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5:07-cv-00146-FPS Stenger v. Carelink Health Plans, Inc. et al

**U.S. District Court**

**Northern District of West Virginia [Live]**

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**Case Name:** Stenger v. Carelink Health Plans, Inc. et al  
**Case Number:** 5:07-cv-146  
**Filer:** Christine Stenger  
**Document Number:** 11

**Docket Text:**

**MEMORANDUM *In Support* by Christine Stenger re [9] MOTION to Remand. (Tucker, Paul)**

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**Document description:**Main Document

**Original filename:**n/a

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] [3ecef6a64844d678f11c803336b1fbcf737c209bf589e7c095e7873a2cb8da0fde2  
fa7deac064a21d3c2144cd4d89c040cb1a2f9bdde40cbd5ff9f08fc99edc]]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT WHEELING

CHRISTINE STENGER,

Plaintiff,

v.

Civil Action NO. 5:07-CV-146  
(Judge Frederick P. Stamp, Jr.)

CARELINK HEALTH PLANS, INC., and  
PATRICK W. DOWD,

Defendants.

**PLAINTIFF'S MEMORANDUM IN SUPPORT**  
**OF MOTION TO REMAND**

On November 16, 2007, defendants Carelink Health Plans, Inc. ("Carelink") and Patrick W. Dowd removed this action from the Circuit of Ohio County, West Virginia. The basis for the removal was that plaintiff's claims are, according to the defendants, preempted by the enforcement mechanism of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Plaintiff contends the action is not subject to removal because the Complaint avers, in the specific language of Section 502(a)(1)(B) of ERISA, that, "Plaintiff does not seek to recover benefits due to her under the terms of her health care plan, to enforce her rights under the terms of the plan, or to clarify her rights to future benefits under the terms of the plan." (Complaint, ¶ 5.) Further, the claims asserted in the Complaint are not subject to complete preemption under prevailing law.

The Complaint asserts four distinctly State law claims for handicap discrimination in violation of the West Virginia Human Rights Act, intimidation of a witness as proscribed by West Virginia Code §61-5-27,

and negligent and intentional infliction of emotional distress. West Virginia statute provides:

(b) *Intimidation; Harassment.* - It is unlawful for a person to use intimidation, physical force, harassment or a fraudulent legal process or official proceeding, or to threaten or attempt to do so, with the intent to:

...

(2) Impede or obstruct a juror or witness from performing his or her official duties in an official proceeding;

...

(4) Cause or induce a person to: (A) withhold testimony, or withhold a record, document or other object from an official proceeding; . . .

(c) *Retaliation.* - It is unlawful for a person to cause injury or loss to person or property, or to threaten or attempt to do so, with the intent to:

...

(2) Retaliate against a juror or witness for performing his or her official duties in an official proceeding;

(3) Retaliate against any other person for attending, testifying or participating in an official proceeding, or for the production of any record, document or other object produced by a person in an official proceeding.

W.Va. Code §61-5-27(b) and (c).

W.Va. Code §61-5-27(f) provides:

(f) *Civil cause of action.* - A person who violates this section is liable in a civil action to any person harmed by the violation for injury or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs and other expenses incurred as a result of prosecuting a civil action commenced under this subsection, which is not the exclusive remedy of a person who suffers injury or loss to person or property as a result of as violation of this section.

Through this legislative initiative, West Virginia has stated a strong State interest in protecting against intimidation of witnesses and participants in official proceedings, and has decreed the broadest possible range of remedies in the event of violation.

Likewise, West Virginia law proscribes discrimination in places of public accommodation. The

Complaint alleges that plaintiff suffered from a disability (Complaint, ¶ 6), that defendants denied her access to a place of public accommodation because of her disability (Complaint, ¶ 8), and that defendants engaged in threats or reprisals in order to harass and degrade her because of her disability (Complaint, ¶ 9). Again, West Virginia law articulates a strong State interest in protecting against acts of discrimination and provides the broadest possible range of remedies for discriminatory conduct.<sup>1</sup>

It is the case that plaintiff Christine Stenger was a subscriber to a group health care plan issued by defendant Carelink, and that defendant Dowd was the President and Chief Executive Officer of Carelink. This action, however, is not an ERISA action because it does not seek “to recover benefits due to [plaintiff] under the terms of [her] plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights to future benefits under the terms of the plan” as contemplated by 29 U.S.C. § 1132. This is attested by the Affidavit of Christine Stenger, filed herewith, which demonstrates that the issues of benefit recovery and enforcement were previously determined as the result of a separate administrative proceeding before the West Virginia Insurance Commissioner. Plaintiff pursued her claim for benefits in strict adherence to the grievance procedure provided by Carelink’s employee benefit plan, and the administrative remedies provided by West Virginia law. As a result of that process, the Insurance Commissioner determined Carelink violated the terms of its plan and wrongfully refused benefits to the plaintiff. (Final Order No. 06-AP-024, appended as Exhibit A to Affidavit of Christine Stenger).

