION TO DISMISS**

Defendant UnumProvident Corporation has filed a motion to dismiss the second amended complaint¹ alleging that it is not a proper party to this ERISA action stemming from the denial of disability benefits. I recommend that the court **DENY** the motion.

Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) constitutes a threshold challenge by one party to the adequacy of one or more claims set forth in another party’s complaint. The party filing such a motion contends that at least one of an opponent’s claims is fundamentally flawed because the underlying allegations, even if true, fail “to state a claim upon which relief can be

¹ In the Second Amended Complaint, Unum Life Insurance Company of America was misidentified as “The UnumProvident Employee Benefits Plan.” By agreement of the parties a Third Amended Complaint has been filed reflecting the proper name of this defendant. The same counsel appears for Unum Life and moving defendant UnumProvident Corporation. In the Third Amended Complaint UnumProvident remains a named defendant. Since the Third Amended Complaint was not filed until after UnumProvident’s motion to dismiss had been filed, I will simply assume that the motion is actually directed at the Third Amended Complaint which is the operative pleading in this case. The Second Amended Complaint has actually been superseded already by agreement of the parties.

granted.” Fed. R. Civ. P. 12(b)(6). When reviewing a 12(b)(6) motion, a court is generally required to (1) treat all of the non-movant’s factual allegations as true and (2) draw all reasonable factual inferences that arise from the allegations and are favorable to the non-movant. Carroll v. Xerox Corp., 294 F.3d 231, 241 (1st Cir. 2002). In the end, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Such indulgences are granted to the non-movant pursuant to Rule 8, which requires of claimants only a “short and plain statement of the claim” sufficient to provide the adverse party with fair notice of the claim and the grounds on which it rests. Fed. R. Civ. P. 8(a)(2); Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002). Rule 12(b)(6) does not provide an avenue for defendants to challenge the underlying merits of a case. Swierkiewicz, 534 U.S. at 512 (“[N]otice pleading . . . relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”). “At the Rule 12(b)(6) stage, then, it is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by means of appropriate facts, could support an actionable claim.” Garrett v. Tandy Corp., 295 F.3d 94, 105 (1st Cir. 2002).

Factual Allegations

Barbara Johnson, a psychiatric nurse at Southern Maine Medical Center, claims that she is totally disabled from a serious spinal disc disease. (Third Amended Complaint, ¶ 1). Johnson sought disability benefits under an insurance contract issued by Unum Life Insurance Company of America, policy number 00503143-0100. (Id.) Her claim for benefits was denied by defendants, in spite of the report of a vocational rehabilitation counselor who opined that Johnson was completely disabled. (Id., ¶ 3, 4.) According to Johnson, her claim was denied due

to opinions expressed by a licensed practical nurse in defendants' employ, who thought the evaluation conducted by Johnson's consulting occupational therapist was inconsistent with the facts. (Id., ¶ 6.) Ultimately, defendants reversed their initial decision and temporarily paid Johnson's claim. (Id., ¶ 8.) However, in late 2001 the defendants again terminated Johnson's benefits. (Id.) Johnson alleges that defendants did so as part of an intentional plan to save money. (Id., ¶ 9). According to Johnson, both Unum and UnumProvident put pressure on claims reviewers to deny or terminate benefits "even to people who are plainly disabled upon a review of the insurer's own records." (Id.) In the jurisdictional recitation of the complaint, Johnson indicates that she brings her action pursuant to section 1132(a)(1)(B) of the Employee Retirement Security Act of 1974 ("ERISA"). (Id., p.2.)

In its motion to dismiss UnumProvident has appended a copy of the insurance policy under which Johnson claims she is entitled to benefits. The policy plainly states that it was issued by Unum Life Insurance Company of America. UnumProvident's name appears nowhere on the face of the policy. However, Johnson asserts that UnumProvident should be a defendant as well as Unum Life because UnumProvident "assumed direct responsibility for processing, denying and terminating claims after it assumed full ownership of Unum [Life]." (Id., p.2.)

Discussion

To begin, there is some discussion in the parties' memoranda about how the standard of review may relate to the Court's determination of the instant motion.² I address this up front

² Each party suggests that the long term disability policy in question might be reviewed under a de novo standard. My review of the policy revealed language reading, "When making a benefit determination under the policy, UNUM has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the policy." (Motion to Dismiss, Ex. 1, CC.FP-1, Certificate Section). This language suggests that de novo review may not be appropriate in this case. In some cases where there is a suggestion that arbitrary and capricious review applies, the issue has arisen as to whether the decision maker had been properly delegated the fiduciary's discretionary powers, but that issue does not seem to be present in this case. See, e.g., Sidou v. UnumProvident Corp., 245 F. Supp. 2d 207 (D. Me. 2003) (involving plaintiff's contention that if the final claims reviewer was exclusively an employee of a non-fiduciary, then that non-fiduciary served as the final authority with

because I do not agree that the standard of review bears on the question presented in this motion, which is: whether a viable cause of action is suggested by allegations that a parent holding company of an ERISA fiduciary exercised control over the subsidiary's fiduciary obligations.

The pertinent allegations in the complaint relate to UnumProvident's alleged control over plan administration and its improper motivations (in conjunction with Unum Life) to save money by denying Johnson's and others' claims.³ Although I agree with UnumProvident that a parent corporation does not automatically become a plan fiduciary under ERISA, Adkins v. UnumProvident Corporation, 191 F. Supp. 2d 956, 958 (M.D. Tenn. 2002) (concluding that a holding company of an ERISA fiduciary does not automatically share the subsidiary's fiduciary duties),⁴ and that Johnson's claim to recover benefits from a policy-funded plan is properly directed toward the actual insurer-administrator, Unum Life, it appears that a viable claim may yet be made out against UnumProvident. When Johnson's complaint is construed in accordance with the liberal notice pleading standard of Rule 8, it can be read to incorporate a "catchall" claim under ERISA section 1132(a)(3), seeking injunctive relief against UnumProvident for wrongfully exerting control over Unum Life's fiduciary duties. See Watson v. Deaconess

respect to her claim and the de novo standard of review must be applied in the absence of an effective delegation from the fiduciary to the non-fiduciary).