As a result, none of the issues implicated in an ERISA action are before this Court; they have already been adjudicated. Instead, the causes of action included in this Complaint are strictly State law

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<sup>1</sup> Plaintiff’s claims for negligent and intentional infliction of emotional distress derive from the same factual predicate as her discrimination and intimidation claims.

claims unrelated to the terms of the plan, enforcement of rights under the terms of the plan, or clarification of rights to future benefits under the plan.

It is the case, as averred in the Stenger Affidavit, that the acts of discrimination and intimidation alleged in the Complaint occurred during the course of the administrative proceeding before the West Virginia Insurance Commissioner, but none of these acts relate to the claim for benefits. Instead, they relate to plaintiff's participation in an official proceeding of the State of West Virginia. West Virginia has articulated a clear and strong State interest in proscribing these acts of discrimination and intimidation. As a result, the Courts of the State of West Virginia should be permitted to enforce the public policies implicated by the allegations of the Complaint.

**I. The “well-pleaded complaint rule” warrants remand to State court.**

Federal question jurisdiction under 28 U.S.C. § 1331 is generally assessed in light of a doctrine which has come to be known as the “well-pleaded complaint rule”. By virtue of this doctrine, claims are deemed to “arise under the Constitution, laws, or treaties of the United States” when the allegations contained within the four corners of the plaintiff's “well-pleaded complaint” raise questions of federal law. *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). As noted in this district by Judge Keeley,

Moreover, to confer federal question jurisdiction these issues of federal law must ordinarily be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, *unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.*

. . . [T]he defendants' assertion that these claims are preempted by § 514(a) of ERISA is merely a defense to such claims and therefore insufficient, in and of itself, to establish

federal question jurisdiction under the auspices of the “well-pleaded complaint rule.” See *Franchise Tax Bd.* 463 U.S. at 25-27, 103 S.Ct. at 2854-55.

*Stonewall Jackson Memorial Hospital v. American United Life Insurance Company*, 963 F.Supp. 553, 559-60 (emphasis in original).

The Complaint in this action states purely State law claims, and specifically disavows any cause of action pursuant to ERISA (Complaint, ¶ 5). Hence, the “well-pleaded complaint rule” indicates remand to State court absent some other consideration raised by the Notice of Removal.

The Notice of Removal states, without substantiation, that the “group health plan” contemplated by the Complaint is an employee benefit plan subject to the provisions of ERISA.<sup>2</sup> The Notice of Removal further states, also without substantiation, that “Plaintiff seeks damages from Defendants for the purported maladministration of an employee welfare benefit plan that is regulated by ERISA.” (Notice, ¶ 5). Based on this assertion, and this assertion alone, defendants contend preemption is mandated.

These allegations are wholly insufficient to overcome the effect of the “well-pleaded complaint rule”. Contrary to the defendants’ unsupported assertion, the Complaint says nothing about the “purported maladministration” of an ERISA plan. Indeed, it specifically disavows any such claim. As a result, the Notice of Removal is insufficient on its face to carry defendants’ burden of establishing grounds for removal, and the “well-pleaded complaint rule” indicates remand.

## **II. The “complete preemption doctrine” does not apply.**

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<sup>2</sup> Although the Notice of Removal fails to substantiate this allegation, plaintiff acknowledges that the plan as to which all benefits issues have previously been adjudicated by the West Virginia Insurance Commissioner is an ERISA plan.

The “complete preemption doctrine” is an established exception to the “well-pleaded complaint rule”. The Fourth Circuit Court of Appeals has described the underlying concepts applicable to ERISA preemption in *Coyne & Delany Company v. Selman*, 98 F.3d 1457. There, the Court determined that professional negligence claims against an insurance professional and an insurance consulting and design group that functioned as a third-party administrator for ERISA plans were not preempted. With apologies for the lengthy quotation, the applicable analytic framework was described as follows:

By virtue of the Supremacy Clause, U.S. Const., Art. VI, Congress may by statute expressly preempt state law. However, as the Supreme Court has made clear, courts never “assume[ ] lightly that Congress has derogated state regulation.” Instead, courts “address claims of preemption with the starting presumption that Congress does not intend to supplant state law.” This is especially true in cases involving fields of traditional state regulation, including common law tort liability.

With that presumption in mind we turn to the text of ERISA’s preemption provision to discern Congress’s intent. ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a). This pronouncement is “clearly expansive” but not limitless. “If ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for [r]eally, universally, relations stop nowhere.” “[T]hat, of course, would be to read Congress’s words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.”

In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct 2890, 77 L.Ed.2d 490 (1983), the Court explained that “[a] law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.” The Court cautioned, however, that “[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law ‘relates to’ the plan”

To determine whether a state law “relate[s] to” an ERISA plan, the Court in *Travelers* adopted a pragmatic approach. The Court went “beyond the unhelpful text [of § 1144(a)] and the frustrating difficulty of defining its key term [“relates to”], and look[ed] instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive [preemption].”

The purpose of ERISA is to “protect ... the interests of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... by providing for appropriate remedies, sanctions, and ready access to the Federal courts.” 29 U.S.C. § 1001(b). Indeed, in passing ERISA’s preemption provision, Congress intended “to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ... [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.”

In short, “the basic thrust of the preemption clause ... was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.”

*Coyne & Delany Co. v. Selman*, 98 F.3d at 1467-8 (some citations omitted).

Judge Keeley has also noted that complete preemption, as a threshold matter, applies only to cases in which plan benefits are sought. In *Stonewall Jackson Memorial Hospital v. American United Life Insurance Company*, 963 F.Supp. 553 (N.D.W.Va. 1997), the Court held that claims of breach of contract, professional negligence, and unfair and deceptive trade practices against a consultant and insurer that issued an annuity contract through which an ERISA plan’s assets were invested were not preempted. The initial phase of the analysis began with the observation that preemption, at its core, applies to cases in which plan benefits are in dispute:

In *Metropolitan Life [Ins. Co. v. Taylor]*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)], the Court extended complete preemptive status to all causes of action brought by participants or beneficiaries of ERISA-regulated plans to recover benefits allegedly due them under the terms of these plans.

*Stonewall Jackson*, 963 F.Supp. at 560.

The Court noted that the holding of *Metropolitan Life* “was expressly confined to benefit recovery

claims.” *Id.* As plaintiff has earlier noted, she does not seek to recover plan benefits in this action. Therefore, the only basis upon which preemption could apply is if the Court concludes the State law claims are somehow converted into federal claims. Of course, defendants here make no such claim; they merely state that the Complaint asserts something – “purported maladministration” – that it does not. Nevertheless, the Fourth Circuit Court of Appeals has addressed this possibility in such a way as to make it clear that preemption is not appropriate here.

In *Custer v. Sweeney*, 89 F.3d 1156 (1996), the Fourth Circuit Court of Appeals considered whether a claim that an attorney committed legal malpractice in his representation of an ERISA plan was subject to the complete preemption doctrine. Recognizing that a legal malpractice action was an exclusively State law claim, the Court applied the following analysis to the question of whether the claim was nonetheless preempted:

In applying the complete preemption doctrine, courts generally look first to the preemptive *scope* of the federal statute and second to its preemptive *force*. . . . Only where the federal statute’s preemptive scope is sufficiently broad to reach a purported state law claim *and* its preemptive force is sufficiently powerful to convert that particular claim into a federal claim will the complete preemption doctrine apply.

89 F.3d at 1165 (emphasis in original).

Concluding the legal malpractice claim was not preempted, the Fourth Circuit embraced the plaintiff’s argument as follows:

[Plaintiff] argues that his malpractice claim does not “relate to” ERISA within the meaning of § 514(a) because it arises under a state “law of general applicability” and involves “an area traditionally the subject of state regulation.” Because professional negligence and malpractice claims against third-party service providers to an ERISA plan do not implicate “the essential functions of an employee benefit plan, such as funding, benefits, reporting, and administration,” [plaintiff] insists that Congress did not intend ERISA’s preemptive

scope to reach such claims.