In most circumstances, a reviewing Court should limit its review of a benefits determination to the evidence that was properly presented to the claims administrator. See Liston v. Unum Corp. Officer Severance Plan, 330 F.3d 19, 24 (1st Cir. 2003) ("Even where de novo review exists under ERISA, it is at least doubtful that courts should be in any hurry to consider evidence or claims not presented to the plan administrator. Exhaustion of remedies principles point in this direction even if no deference were due to the administrator's determination, assuming always that the plan empowered the administrator to make an initial decision.") (citations omitted, emphasis added).

³ Johnson also characterizes UnumProvident as the "alter ego" of Unum Life, but this case does not involve allegations that Unum Life lacks the financial solvency to pay any judgment against it or that justification exists for the Court to pierce the corporate veil.

⁴ Adkins was also a case in which the plaintiff conceded that the parent was not an ERISA fiduciary. 191 F. Supp. 2d at 958. Somewhat akin to both Adkins and the instant case was Sidou v. UnumProvident Corporation, 245 F. Supp. 2d 207 (D. Me. 2003), in which I addressed a pure claims benefit denial case that originally named UnumProvident as a co-defendant. The plaintiff in Sidou, however, terminated UnumProvident as a party when she filed her amended complaint.

Waltham Hosp., 298 F.3d 102, 109-10 (1st Cir. 2002) (discussing the nature of ERISA section 1132(a)(3)). Although I recognize that Johnson’s complaint recites only one count⁵ and states in its jurisdictional statement that it is brought under ERISA section 1132(a)(1)(B), certain of Johnson’s allegations and her plea for relief “sketch a scenario which, if subsequently fleshed out by means of appropriate facts, could support an actionable claim.” Garrett, 295 F.3d at 105. Specifically, Johnson asserts that UnumProvident exerted ultimate control over plan administration but flouted the fiduciary obligations that arose as a result of such control. For this alleged ERISA violation, Johnson seeks traditional equitable remedies against both defendants in addition to the disability benefits allegedly due her.

Whether such a claim is precluded as a matter of law is something that UnumProvident has not addressed in its three-page motion/memorandum and I do not think it is a matter that the Court should reach sua sponte in the context of a motion to dismiss. I do note, however, that the definition of an ERISA fiduciary includes one who “exercises any discretionary authority or discretionary control respecting management or disposition of its assets,” Adkins, 191 F. Supp. 2d at 958 (quoting, 29 U.S.C. § 1002(21)(A)(1)) or has “authority to control and manage the operation and administration of the plan.” Id. (quoting 29 U.S.C. § 1102(a)(1)). If UnumProvident assumed such authority and control over Unum Life’s benefits administration, it may or may not be a fiduciary subject to an equitable ERISA claim. Terry v. Bayer Corp., 145 F.3d 28, 36 (1st Cir. 1998) (“The proper party defendant in an action concerning ERISA benefits is the party that controls administration of the plan.”). Compare Reich v. Rowe, 20 F.3d 25, 26,

⁵ The Court previously granted a motion to dismiss “Count II” of the former “Amended Class Action Complaint.” That count purported to assert a due process claim under the United States Constitution. (Feb. 5, 2003 Order, Docket No. 16.) My understanding of the Court’s prior Order is that it granted a dismissal of only the clearly abortive constitutional claim. I would characterize Johnson’s new claim against UnumProvident as a claim for equitable relief that emerges from the substantive allegation that UnumProvident exercised control and ultimate decision making authority over plan administration.

32 (1st Cir. 1994) (declining to impose ERISA’s equitable remedies against non-fiduciary service provider “who knowingly participates in a fiduciary breach”). Given the nature of these allegations, it is my view that a summary judgment record should be developed and that the case against UnumProvident should not be dismissed out of hand.

Conclusion

Based upon the foregoing, I recommend that the court **DENY** UnumProvident’s motion to dismiss.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

June 27, 2003

Margaret J. Kravchuk
United States Magistrate Judge

STANDARD, DBHRECUSED, DMCRECUSED, GCRECUSED

**U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:03-cv-00068-GZS
Internal Use Only**

JOHNSON v. UNUMPROVIDENT CORPORATION et al
Assigned to: Judge GEORGE Z. SINGAL
Referred to:
Demand: \$

Date Filed: 03/04/03
Jury Demand: None
Nature of Suit: 791 Labor: E.R.I.S.A.
Jurisdiction: Federal Question

Lead Docket: None
Related Cases: 2-02-CV-176-GZS
 2:02-cv-00067-GZS
 2:03-cv-00069-GZS
 2:03-cv-00067-GZS
Case in other court: None
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

Plaintiff

BARBARA JOHNSON

represented by **JON HOLDER**
HOLDER & GROVER
70 DEERING STREET
P.O. BOX 4256
PORTLAND, ME 04101
774-2899
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**UNUMPROVIDENT
CORPORATION**

represented by **PATRICIA A. PEARD**
BERNSTEIN, SHUR, SAWYER, &
NELSON
100 MIDDLE STREET
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

**THE SOUTHERN MAINE
MEDICAL CENTER EMPLOYEE
BENEFITS PLAN**
TERMINATED: 05/19/2003

**UNUM LIFE INSURANCE
COMPANY OF AMERICA**

represented by **PATRICIA A. PEARD**
(See above for address)
ATTORNEY TO BE NOTICED