89 F.3d at 1165.

These arguments, adopted by the Fourth Circuit Court in *Custer*, are precisely applicable to the claims asserted in the Complaint here. West Virginia's discrimination and intimidation statutes, which form the gravamen of the Complaint, are statutes of general applicability with no specific reference to either employee benefit plans or the responsibilities of ERISA fiduciaries. In these statutes, West Virginia has articulated a strong State interest in redressing claims of discrimination and intimidation. Nothing in the claims asserted, or remedies sought, by plaintiff will implicate the essential functions of an ERISA plan, such as funding, benefits, reporting, or administration.

The fact that the conduct of which plaintiff complains arose in the context of an administrative proceeding associated with a claim denial does not convert these essentially State law claims into Federal ones. As Judge Keeley noted in *Stonewall Jackson*,

The state law at issue in this case imposes a duty of care on all professionals, including all insurance professionals. Common law imposes the duty of care regardless of whether the malpractice involves an ERISA plan or a run-of-the-mill automobile insurance policy. *Thus, the duty of care does not depend on ERISA in any way.*

In both *Coyne and Delaney I* and the present case [ ], the rights and duties forming the basis of the plaintiffs' claims exist irrespective of any rights and duties that arise under an ERISA plan.

The mere fact that peripheral reference to the plan's terms might be required in order to assess the total amount of damages does not alter this conclusion. In *Coyne and Delaney I*, the Fourth Circuit stated:

To be sure, resolution of Delaney's malpractice claim will require an

examination of certain provisions in the Delaney Plan the defendants drafted and the Security Policy the defendants procured. Thus, to some extent the court's inquiry will be 'directed to the plan.' However, we do not believe this factor carries much weight in this context. In considering Delaney's claim, the court's inquiry will be centered on whether the defendants' conduct comported with the relevant professional standard of care . . . . Delaney's claim, although it may require the court to examine some provisions of an ERISA plan, turns on duties generated by Virginia common law.

*Coyne and Delany*, 98 F.3d at 1472. Similarly, in the present case, Stonewall's claims will turn on the duties generated by the provisions of the collateral annuity contract and West Virginia law in spite of the fact that it may be necessary for the Court to examine some of the plan's provisions in their ultimate resolution.

963 F.Supp. at 562-3 (emphasis in original; citation omitted).

In the present case, it will not be necessary for the Court to examine the plan's provisions at all in order to determine whether State duties have been violated. The plan, its terms and responsibilities, are completely unrelated to the issues of whether the defendants violated West Virginia's discrimination and intimidation statutes in its treatment of the plaintiff.

Again turning to the analysis of Judge Keeley,

In *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), the United States Supreme Court considered whether § 514(a) preempted the state of Georgia's general garnishment statute when applied to individual participants' accrued benefits under an ERISA regulated welfare plan. Citing § 502(d)(1), the Court began with the recognition that ERISA expressly provides that "an employee benefit plan may sue or be sued under this subchapter as an entity." 29 U.S.C. § 1132(d)(1). After noting that this directive relates solely to actions arising under ERISA's civil enforcement provisions, the Court went on to state:

ERISA plans may be sued in a second type of civil action as well. These cases - lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan - are relatively common place. [footnote omitted]

Petitioners . . . concede that these suits, although obviously affecting and involving ERISA plans and their trustees, are not preempted by ERISA § 514(a).

*Stonewall Jackson*, 963 F.Supp. at 564 (emphasis added; ellipsis in original).

This precise analysis applies with equal force to the claims articulated in the Complaint in this case. Nothing in the Complaint implicates the interests to be served by ERISA preemption, nor does the Complaint affect plan benefits or fiduciary responsibilities.

To accept defendants' contention that these claims are preempted would be to accord ERISA administrators blanket immunity for an unlimited range of wrongful conduct directed to plan beneficiaries even where that conduct does not implicate the administrators' fiduciary responsibilities. In this instance, West Virginia law imposes a duty of care on all those within its purview to refrain from discrimination and intimidation irrespective of the context in which the conduct occurs. The duty of care thereby imposed does not depend on ERISA in any way.

### **III. Conclusion**

Defendants' Notice of Removal wholly fails to carry its burden of establishing a basis for removal. Application of the "well-pleaded complaint rule", standing alone, warrants remand. Further, the "complete preemption doctrine" does not apply under the circumstances of this case. For all of these reasons, Plaintiff's Motion to Remand should be granted.

s/Paul T. Tucker  
Of Counsel for Plaintiff

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**CERTIFICATE OF SERVICE**

Service of the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO REMAND** was had upon defendants by electronically forwarding a true and complete copy thereof to their counsel this 19th day of December, 2007, as follows:

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